

The complaint

Mr and Mrs P's complaint is that Topaz Finance Limited trading as Heliodor Mortgages unfairly charged legal costs of £773.80 to their mortgage account. They are also unhappy that Topaz asked them to telephone when Mr and Mrs P had made it clear they would prefer to communicate in writing.

What happened

I do not need to set out the full background to the complaint. This is because the history of the matter is set out in the correspondence between the parties and our service, so there is no need for me to repeat the details here. In addition, our decisions are published, so it's important I don't include any information that might lead to Mr and Mrs P being identified.

So for these reasons, I will instead concentrate on giving a brief summary of the complaint, followed by the reasons for my decision. If I don't mention something, it won't be because I've ignored it; rather, it'll be because I didn't think it was material to the outcome of the complaint.

In 2021 Mr and Mrs P had fallen into financial difficulty and their mortgage account was in arrears. In October 2021 they had a meeting with a field agent instructed by Topaz. They provided the agent with details of their financial and personal circumstances, including physical and mental vulnerability.

In March 2022 Topaz issued legal proceedings. Mr and Mrs P complained and, after reviewing the matter, Topaz agreed it had not taken account of the vulnerability issues. In a final response letter dated 9 May 2022 Topaz agreed it had acted prematurely.

"From thoroughly reviewing the information on your account ... I feel the information provided in relation to your health in the field agent report had not been taken into consideration when instructing solicitors on your account.

I also feel enough had not been done to assist you in moving forward or to communicate via letter prior to the instruction of the account ...

I am upholding this element of your complaint and feel an offer should also be made as part of my apology. I am awarding you a trouble and upset payment of £150.00. I will ensure feedback is provided to the agent who recommended that solicitor action should be the next course of action.

In relation to the court costs, at this time an instruction fee of £40 has been applied to your account, I have no evidence of further costs at this time..."

In February 2023 Mr and Mrs P raised this current complaint. They'd noticed Topaz had added legal costs of £773.80 onto the account, and that, despite requests to communicate in writing, they'd received letters asking them to telephone.

Topaz issued another final response letter. This time Topaz said:

"I have reviewed your previous complaint and I note the complaint handler did explain she felt legal proceedings had been issued too quickly. Whilst I can understand why she came to this conclusion, legal proceedings were issued and legal costs were incurred because of this. In line with your mortgage terms and conditions we are within our rights to apply any costs o your account that we incur in any legal proceedings concerning the mortgaged property. I cannot agree to waive the legal costs as they have been charged correctly..."

In relation to the complaint about Topaz asking Mr and Mrs P to telephone, Topaz explained that a letter Mr and Mrs P had received in January 2023 was a standard letter, and that it was aware Mr and Mrs P preferred written contact, which Topaz said was acceptable.

Topaz also said that it could review any payment arrangements, but had not received any Income & Expenditure (I&E) forms from Mr and Mrs P.

Dissatisfied with Topaz's response, the complaint was raised with our service. An Investigator looked at what had happened. She noted that the letter in January 2023 was a standard letter. She also explained that, in order to review any arrangements, Mr and Mrs P would need to provide Topaz with and I&E form.

However, the Investigator was satisfied that Topaz should not have added the legal costs to the account in circumstances where Topaz had already conceded that the legal proceedings were premature. She asked Topaz to reimburse these and remove any interest charged on them, and pay Mr and Mrs P £250 compensation for the distress and inconvenience caused.

Topaz didn't agree with the Investigator's findings. It said that the field agent's report hadn't gone into detail about Mr and Mrs P's circumstances, only that they had had health and financial issues. Topaz felt Mr and Mrs P weren't prioritising their mortgage and so issued legal proceedings. Topaz said it wasn't until May 2022, after Topaz had adjourned the hearing, that it was told of the severity of the issues Mr and Mrs P were facing.

Therefore Topaz now didn't agree with its previous outcome, but noted that Mr and Mrs P had accepted the £150 compensation offered in settlement of the complaint. Because Topaz had now changed its mind, and said that it *hadn't* been premature in issuing legal proceedings, it didn't agree that the legal costs should be removed, or that it should pay any compensation to Mr and Mrs P.

The Investigator reviewed the complaint, but wasn't persuaded to change her initial opinion. She was satisfied that Topaz could have obtained the information about Mr and Mrs P's circumstances *before* initiating legal action, but didn't.

The Investigator also received confirmation from Mr and Mrs P that they had sent in at least two I&E forms, and had definitely sent one prior to March 2022. Mr and Mrs P said that if Topaz was now saying it hadn't received this, it wasn't being truthful.

After reconsidering the complaint, the Investigator was satisfied that Topaz hadn't done enough to try to resolve the situation before starting legal action. She considered this was a breach of the Mortgages and Home Finance: Conduct of Business Sourcebook (MCOB) 13.3.2A, which said that possession action must not be taken unless all other reasonable attempts to resolve the position had failed.

