

## **The complaint**

Mr and Mrs K complain about their mortgage with Bank of Scotland plc. They say it's kept them on the standard variable rate (SVR), leading to them having to pay too much interest.

## **What happened**

Mr and Mrs K have a mortgage with BoS, taken out on a self-certification basis in 2005. They initially had a two year fixed rate, and then took a two year tracker rate. From 2009 their mortgage reverted to the SVR.

Mr and Mrs K say they asked BoS for a new interest rate, but it told them none was available to them because they had a self-certification mortgage. So they had to stay on the SVR – leading to a large increase in their monthly payments.

In 2016, Mr and Mrs K fell into arrears and agreed a repayment plan with BoS. The arrears were capitalised in 2017, and Mr and Mrs K say they asked again about a new interest rate but were told they weren't eligible. They say they were told they could not have a mortgage product as their type of mortgage didn't exist anymore, and because they couldn't provide proof of income.

In 2019, Mr and Mrs K fell back into arrears. They complained that they had been paying too much interest and that the monthly payments were too high because they'd unfairly been kept on the SVR rather than being given a new interest rate.

BoS said it had no evidence that Mr and Mrs K had asked for a new rate in 2017. They hadn't been eligible in 2016 because of the arrears. Once the arrears were capitalised, they were told they would be able to apply for a rate after they'd kept the mortgage up to date for a month or two. But it said they never made that application. BoS said the next time Mr and Mrs K discussed rates with the bank was in 2019, by which time they were back in arrears. The arrears were capitalised again, and Mr and Mrs K did take a new rate in 2020.

Our investigator said that what had happened in 2009 was out of time, and he couldn't consider that. He said Mr and Mrs K weren't eligible for a new interest rate in 2016 and there was no evidence they asked for one after capitalisation in 2017. So he didn't recommend that their complaint be upheld. Mr and Mrs K asked for it to be looked at by an ombudsman.

## **My provisional decision**

I took a different view of the complaint to the investigator. So I issued a provisional decision setting out my thoughts on the complaint. I said:

“There are a number of issues that I have to decide in this case, and I'll deal with each in turn. They are:

- What parts of this complaint we can consider – the events of 2009, or just the events of 2016 / 2017 and after?

- Did Mr and Mrs K apply for a rate in 2017, as they say?
- If they did, should a rate have been made available to them – and which rate?

### *The time limits*

The rules of the Financial Ombudsman Service say that we cannot consider complaints made out of time. The time limit is that a complaint must be made no later than six years from the date of the event complained of – or, if later, no more than three years from when the complainant knew, or ought reasonably to have known, of cause for complaint. Where a complaint is made out of time we cannot look at it unless the firm consents (which BoS doesn't in this case), unless there's evidence of an earlier complaint, or unless there are exceptional circumstances to explain the delay.

The starting point is that Mr and Mrs K are only going to be given a new interest rate if they apply for one – there's no obligation on BoS to pro-actively offer them a rate or invite them to apply. But if they do apply, BoS must treat them fairly in considering that application.

Mr and Mrs K say they applied for a rate in 2009, only to be told none was available. That deterred them from applying again, until they asked about rates again in 2016 and 2017. The application they say they made in 2009 is more than six years before they first made this complaint. So it's out of time on the first part of the rule. And I agree with our investigator that it's out of time on the second part too. Mr and Mrs K say they had no way of knowing what they were told might be wrong or that they could complain about it. But they'd taken a new rate before, in 2007. If they wanted another, in 2009, but were told this time that they couldn't have one, then I think that ought reasonably to have told them they might have cause for complaint about not being given a rate.

As I haven't seen any exceptional circumstances that meant Mr and Mrs K weren't able to bring this part of their complaint in time, I'm satisfied this means I can't consider what happened in 2009.

However, the events of 2016 and 2017 and thereafter are within six years of Mr and Mrs K's complaint, and so are in time. It's on those events that I will focus in the rest of this decision.

### *What happened in 2016 and 2017?*

I've carefully considered what both Mr and Mrs K and BoS say about what happened in 2016 and 2017. When they asked about a rate in 2016, Mr and Mrs K weren't eligible for one because they were in arrears. I don't think that's unreasonable – a fixed rate comes with an early repayment charge (ERC). And where a borrower is in arrears, there's a risk that the mortgage will be unsustainable. If the property is sold, or repossessed, adding an ERC would increase the amount that has to be repaid.

