

The complaint

Mr and Mrs B complain that Bank of Scotland plc wouldn't offer them any interest rate products on their mortgage due to the fact they were self-certified customers. They feel they've been treated unfairly and have overpaid as a result.

What happened

Mr and Mrs B took out a mortgage with Bank of Scotland in 2008 on a self-certified basis. That meant they didn't need to provide proof of their income in order to get the mortgage approved. The mortgage was taken on an initial interest rate product that would track 0.49% above the Bank of England base rate until 1 May 2011.

In April 2011 Mr and Mrs B spoke to Bank of Scotland about their mortgage. Mr and Mrs B say they asked about new interest rate products and were told that there weren't any available to them as their mortgage was self-certified, and the bank no longer offered those mortgages. Mr and Mrs B say they shopped around and looked at what was available with other lenders and they found the same thing. Their mortgage reverted onto Bank of Scotland's standard variable rate (SVR), which is the rate it was on until 2021.

Mr and Mrs B said they spoke to Bank of Scotland again over the years and asked about interest rates. They say they were repeatedly told there were no rates available to them as they had a self-certified mortgage. Bank of Scotland have told our service they don't have any record of those later conversations.

In March 2021 Mr and Mrs B complained to Bank of Scotland about the fact they hadn't been offered any interest rate products over the last 10 years. Bank of Scotland didn't uphold the complaint. They said that there had been rates available to Mr and Mrs B over the years as self-certified customers, but the rates were higher than the SVR they were already paying. They said if Mr and Mrs B had been able to provide proof of their income, they could have applied for a mainstream product which would have been lower. Bank of Scotland also said they had no records of any other conversations with Mr or Mrs B about interest rates after 2011. They said there were rates available to Mr and Mrs B now if they still wanted to switch.

Mr and Mrs B applied for an interest rate product which was successful. Bank of Scotland also sent Mr and Mrs B a follow up letter to explain that the earliest they could have applied to switch to a mainstream product was 2019, but they didn't have any records to suggest Mr and Mrs B had asked about new rates since then. So they didn't change the outcome of the complaint.

Mr and Mrs B brought their complaint to our service. Bank of Scotland didn't consent to our service considering Mr and Mrs B's complaint about what happened more than six years before they complained, as they said that had been made out of time. Our Investigator looked into things, and explained that Mr and Mrs B's complaint about what had happened before March 2015 had been made outside of the time limits, so we couldn't consider it. She did say we could consider whether Bank of Scotland were treating Mr and Mrs B fairly from March 2015 onwards as that part of the complaint had been made in time. Both parties agreed to proceed on that basis.

The Investigator looked into what happened since March 2015, and having done so, she didn't uphold Mr and Mrs B's complaint.

Mr and Mrs B disagreed with the outcome, so the complaint's been passed to me to issue a decision.

My provisional decision

I issued a provisional decision on 3 August 2022. This is what I said.

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

Both parties have accepted that our service cannot consider Mr and Mrs B's complaint about events that took place before March 2015. I agree that the time limit rules prevent our service from considering a complaint about that period too. So in this decision, I have considered how Bank of Scotland have treated Mr and Mrs B from March 2015 onwards.

Did Mr and Mrs B ask Bank of Scotland about new interest rate products?

There was no regulatory requirement or expectation for Bank of Scotland to pro-actively reach out to individual borrowers on the SVR and invite them to apply for a new product at the relevant time being complained about. If Mr and Mrs B wanted to take out a new product on their mortgage, they needed to contact the bank and ask for one.

Bank of Scotland have told our service that they have no record of any contact from Mr and Mrs B about their mortgage during the relevant period. And having looked at a copy of the account notes Bank of Scotland have sent to us, I can see there is no record there of any conversations with Mr and Mrs B from March 2015 onwards until this complaint was made. However, Mr and Mrs B have told us that they did call the bank to ask about new rates, and were told that there weren't any available to them. So I've thought about what's most likely to have happened here based on the balance of probabilities.

Mr and Mrs B have said they called Bank of Scotland in more recent years after the bank had written to them about their repayment strategy. They said they received letters about this in August 2014, June 2015 and May 2018, and contacted the bank afterwards. But when they called, they were told there were no preferential rates available to them, unless they were able to provide proof of their income. Bank of Scotland have said they did have interest rate products available for self-certified customers from March 2015 onwards, and have sent us details of those rates. The products offered to self-certified customers were higher than the SVR Mr and Mrs B were paying at the time. Bank of Scotland have said it was only in 2019 that they aligned their rates and so they had lower rate options available to Mr and Mrs B without them having to provide proof of their income.

