

## **The complaint**

Ms B has complained that Bank of Scotland plc (BOS) has failed to offer her a new interest rate, or adequate support for her financial difficulties.

To settle the complaint, Ms B wants BOS to apologise for distress caused by wasting her time making futile telephone calls, for BOS to review its policies relating to disabled customers, for BOS to offer her a new mortgage interest rate product and for BOS to be sanctioned (and Ms B compensated) for its breaches of the Equality Act 2010 and the “Financial Conduct Authority (FCA) Code of Conduct”.

## **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 Ms B being identified. So for these reasons, I will instead concentrate on giving 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. I will also mention at the outset that the Financial Ombudsman Service isn't a regulator or a court. Therefore, although I've noted what Ms B has said about what she considers to be breaches of the Equality Act 2010 and regulatory breaches by BOS, it is not within my power to determine whether there has been a breach of legislation or regulations, or to punish or sanction BOS. My role is to determine what is fair and reasonable in all the circumstances of the case.

Ms B has a mortgage with BOS taken out in 2002. It was originally a flexible mortgage, regulated under the Consumer Credit Act 1974 where borrowers had a credit limit and could draw down further advances as and when required without the need for a formal application. Ms B drew down five further advances, the last one being in September 2006. BOS no longer offers this type of mortgage, or allows additional drawdowns on existing mortgages. Pursuant to MCOB 1.2.21(3), since 21 March 2016 the mortgage has been subject to FCA regulations contained in the Mortgages and Home Finance: Conduct of Business Sourcebook (MCOB) in relation to arrears-handling.

Ms B has been unable to work since 2008 after suffering a catastrophic trauma, and is reliant on benefits and on financial help from family members. The mortgage has been in and out of arrears since 2003, and is currently about £9,000 in arrears. Due to recent interest rate increases, the monthly repayment has increased significantly. The outstanding balance on the account is approximately £177,000.

Ms B complained to BOS about a number of issues. Primarily, she was unhappy that BOS wasn't able to keep her account with a specialist team, which the bank said was to help customers through short-term difficulties. Because Ms B's situation is long-term and apparently permanent, BOS said it wasn't able to look at short-term solutions to resolve the arrears position on the account, as these would not be viable.

Ms B was also unhappy that BOS hadn't offered her a new interest rate product. BOS explained that, in order to put Ms B on a new interest rate, an application would need to be made for a new product, and the arrears would need to be cleared. But based on what Ms B has said about her financial situation, there wasn't any available product that could be considered affordable.

BOS said that it had signposted Ms B to advice agencies and suggested she take independent financial advice. BOS said that if there was no affordable solution, as a last resort, it could take legal action, but would also discuss a sale of the property with Ms B.

Dissatisfied with BOS's response to the complaint, Ms B raised it with our service. An investigator looked at what had happened. In a detailed letter dated 29 September 2023 he explained why he didn't think BOS had acted unfairly.

He explained that, as Ms B's mortgage is on a 'closed book', no new rates are available for her specific mortgage. BOS could offer a new rate on a new product, but this would be subject to Ms B undergoing an affordability assessment and meeting lending criteria. He noted that one criterion was that there were no arrears, which was not the case here.

The investigator noted that Ms B was receiving financial help from family members, but he thought it was reasonable that BOS wouldn't take this into account when considering affordability. Overall, the investigator didn't think that arranging a new mortgage product and capitalising arrears would be the right solution, because it would increase Ms B's debt, and potentially tie her into an early repayment charge (ERC).

In relation to Ms B's request for her account to be dealt with by a particular specialist team (CPT), the investigator wasn't able to agree that BOS should do this. That team was set up to deal with customers in short-term difficulties, whereas the team currently dealing with the account (CFA) was for long-term arrears situations.

Whilst the investigator didn't think BOS was obliged to offer Ms B a new interest rate product or switch her account back to CPT, he did think that the bank should show a little more sensitivity in its dealings with Ms B, particularly in relation to instructing field agents.

Ms B didn't agree with the investigator's findings and asked for an ombudsman to review the complaint. Ms B has made some detailed points. She says that the role of the Financial Ombudsman Service is to put customers in the position they should be in if they had not been wronged by the bank, which therefore requires me to find in her favour, tell BOS that it is required to take ownership of its failures and negligence towards her and provide her with the protection to which she is entitled under the Equality Act 2010.