Mr and Mrs K were told that they weren't eligible for a rate while in arrears. In January 2017, they discussed capitalising the arrears and then taking a rate, and were told they would need to make the monthly payments for six months before capitalisation could be considered, and then they could apply for a rate.

Mr and Mrs K called BoS several times over the next few months to check they were on track. In July 2017, they called and capitalisation was agreed with effect from August. This call note also records

*Also wants to check about getting a lower interest rate, advised once account is up to date, will possibly need to maintain payments for a couple of months before they can apply for a new interest rate.*

There is no further record in the contact notes BoS has given us of contact with Mr and Mrs K until March 2019, when the mortgage had fallen back into arrears.

BoS says this means that Mr and Mrs K didn't get back in touch to apply for a rate after the capitalisation had taken effect. And as they didn't ask for a rate, it couldn't give them one.

Mr and Mrs K say they did contact BoS to ask for a rate – but were told they would have to prove their income and go through a full affordability assessment and that they wouldn't be eligible for a rate otherwise.

On balance, and having considered the evidence, I'm more persuaded by what Mr and Mrs K say about this than BoS. I'll explain why.

In the first place, the detailed contact notes BoS has given us are the collections notes, the record of discussions with the collections team about arrears. There are several entries in those notes where Mr and Mrs K were put through to other mortgage teams, but those calls do not appear in the notes. It's clear they must have happened, since there's a record of the collections team passing Mr and Mrs K through. But the notes of the other teams do not appear on the collections contact notes.

So I'm satisfied that the evidence BoS has given us does not record all contact with Mr and Mrs K. It omits details of calls passed through to other teams. And therefore it's equally possible that Mr and Mrs K called the team that dealt with rate switches after the capitalisation – but that also isn't recorded in the contact notes. Therefore, the mere absence of a record of any call in these notes is not definitive.

In the second place, Mr and Mrs K's recollection of what they were told is clear. If they wanted a better rate, they would have to pass an affordability assessment, which they couldn't do. So they couldn't get a better rate.

This matches BoS's policy and their situation at that time. Mr and Mrs K took their mortgage out on a self-certified basis. At this time, BoS had separate rates for self-certified and full-certified customers. It's shown us the list of rates it had in 2017. And in 2017, the only fixed rate available to a self-certified customer was 6.59%, which was higher than the SVR Mr and Mrs K were on.

To get access to the full-certified rates, BoS has told us that Mr and Mrs K would have had to pass a full affordability assessment at the same level it would expect of new borrowers at that time. Mr and Mrs K had just come out of arrears. Both of them were self-employed and had experienced issues with their incomes. In those circumstances, I think it's unlikely they would have passed such an assessment had one been carried out – and I think it's likely that would have been clear to Mr and Mrs K.

If Mr and Mrs K had applied for a rate in 2017, then, they would either have been offered a self-certification rate which was higher than the SVR they were on. Or they would have been required to pass a full affordability assessment to get access to a rate lower than SVR, which they would not have passed. Therefore, if an application had been made, Mr and Mrs K would not have been offered a rate lower than the SVR they were paying at the time.

This is BoS's policy from the time, as it has confirmed to us. And these were the self-certification rates available at that time, again as it has confirmed to us. The information BoS has given us as part of our investigation of this complaint exactly matches Mr and Mrs K's testimony about their recollections of what they were told in 2017. And it's difficult to see how they would have known that was the position unless BoS had told them that at the time.

Taking that into account, I'm persuaded that Mr and Mrs K did try to apply for a new rate, some time after the capitalisation – probably around August 2017. What they say they were told accords with what we know they would have been told. And, as I said above, I don't think the fact this conversation wasn't recorded in the collections contact notes is persuasive evidence it didn't happen.

I'm therefore satisfied that Mr and Mrs K did try to apply for a rate, after capitalisation, in 2017. And I'm satisfied they were told that to reduce their rate from the SVR they were on, they would need to pass a full affordability assessment. As a result, the application didn't go any further – because there was no realistic prospect of Mr and Mrs K getting a rate lower than SVR based on BoS's policy at that time. And that brings me to the third question I have to answer – was this fair and reasonable in all the circumstances?