I think it's plausible that Mr and Mrs B did call Bank of Scotland to ask about interest rate products in the years following March 2015. I think it's likely that when those enquiries took place, Bank of Scotland told Mr and Mrs B the rates they had available for self-certified customers, but as they were higher than what they were paying, Mr and Mrs B did not go ahead with an application. Bank of Scotland have said that if an application doesn't proceed for any reason, it drops off their system after a few months. So I think the fact there's no record of these conversations doesn't mean they didn't happen. Mr and Mrs B could have called as a general enquiry rather than an account specific question – which would mean it wouldn't be recorded on their account notes, and if no application was made then the bank have said it wouldn't stay on their records for more than a few months.

Mr and Mrs B have provided specific dates and recollections of what happened to prompt those conversations, as well as what they were told. Based on the fact that they would have been told they wouldn't have been able to access a lower interest rate during those conversations, I'm satisfied Mr and Mrs B's recollections are plausible. So, on balance, I think it's likely Mr and Mrs B did call Bank of Scotland in June 2015 and May 2018, and asked about interest rate products available to them.

Was it fair that Bank of Scotland didn't offer them a preferable interest rate?

Mr and Mrs B have said that it's unfair Bank of Scotland have continued to charge them a high interest rate as a result of their mortgage being self-certified. They say they're trapped with Bank of Scotland as self-certified mortgages are not allowed under the rules anymore, and they're unable to provide proof of their income. So they can't pass affordability assessments with new lenders. Considering Mr and Mrs B's circumstances, I think that's likely. As a result, they've had to continue paying Bank of Scotland's SVR despite the fact they've never missed a payment.

I'm pleased to hear that Mr and Mrs B have now been able to access a lower rate with Bank of Scotland, but I've thought about whether they should have been offered a lower rate sooner, and specifically when they called the bank in June 2015 and May 2018.

Bank of Scotland have said that they only offered preferential rates to self-certified customers from 2019. Before that, in order to access a preferential rate Mr and Mrs B would have been required to provide proof of their income. I'm also aware they would have had to pass a full affordability assessment based on the bank's lending criteria at the time. And so in order for Mr and Mrs B to access the lower interest rate products before 2019, they would have needed to have met the new borrower criteria, and essentially take out a new mortgage as new customers. I've thought carefully about this, and I'm not satisfied that's resulted in fair treatment for Mr and Mrs B.

When considering whether Bank of Scotland have acted fairly, I need to consider the relevant rules, guidance, law and industry practice. The Financial Conduct Authority (FCA) has set out an evidential provision in the Mortgage Conduct of Business handbook (MCOB) in relation to the fair treatment of borrowers who are unable to 'shop around' and move their mortgage to another lender. I've set this out below, as I think it's relevant when deciding whether Bank of Scotland have treated Mr and Mrs B fairly.

MCOB 11.8.1 E says:

"Where a customer is unable to:

(1) enter into a new regulated mortgage contract or home purchase plan or vary the terms of an existing regulated mortgage contract or home purchase plan with the existing mortgage lender or home purchase provider; or

(2) enter into a new regulated mortgage contract or home purchase plan with a new mortgage lender or home purchase provider;

the existing mortgage lender or home purchase provider should not (for example, by offering less favourable interest rates or other terms) take advantage of the customer's situation or treat the customer any less favourably than it would treat other customers with similar characteristics.

To do so may be relied on as tending to show contravention of Principle 6 (Customers' interests)."

Principle 6 says:

“A firm must pay due regard to the interests of its customers and treat them fairly.”
I think this is relevant to Mr and Mrs B’s complaint. I’ll explain why.

Technically, Mr and Mrs B were able to vary their existing mortgage with Bank of Scotland as they were able to take out their self-certified products – albeit these were higher than the bank’s SVR at the time. However, I’ve explained above why I’m persuaded, on balance, that Mr and Mrs B were unable to enter into a new mortgage contract with a new lender. So I think sub-point (2) applies above – even if they could access a new product with Bank of Scotland, Mr and Mrs B come within 11.8.1 because they had no options on the wider market. 11.8.1 does not require both (1) and (2) to be satisfied before it is relevant to considering whether they were fairly treated, it requires either to be satisfied. Mr and Mrs B satisfied 11.8.1 (2).

The rates Bank of Scotland offered to Mr and Mrs B were higher than the rates they offered to their non self-certified borrowers (i.e. those borrowers who had provided proof of their income when the mortgage was taken out). Bank of Scotland say they couldn’t offer Mr and Mrs B the lower rates until they provided proof of their income, whereas I’m aware non self-certified borrowers would have been granted access to a lower rate without the need to pass an affordability assessment, or provide proof of their current income. Though proof would have been provided when those other customers took their mortgages out – in some cases many years before when their circumstances were different – not when applying for a rate later on. Non self-certified Bank of Scotland borrowers were not required to have their income assessed or to prove it when applying for a new rate.

