

## The complaint

This complaint's about a Halifax-branded mortgage Mr and Mrs G hold with Bank of Scotland plc (BOS). Mr and Mrs G are unhappy that BOS didn't apply the fixed interest rate product they took with a further advance to the existing mortgage as well. The fixed rate on the existing mortgage expired a few months later, and they say they're now paying more in total than they can afford.

## What happened

By way of a provisional decision dated 22 November 2023, I set out my provisional conclusions on this complaint. The following is an extract from the provisional decision.

"The broad circumstances of this complaint are known to Mr and Mrs G and BOS. Our decisions are published, and it's important that I don't include any information that might result in Mr and Mrs G being identified. Instead I'll give a brief summary of the main points, rounding the figures where appropriate, and then focus on giving the reasons for my decision. If I don't mention something, it won't be because I've ignored it. It'll be because I didn't think it was material to the outcome of the complaint.

Mr and Mrs G already had a BOS mortgage, on a fixed rate of 1.85%. This deal was arranged by their mortgage broker – a firm I'll call C - in 2020, when the outstanding balance was around £153,200. In common with most fixed rate interest products, this came with a clause requiring them to pay an early repayment charge (ERC) if they left the deal before the end date, which in this case was 31 January 2023.

In August 2022, Mr and Mrs G applied directly to BOS for a further advance of around £53,000 to fund an extension and home improvements. The new borrowing was on a separate fixed rate, 3.51% fixed until 31 October 2027, and came with an ERC of its own.

In November 2022, C called Mr and Mrs G to remind them the fixed rate on the main mortgage would be ending soon. They told C they'd already renewed the rate in August, but C disagreed. When they checked with BOS, they then realised that the 3.51% rate only applied to the new borrowing. In January 2023, C arranged a new interest product on the main mortgage, a fixed rate of 4.90% until 30 April 2025.

Mr and Mrs G complained to BOS that they'd been misled in August 2022 into believing that the 3.51% rate fixed until 31 October 2027 applied to the entire debt, and that the aggregate monthly instalment (around £840) wouldn't change in the meantime. With the new rate on the main mortgage, the aggregate monthly payment was around £1,080, and this was a struggle for them.

BOS largely rejected the complaint, and when it came here, the investigator who looked into wasn't persuaded to recommend it be upheld. Mr and Mrs G has asked for the case to be reviewed by an ombudsman.

## What I've provisionally decided – and why

I'll start with some general observations. We're not the regulator of financial businesses, and we don't "police" their internal processes or how they operate generally. That's the job of the Financial Conduct Authority (FCA). We deal with individual disputes between businesses and their customers. In doing that, we don't replicate the work of the courts.

We're impartial, and we don't take either side's instructions on how we investigate a complaint. We conduct our investigations and reach our conclusions without interference from anyone else. But in doing so, we have to work within the rules of the ombudsman service, and the remit those rules give us.

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

That has included listening to a recording of Mr and Mrs G's phone conversation with BOS in August 2022 that led to the further advance being agreed. Having done so, the conclusions I've reached aren't materially different from the investigator's, but they are more detailed. So I've set them out in this provisional decision so that both parties can comment before I finalise them.

In their email submission of 3 May 2023, Mr and Mrs G ask *"Why were we not offered a re-mortgage? Or explained to clearly that we were being sold further borrowing that was separate to our existing mortgage?"* They maintain that they weren't told they were being sold extra borrowing on top of the existing mortgage until the very last minute of the phone call.

I've listened to the call (it runs for just under 100 minutes) and am satisfied that quite early on, the advisor set out that the purpose of the call was extra borrowing; at 1.59 minutes, she mentioned Mr and Mrs G had already started the further advance online, with which they agree.

The advisor then addressed the question of the fixed rate on the existing mortgage first, before getting into a discussion about Mr and Mrs G's additional borrowing requirements. At 5.17 minutes, the advisor said: *"you have an interest rate running until January next year"*. She followed that up by saying they can look at reserving a new rate up to three months beforehand to take effect from February 2023.