*Was it fair Mr and Mrs K were refused a lower rate in 2017?*

BoS has told us that it has separate rates for self-certified and full-certification customers. When they applied in 2020, Mr and Mrs K were able to pass an affordability assessment, so the self-certification marker was removed from their account and so they can now access the lower rates offered to full-certification customers. But this was not the case in 2017, as I've found above.

The difference between a self-certification customer and a full-certification customer is that a self-certification customer was not required to provide proof of income or expenditure at the point of application. As I understand it, there was no difference between the affordability threshold or underwriting criteria – only that no evidence was required. In other words, Mr and Mrs K had to pass the same affordability criteria to get their mortgage as any other customer, they just didn't have to provide proof that they did so.

Mr and Mrs K took their mortgage out in 2005. Their application for a rate was in 2017, twelve years later. So I need to think about whether it was fair that they continued to be considered self-certification, and as a result offered less favourable rates (higher than those offered to full-certification customers, and higher than SVR), after all that time.

I've taken into account the regulator's rules and guidance for mortgage lenders. They are to be found in the Financial Conduct Authority Handbook, in the section known as MCOB.

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.”*

The “E” suffix means this is not a rule (“R”), but an evidential provision. It means that conduct of the type set out in the provision is not necessarily a breach of the rules, but may tend to show unfairness (though, depending on the circumstances, it also may not).

11.8.1 E does not say that all customers are 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.

In my view that was Mr and Mrs K's position in August 2017. They were interest only borrowers, only just out of arrears, and having had difficulties with their self-employed income. I think it very unlikely they'd have been able to move their mortgage to another lender even if they'd tried. And that means they had no option but to stay with BoS, whatever rate it did (or didn't) offer them.

11.8.1 E says it may tend to show unfairness where a customer in this position is offered less favourable interest rates than other customers with similar characteristics.

I'm satisfied that a full-certification customer in Mr and Mrs K's position, in August 2017, would have been offered access to the range of rates offered to full-certification customers without the need to pass a full new customer affordability assessment.

Whereas Mr and Mrs K, as self-certification customers, would only be offered a self-certification rate – higher than the full-certification rates, and higher than SVR – unless they passed a full new customer affordability assessment.

The only difference between Mr and Mrs K and that other customer is that Mr and Mrs K took their mortgage out on a self-certification basis twelve years earlier. I don't think that means that Mr and Mrs K lack similar characteristics to that other borrower. I think that what's relevant to what 11.8.1 E refers to as similar characteristics are their characteristics at the time of the application, in 2017 – not how they took their mortgage out many years earlier.

Mr and Mrs K met BoS's lending criteria in 2005 – even if they weren't required to prove it at the time. And that was twelve years before the application. Many things could change, both in their circumstances and in the circumstances of other customers who were asked to prove their income in 2005 over that time. I'm not persuaded that how their application was assessed in 2005 is relevant to their circumstances, or the risk they presented, in 2017. I think what's relevant is their circumstances – their characteristics – at the time they made the application in 2017.

I'm satisfied that Mr and Mrs K were treated less favourably than other customers who did prove their income many years earlier, but were in the same position as Mr and Mrs K in 2017. As, at that time, they had similar characteristics to those other customers, I don't think that's fair.

I think that, acting fairly, when Mr and Mrs K applied for a rate in 2017, BoS should have recognised that they had no other options and should have ensured they were offered a rate no less favourable than it would have offered to a full-certification customer at that time. And to put matters right, that's the position it should put them back in now.

Mr and Mrs K finally took a new rate in September 2020. I don't now know what rate they would have taken in 2017, given the choice. But in the interests of simplicity and fairness, BoS should identify the lowest three year rate it had available to full-certification customers in August 2017, and re-work Mr and Mrs K's mortgage as if they'd been on that rate from 1 September 2017 until the start of their current rate in 2020.

That means Mr and Mrs K will have made overpayments between 2017 and 2020. They should be given the choice of having those overpayments applied to their mortgage, to reduce the balance month on month (including the compounding effect of reductions made month by month), or of having the overpayments refunded to them with interest.