11.8.1 E does not require all customers to be treated the same. But it does, in my view, show that there may be unfairness where a borrower who is unable to move to another lender is treated less favourably than a borrower who shares similar characteristics, “for example, by offering less favourable interest rates or other terms”. Where the lender offers less favourable products to some customers, it may give rise to the possibility of unfair outcomes in some situations. 11.8.1 E suggests that the regulator considered there to be the potential for unfairness where borrowers are unable to shop around.

I’ve thought about whether Mr and Mrs B, who originally became Bank of Scotland’s customers as self-certified borrowers, could – at the time of the conversations in 2015 and 2018 - be considered as having similar characteristics as a different borrower with Bank of Scotland, who had originally provided proof of income and been offered a lower interest rate product. I think this is the central question I need to decide.

At the time of the conversations in 2015 and 2018, Mr and Mrs B had an interest only mortgage and were up to date with their payments. I think it’s likely that there were other Bank of Scotland borrowers whose mortgages were in much the same position (and potentially worse), as Mr and Mrs B’s mortgage at the time, and whose circumstances at that time would have been substantially similar. A significant amount of time had elapsed since 2008 when this mortgage was taken out, so I’ve considered whether the way in which the mortgage was originally taken out (i.e. self-certification vs proof of income) can properly be said to be a ‘characteristic’ relevant to the risk Mr and Mrs B presented in 2015 and 2018.

Bank of Scotland say they could only offer Mr and Mrs B a product from the non self-certified range if they provided proof of their income, like their other borrowers had. But I’m not persuaded that how the mortgage was initially taken out in 2008 was a relevant consideration or ‘characteristic’ in 2015. Whilst they hadn’t proved their income, Mr and Mrs B had met Bank of Scotland’s eligibility and lending criteria as new borrowers in 2008. But,

as these criteria changed over time, following the introduction of tighter regulation and more stringent checks – Mr and Mrs B did not meet the new borrower criteria for other lenders by 2015.

If a non self-certified Bank of Scotland borrower wanted to apply for a new interest rate product in 2015, they would not have been required to pass an affordability assessment. That means that they were not required to meet the bank's new lending criteria in order to access the cheaper rates. I think it's likely that there were other Bank of Scotland borrowers who, although they'd passed the lending criteria in 2008, would have been unable to pass the new, stricter lending criteria that existed in 2015.

And just because they chose to prove their income in 2008, doesn't mean they had the same income, or circumstances relevant to the risk they presented in 2015, as they did in 2008. In fact, I think that's very unlikely. But they wouldn't have been prevented from accessing the cheaper rates. Mr and Mrs B have been treated less favourably than Bank of Scotland's non self-certified customers because of the way their mortgage was approved in 2008. In my view, when considering 11.8.1 E, I think the characteristics of Mr and Mrs B's mortgage in 2015 and 2018 are what's relevant.

When Mr and Mrs B asked about new interest rate products in 2015, I think Bank of Scotland ought to have looked into their situation, and considered whether or not MCOB 11.8.1 E might have been relevant, for example as here because they were unable to move to another lender. This doesn't appear to have happened.

Mr and Mrs B were treated differently from Bank of Scotland's non self-certified borrowers as I'm satisfied that they are likely to have been required to meet higher standards than other customers who at that time had similar characteristics in order to access the same rates. I'm not satisfied being 'self-certified' several years previously constitutes a characteristic in itself at the time the application was made. I'm satisfied that a non self-certified customer with similar characteristics at the time – not in arrears, with a similar loan to value, and with the same outcome of any affordability assessment – would have been offered a more favourable rate than Mr and Mrs B were. As a result, considering all the circumstances, I think Bank of Scotland have treated Mr and Mrs B unfairly.

In my view, it would have been fair and reasonable for Bank of Scotland, taking into account 11.8.1 E and all the circumstances, to have considered Mr and Mrs B's circumstances, noted they were unable to move to another lender, and offered them a rate which was not less favourable than would have been offered to a non self-certified customer with similar characteristics. I am satisfied that in the circumstances it was not fair to treat Mr and Mrs B less favourably than those other customers, at least some of whom would have been at a similar or possibly even a greater risk of defaulting on their mortgage, and yet were offered "cheaper" rates on their interest only mortgages without the need to pass a new customer assessment.

