

complaint

Mr G has complained about the way in which Bank of Scotland plc (Halifax) has dealt with his mortgage account. Initially Mr G's complaint was that Halifax had been unsympathetic and unhelpful when he fell into arrears. Mr G says that Halifax cancelled a payment arrangement and refused to put another arrangement in place. But Mr G is now questioning whether his mortgage with Halifax is in fact valid or legally binding.

background

In 2012 Mr G took out a mortgage with Halifax on his home. He borrowed approx. £92,000, of which about £56,000 was used to repay his existing mortgage to another lender. Unfortunately in January 2013 Mr G contacted Halifax to explain he was unemployed. The mortgage began to fall into arrears but in February 2013 Mr G told Halifax he had a new job. The account was brought up to date.

Regrettably Mr G became unemployed again a few months later. He was put on a reduced payment for three months but arrears began to accrue. By August 2013 the arrears were approx. £1,700. Mr G was unsure how much the DWP would be paying towards his mortgage interest at this stage. By September 2013 the arrears were over £2,000. An arrangement was put in place for a payment of £311 per month - £155 from Mr G and £156 from the DWP, with the account on an interest-only basis.

It seems Mr G was able to secure employment, but by November 2013 he had been made redundant. An arrangement was put in place on 26 November 2013 for Mr G to pay £335 by 27 December 2013, part of which would be paid by the DWP. But the arrangement was cancelled because only £297.30 was paid by the due date. Halifax wrote to Mr G to say that it would start possession action. A field agent was also instructed to visit Mr G. During the meeting Mr G offered to pay £160 per month in addition to the payment from the DWP of £169 per month.

This was rejected by Halifax, as it was considerably lower than the contractual monthly repayment of £663.33 per month. Arrears by this time were about £3,800.

Mr G complained to Halifax that it had unreasonably rejected his proposals. He also brought his complaint to us. By this time, Mr G said that his complaint about the payment arrangement had "*sort of been resolved*" but that he had looked at the terms and conditions attached to his account.

From these Mr G has queried whether, on signing the mortgage agreement, a Power of Attorney (POA) had been invoked. He has also raised an argument that there is only a promissory note and that since 1933 nobody has been able to do any more than promise to pay. Mr G is concerned that Halifax has not signed the mortgage deed and so there is no contract between him and Halifax. Mr G also contends that Halifax is unable to lend money because of '*fractional reserves*' and that, for various reasons, there is no loan and so the mortgage is void.

Our adjudicator didn't recommend the complaint should be upheld. She explained that the POA contained in the mortgage hadn't been invoked. She was also not persuaded that Halifax had acted unreasonably in its handling of the account whilst Mr G was in arrears.

Mr G asked for an ombudsman to review the adjudicator's findings. He has reiterated his arguments concerning the legitimacy of his mortgage and whether or not Halifax has actually lent him any money because of "*fractional reserves*". Mr G remains of the opinion that there is no valid mortgage between him and Halifax.

my findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

arrears handling – I've considered what Mr G has said about Halifax's refusal to accept his payment proposals. I have some sympathy for Mr G – he fell into financial difficulty through no fault of his own. I fully appreciate Mr G has made every effort to find alternative employment. But the DWP will only pay a proportion of his mortgage interest, and there is a shortfall each month which Mr G is unable to meet.

Halifax is able to grant interest-only concessions to customers in financial difficulty over the short-term; in the absence of any repayment vehicle (such as an endowment policy, ISA or other investment), it would be considered irresponsible for Halifax to allow a customer to remain on interest-only – because there would be no prospect of the mortgage ever being repaid.

So whilst I sympathise with Mr G and the situation he is in, I'm not persuaded Halifax has treated him unfairly or unsympathetically here. The mortgage has been in arrears for some time and the arrears are substantial. The options available to Mr G are limited and in the event that he is unable to pay the full contractual instalment, Halifax is entitled to seek possession. This means that I'm unable to uphold this part of Mr G's complaint.

other matters – I've considered everything Mr G has said about whether or not there is a loan, the nature of a promissory note and the validity of the mortgage. In doing so, I have considered what is fair and reasonable, as well as giving consideration to the relevant law applicable to the circumstances of Mr G's complaint.

