

The complaint

This complaint is about two buy-to-let mortgages Mrs B holds with Bank of Scotland Plc (BOS). Mrs B says BOS provided the mortgages in the knowledge that the properties were worth less than the amount being borrowed, and failed to carry out appropriate due diligence before offering her the mortgages.

To settle the complaint Mrs B wants BOS to write off the mortgage debts and pay her compensation for the distress she has been caused.

Mrs B has instructed solicitors to act for her, but for clarity I will refer to Mrs B throughout as if all submissions are made by her.

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 Mrs B 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.

This complaint is rather simpler than has been presented. In 2007 Mrs B applied for two BTL mortgages on new-build flats (which I will refer to as 6a and 8a) with BOS, after discussing her requirements with a third-party broker. The mortgage offer shows that no advice or recommendation was given to Mrs B and that it was up to her to decide whether to accept the mortgage offers.

The mortgage applications were submitted via a packager, which meant that BOS had no direct contact with the broker.

Mrs B told BOS on the application form for 6a that the purchase price was £164,995 and that she needed a mortgage of £140,946, on an interest-only basis. BOS was told that the deposit was being paid by Mrs B from her savings. For 8a, the purchase price was £116,000 and Mrs B wanted a mortgage of £100,572, again with the deposit coming from her savings. BOS was later told by Mrs B that this was, in fact, untrue and that the deposits had been "*gifted*" by the developer.

An independent third party surveyor was instructed to provide a valuation for BOS, following which the bank issued the mortgage offers and Mrs B completed on her purchases.

When the property market crashed in 2008 Mrs B discovered that the flats she'd bought were worth less than she'd expected and she wasn't able to rent them out for as much as she'd been led to believe by the developer. Mrs B hasn't been able to sell the flats because they are in negative equity.

Mrs B holds BOS responsible for this situation. She complained to the bank, saying that if it had carried out its due diligence, it would never have offered her the mortgages. BOS didn't uphold the complaint, so Mrs B brought it to our service.

An investigator looked at what had happened but didn't think the complaint should be upheld. She was satisfied that BOS was entitled to rely on the opinion of the surveyor and that the valuations had been carried out for mortgage purposes only. The investigator was also satisfied that it was clear the mortgages were interest-only, and that it was reasonable for BOS to rely on a sale of the properties as the intended repayment strategy.

Overall, the investigator didn't think BOS had acted irresponsibly in offering the mortgages to Mrs B.

In relation to Mrs B's other concerns about what had happened after the mortgages were taken out, the investigator was satisfied that BOS wasn't responsible for, or under any obligation in relation to, taking action against surveyors or solicitors who had acted in the transaction. The investigator also didn't think BOS was under any obligation to freeze interest or allow negative equity sales of the properties.

The investigator also noted that Mrs B had raised new complaints during the course of the investigation. Mrs B wasn't happy about how her complaint had been handled, and the investigator explained that this wasn't something we were able to look into. Mrs B also said that she had found a buyer for one of her properties and was unhappy that BOS wouldn't agree to this, because the shortfall exceeded its policy. The investigator said that Mrs B would first need to raise this with BOS as a new complaint.

Mrs B didn't accept the investigator's findings, and asked for an ombudsman to review the complaint. She repeated all the points she's previously made about why she considers the developer, the solicitors, the brokers, the surveyors and BOS are responsible for the situation she now finds herself in.

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.

I will begin by explaining that I won't be looking at Mrs B's concerns about how BOS has dealt with her complaint. We can only consider complaints that are about regulated activities, or that are ancillary to regulated activities (for example, account administration or debt collection). Whilst the Financial Conduct Authority requires businesses to have a complaints procedure, the handling of complaints doesn't fall within the scope of either a regulated activity or an ancillary activity. In the context of this complaint – about irresponsible lending and about BOS's forbearance action – a complaint about complaint-handling doesn't come within the ambit of an activity that's ancillary to a regulated activity. I therefore can't comment on how BOS has dealt with the complaint.

And, as the investigator explained, any new issues that have arisen since the complaint was brought to us will need to be raised first with BOS. If after 8 weeks the bank hasn't issued a final response letter, or if it has and Mrs B isn't happy with it, she can bring a fresh complaint to us about those new issues. But I won't be able to consider them here.

I must also explain that the Financial Ombudsman Service is independent of both consumers and the businesses they are complaining about. This means that we don't act for consumers, nor do we take instructions either from consumers or businesses, or allow either party to direct the course of our investigations; were we to do so, it would compromise our

independence and impartiality. It's up to us to determine what evidence we need in order to investigate a complaint. So although I've noted the questions which Mrs B would like answered, it's not my role to put those questions to BOS or act as a representative or go-between on this case.

I also confirm that this decision relates only to Mrs B's complaint against BOS. Any action BOS (or indeed any other mortgage lenders) may, or may not, have taken in relation to other similar mortgages is of no relevance to this complaint.

Mis-sale complaint: I confirm I've read everything Mrs B has sent us, and I have no doubt from what she's said that this has been a very stressful time for her. I don't underestimate her strength of feeling about what happened. I note Mrs B believes she has been a victim of a scam perpetrated on her by the developer, the mortgage broker and the surveyors – and that BOS was negligent in not spotting this and protecting her interests.

These were unregulated mortgages, and so the regulatory protections offered to residential mortgage customers do not apply here. Mrs B was taking out the mortgages as a commercial investment.

Mrs B was responsible for ensuring that the information she provided to BOS on the mortgage applications was true and accurate. BOS was told that Mrs B was providing the deposits for the properties from her savings. This wasn't true, the deposits were 'gifted' by the developer, and Mrs B knew this. However, BOS wasn't told this and didn't know. The bank was entitled to assume that the information on the applications forms was accurate. I'm satisfied that if the true picture had been disclosed to BOS, its decision to lend might well have been different. But BOS could not have known that the applications contained false information.