Ms B says that it is discriminatory for BOS – or any other organisation, including the Financial Ombudsman Service – to rule that disabled customers with financial hardship can only be offered short-term support. Ms B says that it is imperative that BOS is not allowed to “*get away with*” failing to adhere to disability legislation which affords disabled customers rights which carry more weight than BOS's own policies, which amounts to making “*obscene*” profits and bonuses generated from the trauma and suffering of the most fragile, vulnerable and disabled within society.

Ms B concludes that it is “*entirely immoral, unethical and wholly unlawful for BOS to be permitted to implement and impose an internal policy that restricts the customer to a six-month window of being in the BOS specialist care team when such policy totally contradicts disability discrimination legislation and erodes the lawful rights of disabled customers.*”

Ms B says that she is aware of other banks which have permitted their customers to remain in specialist care teams indefinitely, whilst only paying £50 a month, whereas her parents have been paying BOS £500 a month without fail.

Ms B says that her “*housing benefit*” was stopped in April 2018, and is unhappy that BOS agreed to payment arrangements which it knew were being financed by her parents, but at the same time refused to offer her a new interest rate.

In addition, Ms B says that BOS had a duty of care to inform her when her mortgage product became obsolete and signpost her to a suitable alternative. Ms B also disputes that BOS ever tried to return her calls.

Ms B wants BOS to be held to account for the way she has been treated.

### **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 can see from what she’s told us that Ms B has been through a very, very difficult time, and that her disabilities are permanent and extremely debilitating to an extent that I cannot imagine. They impact her life constantly, and I do not dispute for a second the trauma Ms B has been through and the effect of this on a daily basis. I have considerable sympathy for Ms B. However, I have to put aside my natural feelings of empathy and reach my decision on the basis of the evidence.

I’ll start with some general observations. We’re not the regulator of financial businesses, and we don’t “police” their internal processes and systems, or how they operate generally; that’s the role of the Financial Conduct Authority (FCA). We deal with individual disputes between businesses and their customers.

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 Financial Ombudsman Service – published by the FCA and known as DISP – and the remit those rules give us.

We have no power to sanction, punish or fine businesses – that’s the role of the FCA. I also can’t tell BOS how to run its business – including the way it allocates staff to deal with short-term and long-term financial difficulties, or the policies it implements, in compliance with FCA regulations. I also can’t tell BOS what products it is allowed to offer to customers, or prevent the bank from withdrawing products from the market that are no longer available or which have become obsolete. Those are matters that relate to BOS’s general commercial operations, which fall outside the scope of our rules.

Nor do we have the authority to determine whether or not a business has breached legislation, broken the law, or is in breach of contract, and we don’t award damages – all of those matters fall within the remit of the courts.

So whilst I’ve noted Ms B’s request that we sanction BOS for what she says are breaches of the Equality Act 2010 and FCA regulations, I don’t have any power to do that. But what I can do is take relevant law and regulation into account when deciding what’s fair and reasonable in the circumstances of a complaint.

I am explaining this because I would not want Ms B to think that I haven't taken any notice of what she's told us. I've read and considered everything she and BOS have sent us, but I have to work within the parameters of our rules and reach my decision accordingly. I'm also not required to address each and every complaint point – particularly where, as I've explained above, they relate to matters that are outside our remit. Instead I've concentrated on what I consider to be the relevant issues in the complaint.

I am grateful to Ms B for providing the additional information I requested about whether or not she is in receipt of Support for Mortgage Interest (SMI) from the Department for Work & Pensions (DWP), and whether there are any second charges or charging orders against the property (Ms B says she believes not). It is important that I have all the relevant information in front of me.

Ms B has clarified that she did apply for SMI, but since April 2018 to date she's *"been passed from pillar to post, even more so during Covid between DWP & Royal Bank of Scotland & their admin when progressing such, or not as the case may be, leaving me stuck endlessly between BOS, DWP and RBS..."*

Ms B has explained that, as far as she is aware, the second charge holder wrote off the debt and has removed the charge.

BOS is required by the FCA to have policies in place to deal with customers in financial difficulties. The starting point is that lenders have a duty to treat all customers, but particularly those facing financial hardship, fairly. Balanced against that, one of the fundamental principles underpinning the mortgage contract is that a lender has the right to receive payment of the money owed to it.