Halifax has confirmed that the Power of Attorney contained in the terms and conditions has not been invoked. This would only be necessary if Halifax was required to take action on behalf of Mr G in relation to the secured property. As it has not done so, there has been no need to invoke the Power of Attorney.

I am familiar with the arguments put forward by Mr G about the validity of his mortgage. It is not unusual for people facing repossession to dispute the validity of the claims against them on the basis of a failure to comply with the necessary legal formalities. Mortgage lenders typically send a mortgage offer letter that they invite their borrower to sign. Often the mortgage lender does not formally sign the offer letter. At the time of an advance there is usually a mortgage deed which is signed by the borrower but not the lender.

In an unreported case in Preston County Court decided in July 2013 the borrower raised the argument that the mortgage did not comply with the required legal formalities and was therefore void. This is the argument Mr G has raised here and so it is important to look at what the court said about this argument.

Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (LP(MP)A) provides that a contract for the disposition of an interest in land must be made in writing, incorporating

all the terms of the contract, and signed by each party to the contract. Section 27 of the Land Registration Act 2002 (LRA) provides that if a disposition is required to be completed by registration then it does not operate at law until the relevant registration requirements are met; and that the grant of a legal charge (or, a mortgage) is a disposition which is required to be completed by registration.

The borrower's argument was that her mortgage was null and void for want of statutory formality because it was signed by the borrower only and not the lender (as is the case with the vast majority of mortgage deeds) and as such it did not comply with LP(MP)A. Therefore the mortgage did not exist at law and so could not be completed by registration as required by the LRA, and thus it was not binding on the borrower.

But the judge held that the borrower's argument was "*illusory*" and "*false*". He was concerned that the promulgation of these dangerous arguments on the internet could mislead borrowers into wrongly thinking that their mortgage was not binding upon them and that in the event of default they would not be in danger of losing their homes.

The relevant statutory provision for a mortgage, section 53 of the Law of Property Act 1925, does not require every term to be included in a document signed by both parties; rather the document just needs to be signed by "*the person creating or disposing of the interest*" (i.e. the mortgagor/borrower). The judge also explained that section 27 LRA does not go so far as to say that a disposition required to be completed by registration (such as a mortgage) is created by registration and that it does not therefore exist or operate in equity before registration.

By signing the mortgage deed and by its registration at the Land Registry, applying what the judge said above, I'm satisfied Mr G created a valid mortgage in favour of Halifax.

So as far as the law is concerned, I am not persuaded there is any merit to Mr G's argument that he does not have a valid mortgage. I also do not agree that there is only a promissory note and that since 1933 no bank has been able to lend any actual money.

But the arguments about whether or not there is a valid loan, if the mortgage is void or unenforceable or if there is only a promissory note are really matters that can only be decided by a court. I have no power to decide whether there is some legal technicality that would absolve Mr G of any responsibility for repaying the money he borrowed from Halifax. I am satisfied that it is fair and reasonable for Mr G to repay the money to Halifax, and so I'm unable to uphold this part of his complaint.

I am sorry Mr G has found himself in financial difficulty. I do appreciate this has been a stressful time for him. The options available to him are limited. And as I have said above, it is for a court, not the Financial Ombudsman Service, to decide if there is a valid mortgage or even any actual loan to Mr G that he is required to repay. Should Halifax feel there is no option but to commence possession proceedings, Mr G will have the opportunity to raise all these arguments with the court, which will decide, independent of my final decision, whether Mr G's mortgage is valid or binding.

In the meantime, it may help Mr G to seek advice from one of the free debt counselling services such as StepChange or the Money Advice Service. We can provide Mr G with contact details for those organisations, should he request this information.

my final decision

I know Mr G will be disappointed, but my decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr G to accept or reject my decision before 19 January 2015.

Jan O'Leary
ombudsman