Topaz disagreed and asked for an Ombudsman to review the complaint. Topaz said that arrears had been increasing, and that it had sent numerous letters between October 2021 and April 2022 asking Mr and Mrs P to contact it. Topaz said it was Mr and Mrs P's

responsibility to inform Topaz of their circumstances and so it was unfair of the Investigator to expect Topaz to have asked for this information.

Topaz also said that it had reviewed an I&E form in February 2022 and whilst it noted disposable income was “*minimal*”, felt Mr and Mrs P could afford the full monthly payment, but weren’t prioritising the mortgage.

Because the matter is unresolved, it falls to me to issue a final decision.

What I’ve decided – and why

I’ve considered all the available evidence and arguments to decide what’s fair and reasonable in the circumstances of this complaint.

Having done so, I’ve reached the same outcome as the Investigator, for broadly the same reasons.

First, I will explain that Topaz is required under MCOB to send borrowers letters about the mortgage account in relation to arrears and payment arrangements, and these are generally system-generated letters with standard wording providing a telephone number. I note Topaz has acknowledged Mr and Mrs P’s preference to communicate in writing, but I must explain to Mr and Mrs P that it isn’t possible for Topaz to suppress these types of letters.

With regard to the legal fees added to the account, I don’t think Topaz has treated Mr and Mrs P fairly. It’s clear from their letter of 14 March 2022 that Mr and Mrs P had given the field agent specific, detailed information about their circumstances and authorised the agent to share this with Topaz.

The agent didn’t, in fact, give Topaz details of what had been discussed. I’ve seen many field agents’ reports, and this one is so light on detail about the borrowers’ circumstances as to be almost useless. But I’m satisfied the report does provide sufficient information to have alerted Topaz that there were issues in relation to Mr and Mrs P’s health and vulnerability, and this ought to have led Topaz to ask more questions before embarking on legal action. Topaz’s argument is that it was Mr and Mrs P’s responsibility to provide this information, but I’m satisfied that they did, when they gave this information to the field agent. They weren’t to know that the agent hadn’t passed on the information to Topaz.

In the circumstances, I’m satisfied that, if the field agent had passed on the information given to him by Mr and Mrs P in October 2021, Topaz would have known about the health and vulnerability issues that led the complaint-handler in May 2022 to conclude that legal action should not have been taken.

Putting things right

In the circumstances, I’m satisfied that Topaz didn’t do enough before instructing its solicitors. If it had followed through on the field agent’s report, I don’t think legal action would have been commenced. Given this, I’m satisfied that the legal costs of £773.80 should be removed from the account, along with any interest charged on that sum.

I note that Topaz previously paid £150 compensation for any distress caused. However, I’m satisfied that finding the legal costs applied to the account, after Mr and Mrs P had previously been told their complaint had been upheld, caused them further distress. I agree with the Investigator that £250 compensation for this is also fair and reasonable.

Other matters

I note Mr and Mrs P are still experiencing financial hardship, and I must remind Topaz of its obligation to treat them fairly and reasonably when considering any payment proposals, in line with both the Mortgage Charter and the new rules on Consumer Duty which came into effect last summer.

Equally, I must explain to Mr and Mrs P that, in the event suitable payment arrangements can't be agreed and maintained, Topaz will be entitled to pursue legal action through the courts, as a last resort.

Lenders will generally put recovery action on hold whilst we look at a complaint, but they don't have to, and we can't force them to; if the Financial Ombudsman Service had that power, it would undermine our impartiality between the parties to a complaint. It could also create the potential risk of consumers using our service to bring complaints with the intention of preventing business from taking legitimate action through the courts to recover money owed to them.

I am not suggesting Mr and Mrs P are doing this (or would do this), but I wouldn't want them to be under any misunderstanding, if Topaz was as a last resort to begin legal action and a new complaint was brought to us, that we would tell Topaz that it must put matters on hold. Once legal proceedings have been issued and a hearing date has been set, it is up to the court, not the Financial Ombudsman Service, to decide whether or not the hearing should be adjourned.

I truly hope that position doesn't arise and that Mr and Mrs P are able to come to a sustainable, long-term arrangement with Topaz to clear their arrears. If they haven't already done so, Mr and Mrs P might find it helpful to take advice from one of the free debt advisory services, such as StepChange, Citizens Advice or Shelter. We can provide them with contact details for those agencies, if they'd like us to.

My final decision

My final decision is that I uphold this complaint. I direct Topaz Finance Limited trading as Heliodor Mortgages to remove the legal costs of £773.80 (plus interest) from the mortgage account and to pay Mr and Mrs P £250 compensation for distress and inconvenience.

This final decision concludes the Financial Ombudsman Service's review of this complaint. This means that we are unable to consider the complaint any further, nor enter into any discussion about it.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs P to accept or reject my decision before 6 June 2024.

Jan O'Leary
Ombudsman