The conversation returned to this area in more detail at around 24.05 minutes, when the advisor asked Mr and Mrs G if they wanted to review the existing mortgage. She mentioned they would need to pay an ERC to come out of it and said: *"but we could certainly look at it for you."* Mr and Mrs G declined the suggestion and the conversation moved on to repayment strategies, and the risks of lending beyond retirement age, and how much Mr and Mrs G wanted to pay each month.

Mr and Mrs G said, at around 26.50 minutes, that they could pay an extra £269 on top of what they were already paying. Then, in response to a question about whether they needed or preferred interest rates to stay the same, they said they preferred them to stay the same, to protect themselves from rate rises. The advisor then listed the situations in which being on a fixed rate would make them liable to an ERC. One of those she mentioned, at around 27.10 minutes, was *"changing the rate with BOS"*.

But there's more to consider here; simply giving Mr and Mrs G the opportunity to review the rate didn't quite go far enough. Mr and Mrs G were on record in the

conversation as wanting to protect themselves against the risk of rising rates, and rates were already rising in August 2022, and would continue to do so in the wake of the “mini-budget” of September 2022.

BOS’s advisor couldn’t have foreseen the mini-budget, or its impact, but it seems to me there was already good reason in August 2022 to explain to Mr and Mrs G in a bit more detail that even with an ERC, they could still be better off taking a new rate on the main mortgage sooner rather than later.

That then begs the question of what decision Mr and Mrs G might have made if they had been better informed. That’s not as simple as it might seem at first glance, not least because I can’t take account of any hindsight that subsequent events might have given them since August 2022. I can only consider the knowledge they had, and would have had if the advisor had informed them a little better, during that call.

The ERC for leaving the 1.85% rate before 31 January 2023 was 1% of the balance, so in the region of £1,450-£1,500 in monetary terms. Mr and Mrs G needed to be able to weigh the likelihood of recouping that sum by applying the five-year fixed rate of 3.51% to the existing mortgage as well as the further advance, rather than wait until 1 November 2022 to reserve a (potentially higher) fixed rate to take effect on 1 February 2023.

What was needed to happen for Mr and Mrs G to recoup an ERC of 1% over five years was for comparable fixed rate products to go up by 0.2% between August and November 2022. If the mortgage advisor has presented them with that equation, even before the September 2022 mini-budget, it’s possible Mr and Mrs G might have concluded they would be better off, or at the very least no worse off, by switching rates on the existing mortgage at the same time as taking out the further advance.

It would have given Mr and Mrs G stability over the amount they paid each month on the entire debt, and for the next five years. That aggregate payment would have higher than the £840 they have said was their upper limit, but it would still be less than they’re paying currently. To put that in context, the rate Mr and Mrs G are currently paying on the main mortgage is not 0.2% higher than it would be if they’d switched; it’s almost 1.4% higher.

So from this point of view, it might seem appropriate to direct BOS to reconstruct the main mortgage account on the basis that it was switched to the five-year fixed rate of 3.51% on 1 October 2022 (I’ve picked that date to allow time for the administration to have gone through) instead of to the two-year fixed rate of 4.90% on 1 February 2023. That would require BOS adjusting all of the monthly payments Mr and Mrs G have made since 1 October 2022 up to the date of settlement to reflect the amended terms.

However, it’s not that simple; applying the 3.51% rate retrospectively to the main mortgage would also require BOS to charge an ERC of 1% of the balance at the date of the rate switch. If I’m to order that to happen, I need to be persuaded that either BOS would have been willing to increase the overall debt still further by adding the ERC to the balance, or alternatively Mr and Mrs G could have paid it from their own resources, *and* would have been willing to do so.