BOS was required to appoint a suitably-qualified valuer to inspect the properties. The surveyor instructed was a member of the Royal Institution of Chartered Surveyors. The valuer was employed by a third-party firm, independent from BOS, and over which this service has no jurisdiction. I've no power to consider whether the valuation was flawed in any way. My remit is limited to the actions of BOS. The valuation was solely for BOS's benefit; its purpose was to enable BOS to decide whether the properties Mrs B was buying were suitable security for the money she'd asked to borrow. BOS was entitled to rely on the valuations when it decided to provide the mortgages.

Because this was a BTL mortgage I think it's also important to clarify what the courts have said about this type of purchase where mortgage valuations are in dispute.

In the case of *Scullion v Bank of Scotland* [2011] EWCA Civ 693 the Court of Appeal provided a clear demarcation between residential and investment purchasers. The issue in question in *Scullion* was whether a valuer providing a report to a mortgage lender for a BTL mortgage owed a duty of care towards the borrower and was liable to the borrower for a negligent valuation.

The Court of Appeal was unanimous in deciding that a surveyor who provides a valuation report for a BTL lender does not owe the borrower a duty of care. This is because the courts consider the purchase of BTL investment property to be a commercial venture.

Indeed, I note that in a letter to BOS dated 12 January 2023, Mrs B's solicitors acknowledge this to be the position. They have also confirmed that Mrs B's applications for compensation made to the Solicitors' Regulation Authority Compensation Fund (SRA) were also unsuccessful.

Although I can depart from the approach followed by the courts if I think it's fair and reasonable, I don't intend to do so here. That's because, as a commercial borrower purchasing two BTL properties, I'm satisfied that it was up to Mrs B to have carried out her own due diligence, have her own survey done on the property and satisfy herself as to the rental income she'd be able to generate from her investments.

There was no obligation on BOS's part to provide Mrs B with a copy of the valuation. Nor was there any duty on BOS's part to ensure the properties were suitable BTL investments for Mrs B; as a commercial borrower and a BTL investor, that responsibility was Mrs B's, and hers alone.

In the circumstances, I'm unable to find that BOS acted irresponsibly when it offered the mortgages to Mrs B. The bank was entitled to rely on both the accuracy of the information provided on the application forms, and on the professional opinion of third parties. This means I'm unable to find that the mortgages were mis-sold.

Complaint that BOS failed to take action: I'm not persuaded BOS was under any obligation to take action against solicitors, brokers or surveyors on behalf of Mrs B. This is a commercial decision BOS is entitled to make. BOS doesn't act for, or represent, Mrs B's interests and it is up to her to take her own action, if she considers it appropriate to do so. As I noted above, Mrs B's solicitors have confirmed that Mrs B has unsuccessfully tried to claim compensation from the SRA, the brokers are no longer trading and that Mrs B has been advised that she has no claim against the surveyor. But that doesn't mean that BOS is required to make its own claims if the bank doesn't wish (or is advised not) to do so.

Complaint that BOS has refused to offer forbearance: Although mortgage lenders are required to offer forbearance to residential mortgage customers in line with regulatory obligations, this doesn't apply in the case of unregulated commercial mortgage borrowers. However, BOS is required to treat Mrs B fairly and reasonably. BOS has offered to look at Mrs B's circumstances to see what it can do to assist her.

If Mrs B wants to sell the properties, BOS has a process for this, called the Negative Equity process. BOS has to agree to any offer made. Once there is an accepted offer and the property is sold, the money is used to clear part of the mortgage, the legal charge is released and the remaining debt becomes unsecured. Mrs B would then need to provide BOS with proposals on how she intends to repay this unsecured debt. BOS has confirmed that no interest is charged on a shortfall debt. However, this would impact Mrs B's credit file, with any shortfall showing as a default, with the mortgage only partly-settled.

BOS has also explained that if Mrs B doesn't want to sell at the moment, she can complete a mortgage review to see if there is a better interest rate available to her. This would, of course, tie her into a fixed-rate interest rate product, so there would be an early repayment charge if the properties are sold within the fixed-rate period.

Conclusion: I'm satisfied that BOS did not act irresponsibly in offering the mortgages to Mrs B, based on the information provided on the application forms and by the surveyors and solicitors.

I'm also satisfied that BOS isn't under any obligation to take action against third parties on behalf of Mrs B.

Finally, I'm satisfied that BOS has a process in place to assist BTL borrowers who are in difficulty. It is up to Mrs B to engage with BOS to discuss her circumstances and put forward any proposals if she wants to sell the properties at a shortfall.

I know this isn't the outcome Mrs B was hoping for. I do not doubt for a moment that she entered into these purchases in the expectation that they would provide her with a return on her investment. Sadly, it transpired that she was misled by the developer, and the repercussions of this have been devastating for her. I have considerable sympathy for the situation she is now in. But I have to put aside my natural feelings of empathy and decide the case on the basis of the evidence.

However, equally, I cannot ignore that BOS was also misled. The bank was provided with false information about the source of the deposits, and about the rental income and valuations. I'm satisfied that it was incumbent on Mrs B to ensure the accuracy of the information provided to BOS. As I have stated above, BOS was reasonably entitled to assume this information was true and accurate. In addition, Mrs B didn't carry out her own due diligence, which, if she had done so, might have led her to conclude that this might not have been a sound investment for her after all. I can't hold BOS responsible for that.

Overall, after taking into consideration all the circumstances of this complaint, I'm unable to find that BOS has done anything wrong.

My final decision

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

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 Mrs B to accept or reject my decision before 11 January 2024.

Jan O'Leary
Ombudsman