MCOB 13 sets out what lenders are required to do to help borrowers in arrears.

A lender is required to explore ways to resolve an arrears situation, especially if the problem that created the arrears to begin with is one that looks to be short-term and capable of being resolved within a few months. Short-term difficulties would include such things as temporary unemployment, or an illness or injury that temporarily impacted on the borrower's ability to work – but where those financial difficulties had a solution, such as a new job or a return to work.

For long-term difficulties, a lender must also look at other ways to help, such as transferring a mortgage from capital and interest repayment to interest-only, deferring interest for a period of time or capitalisation of arrears. Balanced against that is the lender's obligation to ensure that any arrangement is affordable and sustainable.

The mortgage account has been in arrears for some years, and the arrears are increasing, currently around £9,000. The mortgage is already interest-only, and has about four years left to run before the capital balance is due to be repaid.

Ms B had previously been in receipt of SMI. I can see from the transaction history that the last payment from the DWP for SMI was in December 2018. BOS's contact notes record that the bank was told by Ms B's mother in July 2018 that a formal complaint had been made to the DWP about the change to SMI. (In April 2018 SMI changed from being a benefit to a loan, secured by a charge over the property and repayable on sale of the property.)

It wasn't until December 2020 that Ms B confirmed to BOS that she'd applied for SMI and that it would be backdated. Ms B told BOS that she was unhappy that, if she had been in rented accommodation the DWP would pay most of the rent, but as she is a homeowner, it would be a loan. I note that BOS placed a hold on the account for 30 days at that point to enable Ms B to arrange for the DWP forms to be sent to BOS.

Ms B told BOS in March 2020 that she was still trying to arrange SMI and that this would be backdated. Another 30-day hold was put on the account. There is no other mention after that in the contact notes of Ms B telling BOS she was applying for SMI, and no further payments have been received from the DWP since December 2018.

I don't think it was unreasonable for BOS to agree to payment arrangements when Ms B said that family members would be helping her with her repayments. But BOS can't take these payments into consideration when considering affordability for a new mortgage product. I can see why Ms B thinks this is unfair, but BOS – in line with other lenders – isn't able to treat *ad hoc* payments from family members as a source of income when looking at the affordability of a mortgage.

Ms B wants BOS to pass her account back to the CPT. However, that team deals with short-term financial difficulties. The CPT is able to set up arrangements to help customers whose financial difficulties have a potential end date – for example, a period of unemployment where the customer then finds another job, or a short-term illness.

Whilst initially BOS hoped that Ms B's financial difficulties would be short-term – as it was anticipating that her claim for SMI would be processed and a backdated lump sum paid by the DWP – that hasn't been the case. Instead the arrears increased, and Ms B didn't appear to have any realistic prospect of clearing them and so it wasn't appropriate for the account to remain with the CPT because the bank needed to look at the overall situation on a more long-term basis.

I'm satisfied BOS has thought about whether there is any long-term solution to Ms B's financial difficulties. BOS says that capitalisation of arrears and transferring the mortgage onto a new product wouldn't be affordable. A new product would come with a product fee (which, if added to the balance, would accrue additional interest) and possibly an ERC. Ms B, on her current income, isn't able to meet BOS's affordability criteria for her existing balance, and so increasing it by capitalising arrears would make it even less affordable and put her in a worse, not better, position.

Ms B says that BOS has discriminated against her and has breached the Equality Act 2010. As I said at the start, I don't have any power to determine whether or not BOS is in breach of the Act. But I've taken into account the law, as well as regulation, guidance and good practice, to decide what I consider to be fair and reasonable in all the circumstances. The relevant law here is the Equality Act 2010, and Ms B specifically asked me to take into account the duty to make reasonable adjustments for persons with disabilities.

The Act says that, in summary - where a provision, criterion or practice puts a person with a disability at a substantial disadvantage in comparison with persons who are not disabled, a service provider must take such steps as it is reasonable to have to take to avoid the disadvantage.

The Act also says that a person with a protected characteristic – such as disability – shouldn't be harassed. The Act defines harassment as unwanted conduct in relation to a protected characteristic that violates a person's dignity, or creates an intimidating, hostile, degrading, humiliating or offensive environment.