Having considered everything that both parties have said and provided, I’m not persuaded either or those two options were likely. The further advance Mr and Mrs G were taking out already put their total borrowing at the upper limit of what BOS was

willing to lend; the initial amount they wanted to borrow was reduced by the online system, as being too high. That rules out BOS adding the ERC to the debt.

So unless Mr and Mrs G had access to funds from elsewhere, paying an ERC would have meant taking away from the money they were committed to using for the extension. It's one thing to do that in the sure knowledge that the ERC will definitely be recouped; it's quite another to take that risk in anticipation that the ERC *might* be recouped. Mr and Mrs G didn't know in August 2022 what they know now, and as I've said, hindsight can't influence my decision.

Putting all of the above together, I'm persuaded the BOS advisor took steps to make sure Mr and Mrs G were aware that the existing mortgage and further advance would be separate, and gave them the opportunity to review the rate on the existing mortgage at the same time as taking out the further advance in the knowledge that doing so now would result in an ERC.

The advisor could have done more to draw their attention to the possible benefits of switching rates on the existing mortgage and incurring an ERC. But overall I'm not persuaded Mr and Mrs G would have made a different decision and be in a different financial position today if that had happened."

I gave the parties two weeks to comment on the provisional decision; both have done so.

BOS accepted the provisional decision, saying it had treated my finding on the broader conversation the advisor could have had with Mr and Mrs G as a learning and development opportunity. Mr and Mrs G didn't agree; they reiterated most of the points they'd already made in their earlier submissions, but added that both of their sets of parents would have been willing to lend them the money to cover the ERC to switch rate on the main mortgage.

### **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 considered afresh everything that both parties have said and provided, I'm not persuaded to depart from my provisional conclusions. But I will address the new points Mr and Mrs G made in their submission of 5 December 2023.

If the available evidence is incomplete and/or contradictory, we work with what is available, and we reach our findings on what we consider is most likely to have happened, on the balance of probabilities. That's broadly the same test that the courts use in civil cases. I appreciate Mr and Mrs G's concerns that a recording isn't available for a later conversation they had with BOS where they expressed their shock on realising the further advance was on different terms from the main mortgage.

However, it's for me to decide what is, or is likely to be, material to the outcome of a complaint. The conversation Mr and Mrs G refer to here happened after the event. So even if a recording of that conversation was available, it wouldn't carry the same weight that I attached to the recording that was available of the August 2022 conversation, during which I'm satisfied BOS informed Mr and Mrs G correctly that the further advance would be separate and on different terms from the existing mortgage.

I did take into account the e-mail exchange between Mrs G and the advisor in September 2022. The reply from the advisor accurately answered the question Mrs G asked – which was about the content of the further advance offer, and therefore not the main

mortgage – and didn't contradict anything already said in the August 2022 phone conversation.

Lastly, on the point about incurring an ERC in order to switch rates on the main mortgage, Mr and Mrs G have said they could have borrowed the money to pay it. But borrowing the money – even interest-free from family – is not the same as paying from one's own resources, which is what I said they'd need to be able to do in the provisional decision. That's because, if BOS considered Mr and Mrs G to be at the upper limit of their borrowing capacity with it, it's unlikely the business would have been willing to agree a change that required Mr and Mrs G to borrow elsewhere.

I said at the outset that I wouldn't be commenting on every single point, and I haven't. I have, as I said I would, confined myself to those matters that I consider have a material effect on the outcome. I can see how strongly Mr and Mrs G feel. That's a natural, subjective reaction, and entirely understandable.

Be that as it may, I have to take a different approach. I'm impartial and I have to look at things objectively, sometimes taking a step back from the minutiae, focussing on the broader picture. That's what I've done.

### **My final decision**

My final decision is that I don't uphold this complaint.

My final decision concludes this service's consideration of this complaint, which means I'll not be engaging in any further discussion of the merits of it.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs G to accept or reject my decision before 3 January 2024.

Jeff Parrington

**Ombudsman**