Finally, I'm satisfied that being refused a rate in 2017 and being kept on the SVR, keeping their monthly payments at a level they struggled with and ultimately leading to them going back into arrears in 2019, caused them substantial distress. It's fair BoS compensates them for that and I think £500 is fair in all the circumstances."

### **The responses to my provisional decision**

Mr and Mrs K accepted my provisional decision. But BoS did not.

BoS said it had now located the call recording from July 2017. This shows that capitalisation was agreed, and that Mr and Mrs K were told that they would be able to call back in a couple of months to apply for a new rate. BoS said it had no record that Mr and Mrs K ever did call back, until October 2020 when they did take a new rate. It said it noted that Mr and Mrs K say they did call and were refused a rate, but that was not supported by the bank's records. It believes that Mr and Mrs K first asked for a rate in October 2020, and so a rate should not be backdated to 2017.

## **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've considered the responses to my provisional decision. But having done so, I haven't changed my mind and I adopt the reasons I set out in it as my final decision.

I've taken into account what BoS has now said. But this is not further evidence – I dealt with this point in my provisional decision. I acknowledged that while Mr and Mrs K say they were turned down for a rate in 2017, there is no record of that conversation in the bank's records – as BoS reiterated in response to my provisional decision.

However, I also explained why, despite the absence of a record in the bank's notes, I was persuaded that it was more likely that not that Mr and Mrs K did apply for a rate in 2017 and were turned down.

I noted that there were other calls recorded which were transferred to other parts of the bank, and not recorded in the notes it sent us – so clearly the records are incomplete. And, in particular, I noted that what Mr and Mrs K say they were told in 2017 exactly reflects what they would have been told, under the bank's policy at the time, if they had applied. I didn't think it likely they would have known what BoS's policy was and how it would impact their mortgage – unless they had made an application, BoS had turned it down, and explained why.

I was therefore persuaded that, despite the absence of a call recording or note of the conversation, Mr and Mrs K did contact BoS to apply for a rate shortly after the capitalisation but that BoS refused their application.

I also explained in my provisional decision why I felt that refusing their application for a rate in 2017 was unfair. BoS didn't respond to this part of my reasoning, and didn't disagree with what I thought should have happened had they asked for a rate. And so I haven't changed my mind about this part of my provisional decision either.

## **Putting things right**

For the reasons I gave in my provisional decision, I'm satisfied that – acting fairly – BoS ought to have offered Mr and Mrs K a rate in 2017 that was no less favourable than it would have offered to other customers with similar characteristics at that time. The origins of the loan as a self-certification mortgage are not relevant to Mr and Mrs K's characteristics in 2017, and so it should have offered them a rate no less favourable than it would have offered to an otherwise similar customer it categorised as full certification.

For ease, it should take the lowest available three year fixed rate and re-work the mortgage as if that rate had applied from 1 September 2017 up to the point they did take a new rate in 2020.

That means Mr and Mrs K will have made overpayments between 2017 and 2020. They should be given the choice of having those overpayments applied to their mortgage, to reduce the balance month on month (including the compounding effect of reductions made month by month), or of having the overpayments refunded to them with interest.

Finally, I'm satisfied that being refused a rate in 2017 and being kept on the SVR, keeping their monthly payments at a level they struggled with and ultimately leading to them going

back into arrears in 2019, caused them substantial distress. It's fair BoS compensates them for that and I think £500 is fair in all the circumstances.

### **My final decision**

For the reasons I've given, my final decision is that I uphold this complaint and direct Bank of Scotland plc to:

- Select the lowest full-certification three year fixed rate available in August 2017 for customers with the same loan to value etc as Mr and Mrs K;
- Re-work their mortgage as if that rate had applied to the mortgage from 1 September 2017 until the start of their current rate in 2020;
- Give Mr and Mrs K the option of either:
  - Having the resulting overpayments used to reduce their mortgage balance month on month, and therefore reducing the interest charged in the following months; or
  - Having the resulting overpayments refunded to them, adding simple annual interest of 8% running from the date of each overpayment to the date of refund;
- In either case, if the interest rate includes a product fee, the product fee can be offset from the overpayments;
- Pay Mr and Mrs K £500 compensation.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs K and Mr K to accept or reject my decision before 13 October 2022.

Simon Pugh  
**Ombudsman**