There are, in law, other forms of harassment too – which don't relate specifically to the protected characteristics – and which, in summary, involve engaging in a course of conduct likely to cause alarm or distress.

It's not my role to make findings on matters of law, including whether or not BOS is in breach of obligations under the Act. But as I say, this is something I take into account in deciding whether it's acted fairly.

I must also bear in mind the regulator's principles for businesses, one of which says that a firm must ensure its communication with customers is clear, fair and not misleading. When a borrower's circumstances make communication through normal channels difficult, I'd expect a lender, acting fairly, to adjust how they communicate - to take account of the borrower's needs.

Ms B says that the way the CFA has dealt with her is in breach of the Equality Act. I can see how upset Ms B has been about the way the CFA team dealt with her account. In particular, sending a field agent to the property, which wasn't appropriate given Ms B's circumstances.

Ms B says BOS has consistently failed to return her calls, but the bank's contemporaneous call notes show that BOS left messages when it wasn't able to speak to Ms B. Those notes were made at the time of the events, and so I'm satisfied I can rely on them as an accurate record of what happened. But I can see that there has been a breakdown in communication between BOS and Ms B at times, which Ms B has found distressing and frustrating.

Ms B has specific vulnerabilities (which I will not go into any detail about, due to the need to preserve Ms B's anonymity). As a result, BOS needs to ensure that Ms B is treated with sensitivity and care in relation to communicating with her about the arrears. That doesn't mean, however, that BOS shouldn't try to contact Ms B to discuss the account, only that BOS needs to think about the most appropriate way of doing so, given Ms B's quite specific circumstances. If there is a particular method of communication Ms B would prefer, she should let BOS know.

When deciding a complaint I have to be fair to both parties. That means that I have to take into consideration what is fair and reasonable in relation to BOS, not just Ms B. On the basis of the evidence before me, there doesn't appear to be any realistic prospect of Ms B either being able to pay off the arrears or to afford the monthly repayments on her current mortgage or to meet affordability criteria for any other mortgage product.

The Equality Act does not mean that Ms B should be treated *more* favourably than a customer who is not disabled. Therefore in relation to BOS's decision not to offer Ms B a new mortgage product on the ground of affordability, I'm satisfied that Ms B is being treated the same as a non-disabled customer who does not meet affordability criteria.

Regrettably, Ms B's situation is such that there is no basis on which she would meet affordability criteria for any product at all, even if BOS had a fee-free, ERC-free product. I fully appreciate that Ms B's situation is not of her own making and that she is in the position she is in due to circumstances beyond her control. But BOS cannot offer a new mortgage where there is no basis on which that mortgage would be affordable. This would be in breach of BOS's regulatory obligations as a responsible lender.

Given Ms B's situation, her options are, unfortunately, very limited. Looking at her overall financial circumstances, it seems to me that the arrears are likely to increase. I know this is not what Ms B wants to hear, but it would be remiss of me to give her false hope that the solution to this problem is that I order BOS to offer Ms B a new mortgage; that is something I simply cannot do in all the circumstances of this case.

It appears to me that there will ultimately need to be a sale of the property, because there does not appear to be another option that is affordable or sustainable. As a last resort, if there is no prospect of repayment of the mortgage arrears, and no possibility that Ms B will be able to afford the mortgage going forward, BOS is entitled to take legal action to recover the outstanding debt. Given Ms B's circumstances, this would have to be the very last resort, after all other options have been exhausted.

I think that BOS should give Ms B six months from the date of this decision before taking any legal action. That will give Ms B time to consider her options and put the property on the market if she decides to sell it to avoid BOS taking legal action. If by the end of six months there is no realistic prospect of the mortgage and arrears being repaid, and no evidence from solicitors that a sale is imminent, then BOS would be entitled to take further action to recover the debt.

I think Ms B might also find it helpful to take some advice from a specialist debt advisory service such as Citizens Advice, StepChange or Shelter, or from an independent financial adviser.

I know this isn't the outcome Ms B was hoping for. I am truly sorry if my decision adds to her distress. But after considering everything she and BOS have said, I'm unable to find that BOS has acted unfairly, for all the reasons given above.

### **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 correspondence about the merits of it.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms B to accept or reject my decision before 30 November 2023.

Jan O'Leary  
**Ombudsman**