From the evidence provided to me, it seems that Bank of Scotland didn't take any account of 11.8.1 E, or consider whether it applied in Mr and Mrs B's situation and whether as a result there were any particular requirements of fairness that applied to them. Had they done so, a fair assessment would have been to offer them no less favourable rates than their other borrowers with similar characteristics. As a result, I provisionally think this complaint should be upheld, subject to any further comments or evidence provided by either party.

Putting things right

I think in June 2015 and May 2018 Bank of Scotland should have considered Mr and Mrs B's circumstances in the round and offered them a rate no less favourable than would have

been offered to customers from their non self-certified product range. We haven't been provided with information about the interest rate products that were available for Mr and Mrs B's loan to value at the time. So Bank of Scotland will need to provide this information in response to my provisional decision.

In order to put things right, I think Bank of Scotland should re-work Mr and Mrs B's mortgage account as if the lower rate had been applied to the mortgage in July 2015 (the following month after Mr and Mrs B called) and offer them the option of either:

- applying the lower rate to the mortgage account which will have resulted in overpayments and a reduction of the balance. Or,*
- receiving the overpayments made as a result of the difference in the interest rates refunded to them in cash, as well as a payment of 8% simple interest calculated from the date of each overpayment to the date of settlement.*

If the rate Mr and Mrs B would have selected in 2015 included a product fee, the fee can be deducted from the redress payment. And when the rate selected in 2015 would have expired, a further new rate to follow on should also be selected to form part of the re-work of the mortgage. This should continue until Mr and Mrs B were able to successfully arrange a new product in 2021.

Mr and Mrs B have said that their plans to repay this mortgage at the end of the term have been severely impacted by the fact they've been unable to switch to a preferable interest rate product, as they haven't been able to save as much money as a result. Whilst, if accepted, the outcome of this decision will put them back into the position they would have been in had they been able to take out new rates as planned, I'm persuaded the worry to Mr and Mrs B of having to change their plans to repay the mortgage at the end of the term would have caused them distress and inconvenience. So I think Bank of Scotland should pay Mr and Mrs B £400 for the distress and inconvenience caused."

Mr and Mrs B responded and provided more details of the impact this issue has had on their lives over the last 10 years.

Bank of Scotland accepted the provisional decision and provided details of the rates that Mr and Mrs B would have been eligible for at the time of their applications.

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.

As neither party has disputed my provisional decision relating to the interest rate, my decision on that issue remains unchanged and I'm still satisfied Bank of Scotland should re-work Mr and Mrs B's mortgage account as I set out previously.

I am grateful to Mr and Mrs B for providing more details about their personal circumstances and the impact this issue has had on their lives. I'm sorry to hear about what they've been through. Considering all they've told us, I'm still satisfied £400 is a fair amount to reflect the distress and inconvenience Bank of Scotland caused directly as a result of not considering their interest rate applications from 2015 as they should have done. Mr and Mrs B will now be able to use the redress from this complaint to reduce the interest only balance and I'm hopeful that will alleviate some of their worry moving forward.

Putting things right

In order to put things right, I think Bank of Scotland should re-work Mr and Mrs B's mortgage

account as if the lower, prime rate had been applied to the mortgage in July 2015 (the following month after Mr and Mrs B called) and offer them the option of either:

- applying the lower rate to the mortgage account which will have resulted in overpayments and a reduction of the balance. Or,
- receiving the overpayments made as a result of the difference in the interest rates refunded to them in cash, as well as a payment of 8% simple interest* calculated from the date of each overpayment to the date of settlement.

If the rate Mr and Mrs B would have selected in 2015 included a product fee, the fee can be deducted from the redress payment. And when the rate selected in 2015 would have expired, a further new rate to follow on should also be selected to form part of the re-work of the mortgage. This should continue until Mr and Mrs B were able to successfully arrange a new product in 2021.

Bank of Scotland should also pay Mr and Mrs B £400 for the distress and inconvenience caused.

If Mr and Mrs B accept this decision, they should also let us know which option they would prefer Bank of Scotland to carry out in order to put this matter right.

*Interest is at the rate of 8% a year simple. If Bank of Scotland considers that it's required by HM Revenue & Customs to take off income tax from that interest, it should tell Mr and Mrs B how much it's taken off. It should also give Mr and Mrs B a certificate showing this if they ask for one, so they can reclaim the tax from HM Revenue & Customs if appropriate.

My final decision

Considering everything, for the reasons I've explained, I uphold this complaint and instruct Bank of Scotland plc to put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs B to accept or reject my decision before 6 October 2022.

Kathryn Billings
Ombudsman