

6 November 2019

**Final report by the Complaints Commissioner****Complaint number FCA00648***The complaint*

1. On 16 September 2019 you complained to me about the FCA's handling of an inquiry you had made about the definition of a 'legal mortgage'.

*What the complaint is about*

2. In its decision letter, the FCA described your complaint as follows:

*you contacted the FCA to obtain the definition of a 'legal mortgage' as stated in PERG 4.4.16 of the [FCA Handbook](#). You were told that the FCA does not provide a definition of the term and to seek legal advice.*

*To resolve your complaint, you are requesting that, "The legal department at the FCA should be removed along with all management."*

*What the regulator decided*

3. The FCA did not uphold your complaint. It said that the FCA associate to whom you had spoken on the telephone had been correct to tell you that the FCA could not define 'legal mortgage', and that you should seek legal advice.
4. The FCA's letter also provided an explanation of the inclusion of the term 'legal mortgage' in the FCA Handbook.

*Why you are unhappy with the regulator's decision*

5. In your email to me, you say:

*If the FCA does not have a definition for a legal mortgage then a legal mortgage does not exist. Without a clear definition consumers will not know if the mortgage they hold is legal and lawful or illegal. I requested that 'The legal department at the FCA should be removed along with all management' this*

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*may seem a ridiculous demand, but not knowing what a legal mortgage is and therefore putting mortgage holders at risk is extremely serious with wide reaching implications. Over 11 million homeowners hold mortgages, they are not able to confirm if the mortgage they hold are legal and lawful or illegal. If 'a legal mortgage' does not exist then PERG 4.4.16 is void and PERG section 4.4 is also void. This has very serious implications.*

#### *Preliminary point*

6. I should explain that I cannot give legal opinions, so you may wish to seek your own independent legal advice; but I hope nonetheless that this explanation is helpful.

#### *My analysis*

7. The regulatory guidance which you have quoted is principally for the use of the FCA and those it regulates: it is not designed as an aid for consumers. However, having said that, I think it important both that the FCA has a clear understanding of its own guidance, and is able to explain it – at least in broad terms – to people who, like you, make inquiries.
8. When you spoke to a member of staff of the FCA's Supervision Hub, you were told that buy-to-let mortgages were outside the remit of the FCA's rules and guidance. The letter you later received from the FCA's Complaints Team qualified this by saying that *there are some instances where a buy to Let mortgage is considered a 'consumer buy to let', and in those instances firms would have to adhere to certain legislation.*
9. The FCA's decision letter went on to say this:

*The FCA does not have a definition of what a 'legal mortgage' is. The term is used briefly within the Perimeter Guidance Manual ('PERG'), which by its very nature includes many terms for which the FCA does not have a Handbook definition for because the guidance is addressing legislative drafting or concepts. The use of the term, in PERG 4.4.16G, is a piece of legacy drafting and is included because it used to be relevant to how Parliament had defined what was a regulated mortgage contract.*
10. I have asked the FCA to clarify this statement, since it was not clear to me – or to you – what it meant. In particular, I wanted to understand what were the limits of the regulation of mortgages, and what 'legacy drafting' meant.

11. In its reply to me, the FCA has explained that

*All of the regulated mortgage activities (e.g. “entering into”, “administering”, “arranging” or “advising” etc) are framed in relation to the legal definition of a “regulated mortgage contract”. There are a number of ways in which this is narrower than “any loan secured by a mortgage on land”. This is discussed in our Perimeter Guidance at PERG 4.4 but as an example the borrower has to be an individual or trustee and at least 40% of the land has to be used (or intended to be used) as or in connection with a dwelling. So this tends to exclude, for example, commercial mortgages and buy-to-let.*

*[Our] intention in referring to “legal mortgage” in PERG 4.4.16G as a piece of ‘legacy drafting’ was to explain its presence by reference to the evolving nature of the legislative definition of a “regulated mortgage contract”. The drafting of PERG 4.4.16G is not now incorrect as a legal mortgage remains within the definition of a “regulated mortgage contract”. We think the current drafting of PERG 4.4.16G and the inclusion of “legal mortgage” within it remains useful. It provides an answer for firms who notice that the original legislative definition of a “regulated mortgage contract” was limited to a “legal mortgage” whereas the current legislative definition doesn’t mention them. This is because they are subsumed within the whole, which is the point that PERG 4.4.16G seeks to make.*

12. This explanation is rather involved, but that reflects the complexity of the legislative framework.

*My decision*

13. It is right that the FCA does not give legal advice to consumers on legal definitions. Equally, the FCA should be able to explain to consumers, at least in broad terms, which kinds of product are regulated by the FCA.

14. The exchanges between you and the FCA centred upon the definition of a ‘legal mortgage’, whereas I think that the real issue is what mortgages are regulated. The FCA – both during the initial telephone call, and in its decision letter – was attempting to address your query. However, the advice in the initial telephone call was not entirely correct, and the decision letter’s description of ‘legacy drafting’ left some questions unanswered.

15. In your response to my preliminary report, you disagreed with my view that the real issue was what mortgages are regulated. You said ‘The very important point is, I along with an ever growing number of mortgage holders need to know ‘a legal mortgage’ what is it’. I recognise that you are concerned to know whether

or not your particular mortgage is a legal one, but that is a matter on which you would need to take legal advice.

16. In my view, the FCA's explanation now set out in paragraph 11 is a reasonable explanation of the position. The FCA has explained in broad terms the definition of a regulated mortgage contract, and I hope that it is helpful to you in pursuing your concerns. If your mortgage is a regulated product and you have concerns about the way in which it has been administered, then you could approach the Financial Ombudsman Service (FOS). If you have reason to believe that your mortgage is not a lawful one, then I recommend that you consult Citizens Advice or a solicitor.
17. I uphold your complaint to the extent that I consider that you could have received a clearer explanation, though I consider that the FCA's explanations were a well intentioned attempt to describe a complex situation.

Antony Townsend  
Complaints Commissioner  
6 November 2019