

The complaint

Mr and Mrs F have complained that Bank of Scotland plc (trading as Halifax) is asking them to pay a shortfall debt following the sale of their property after they handed back the keys. To settle the complaint they want the debt written off and for Halifax to stop contacting them.

What happened

Mr and Mrs F owned a property which was mortgaged to Halifax. Unfortunately they fell into financial difficulty and on 3 January 2012 handed the property back to Halifax. It was sold on 16 March 2012.

Mr and Mrs F say that it was only on 30 May 2018 that they first heard from Halifax's debt recovery agents claiming there was a shortfall debt of about £16,400. They complained to Halifax, saying that the bank was out of time for contacting them, as it had six years from the date of the sale to do so.

Halifax didn't uphold the complaint and so it was brought to us where an investigator looked at it. He didn't think the complaint should be upheld. He noted that Halifax's solicitors had written to Mr and Mrs F sending four letters each between 2013 and 2014. Given this, the investigator was satisfied Halifax was not out of time to pursue the debt.

Mr and Mrs F disagreed with the investigator's findings. They say they'd never seen those letters until the investigator provided copies of them. They say they are not "genuine" as they are not on any official letterhead and were only created on 27 July 2020.

As the complaint remains unresolved, it falls to me to issue a final decision on it.

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.

The position in relation to recovery of mortgage shortfalls is covered in the code of practice issued by UK Finance (formerly the Council of Mortgage Lenders), which says:

"In England, Wales and Northern Ireland, a lender legally has 12 years in which to contact the borrower to begin the process of obtaining repayment of shortfall debt; this period is usually 5 years in Scotland..."

In addition, from 11 February 2000, lenders ... have agreed voluntarily that they will begin all recovery action for the shortfall within the first six years following the sale of a property in possession...

The six year limit only refers to beginning recovery action and does not affect a lender's ability to recover the shortfall debt over a longer period."

It is also part of the Financial Conduct Authority's Mortgages and Home Finance: Conduct of Business Sourcebook (MCOB), which says:

*“(1) If the decision is made to recover the sale shortfall, the firm must ensure that the customer is notified of this intention.
(2) The notification referred to in (1) must take place within five years of the date of the sale (if the regulated mortgage contract or home purchase plan is subject to Scottish law) or within six years (in all other cases).”*

Mr and Mrs F’s property was in England.

First, I’ve considered the issue about whether or not Mr and Mrs F heard anything about the shortfall debt before Halifax’s agents’ 30 May 2018 letter. Mr and Mrs F don’t accept Halifax’s solicitors wrote to them in 2013 and 2014 and argue that those letters have recently been created to support Halifax’s position. Halifax says the letters have been retrieved from the solicitors’ digital records and were created at the time they were acting for Halifax.

Where evidence conflicts, I make my decision on what I think is most likely to have happened, taking all the available evidence into account. I find it’s more likely than not that the solicitors did write to Mr and Mrs F four times each on 1 October 2013, 31 October 2013, 2 December 2013 and 2 June 2014. The letters were correctly addressed. If they had been returned as ‘undelivered’, I would have expected to find some record of this. In the absence of any such evidence, I conclude that the letters were correctly delivered.

The letters clearly reference that this is a shortfall debt arising from the sale of the property, and that Halifax is seeking to recover it. The full amount of the debt is specified. In the circumstances, I find that Halifax (through its solicitors) did contact Mr and Mrs F about the shortfall debt within six years of the date of the sale of the property.

I note that Mr and Mrs F say they believe the solicitors’ letters are forged. But having looked carefully at these, I consider this is unlikely. The letters were retrieved from records held on an internal system, so there is nothing sinister in them showing the date they were recovered from the system. The dates the letters were sent are clearly shown.

I’ve also considered the period under which a lender must start to take legal action to recover a shortfall. A shortfall debt isn’t automatically written off when a property is sold in possession. Section 20 (1) of the Limitation Act 1980 sets out that a lender has 12 years to use court action to make a borrower pay a shortfall from a mortgage.

That 12 years starts from the date the property is sold, not the date of possession. That’s because an accurate figure for the shortfall can’t be known until the sale has definitely gone through. The court action for the shortfall would be separate from the possession proceedings. But it doesn’t have to be an actual court application, as a form of pre-action would be sufficient – for example notification that borrowers need to pay or the lender would start court proceedings.

It’s important to note that the rules relate to when a lender must start these processes. If borrowers don’t respond or do anything until after the timescales have expired, it doesn’t mean that debt will be cancelled, provided the lender has started the processes in time.

After taking everything into account, I’m satisfied that Halifax is not out of time to recover the shortfall debt from Mr and Mrs F.

Mr and Mrs F are, of course, free to reject my decision, if they disagree with it. Nothing in this decision precludes Mr and Mrs F arguing in any court proceedings that Halifax is out of

time to recover the debt. I would suggest Mr and Mrs F take legal advice from a qualified solicitor in relation to any court proceedings.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F and Mrs F to accept or reject my decision before 11 November 2020.

Jan O'Leary
Ombudsman