

Complaint

Ms D has complained about the overdraft charges Bank of Scotland plc (“BOS”) applied to her current account. She’s said that she was effectively locked into paying the overdraft charges which she couldn’t afford and this caused her ongoing difficulty.

Background

BOS has said that Ms D has had an overdraft on her current account since December 2007. At this point, it is unclear what her overdraft limit was. The overdraft limit was increased over the years until it reached £1,750.00 in 2018. The limit has fluctuated since then and has been £500 since 2024.

In April 2025, Ms D complained saying that she was unfairly allowed to continue using the overdraft even when she was effectively locked into paying the charges which she couldn’t afford and this caused her ongoing difficulty.

BOS did not uphold Ms D’s complaint. This was because it considered that it didn’t need to consider parts of Ms D’s complaint as it was made too late and for the parts that it did consider it didn’t think that it had done anything wrong or unfairly. Ms D was dissatisfied at BOS’ response and referred her complaint to our service.

One of our investigators reviewed what Ms D and BOS had told us. She reached the conclusion that he wasn’t persuaded that BOS had acted unfairly by allowing Ms D to use her overdraft in a way that was unsustainable or otherwise harmful. So the investigator didn’t recommend that Ms D’s complaint be upheld.

Ms D disagreed with the investigator and asked for an ombudsman’s decision.

My findings

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

Basis for my consideration of this complaint

There are time limits for referring a complaint to the Financial Ombudsman Service. BOS has argued that Ms D’s complaint was made too late because she complained more than six years after some of the charges on the overdraft were applied, as well as more than three years after she ought reasonably to have been aware of her cause to make this complaint.

Our investigator explained why it was reasonable to interpret Ms D’s complaint as one alleging that the lending relationship between her and BOS was unfair to her as described in s140A of the Consumer Credit Act 1974 (“CCA”). She also explained why this complaint about an allegedly unfair lending relationship had been made in time.

Having carefully considered everything, I've decided not to uphold Ms D's complaint. Given the reasons for this, I'm satisfied that whether Ms D's complaint about some of the specific charges applied was made in time or not has no impact on that outcome.

I'm also in agreement with the investigator that Ms D's complaint should be considered more broadly than just the individual charges or lending decisions. I consider this to be the case as Ms D has not only complained about the circumstances behind the application of the individual charges, but also the fact BOS' failure to act during the periods she alleges it ought to have seen she was experiencing difficulty caused her ongoing hardship.

I'm therefore satisfied that Ms D's complaint therefore reasonably be interpreted as a complaint that the lending relationship between herself and BOS was unfair to her. I acknowledge the possibility that BOS may still disagree that we are able to look at the whole of Ms D's complaint, but given the outcome I have reached, I do not consider it necessary to make any further comment or reach any findings on these matters.

In deciding what is fair and reasonable in all the circumstances of Ms D's case, I am required to take relevant law into account. As, for the reasons I've explained above, I'm satisfied that Ms D's complaint can be reasonably interpreted as being about that her lending relationship with BOS was unfair to her, relevant law in this case includes s140A, s140B and s140C of the CCA.

S140A says that a court may make an order under s140B if it determines that the relationship between the creditor (BOS) and the debtor (Ms D), arising out of a credit agreement is unfair to the debtor because of one or more of the following, having regard to all matters it thinks relevant:

- any of the terms of the agreement;
- the way in which the creditor has exercised or enforced any of his rights under the agreement;
- any other thing done or not done by or on behalf of the creditor.

Case law shows that a court assesses whether a relationship is unfair at the date of the hearing, or if the credit relationship ended before then, at the date it ended. That assessment has to be performed having regard to the whole history of the relationship. S140B sets out the types of orders a court can make where a credit relationship is found to be unfair – these are wide powers, including reducing the amount owed or requiring a refund, or to do or not do any particular thing.

Given Ms D's complaint, I therefore need to think about whether BOS' allowing Ms D to use her overdraft in the way that it did, resulted in the lending relationship between Ms D and BOS being unfair to Ms D, such that it ought to have acted to put right the unfairness – and if so whether it did enough to remove any such unfairness.

Ms D's relationship with BOS is therefore likely to be unfair if it allowed Ms D to continue using her overdraft in circumstances where it ought reasonably to have realise that the facility had become unsustainable or otherwise harmful for her. And if this was the case, BOS didn't then remove the unfairness this created somehow.

I've considered Ms D's complaint in this context.

Did BOS unfairly allow Ms D to continue using her overdraft in circumstances where it ought to have removed the facility from her?

Before I go any further, as this essentially boils down to a complaint that Ms D was unfairly charged as a result of being allowed to continue using her overdraft, I want to be clear in saying that I haven't considered whether the various amounts BOS charged were fair and reasonable, or proportionate in comparison to the costs of the service provided. Ultimately, how much a bank charges for its services is a commercial decision. And it isn't something for me to get involved with.

That said, while I'm not looking at BOS' charging structure per se, it won't have acted fairly and reasonably towards Ms D if it applied this interest, fees and charges to Ms D's account in circumstances where it was aware, or it ought fairly and reasonably to have been aware Ms D was experiencing financial difficulty. So I've considered whether there was an instance, or there were instances, where BOS didn't treat Ms D fairly and reasonably.

In other words, I've considered whether there were periods where BOS continued charging Ms D even though it ought to have instead stepped in and taken corrective measures on the overdraft as it knew, or it ought to have realised, that she was in financial difficulty. Having looked through Ms D's account statements through the vast majority of the period concerned, I can't see that BOS ought reasonably to have unilaterally taken corrective measures in relation to Ms D's overdraft. I accept that Ms D used her overdraft and there is no dispute over that.

However, Ms D's arguments appear to suggest that this in itself means that she was experiencing financial difficulty and therefore the complaint should be upheld. But I think that it is far too simplistic to say that it automatically follows that a customer was in financial difficulty simply because they were using a financial product that they had an agreement to use and which they were entitled to use.

I accept that the rules, guidance and industry codes of practice all suggest that prolonged and repeated overdraft usage can sometimes be an indication of financial difficulty. However, this is not the same as saying that prolonged and repeated overdraft usage by a customer will always mean that they are, as a matter of fact, in financial difficulty. Indeed, if that were automatically the case, there would be an outright prohibition on revolving credit accounts being open ended, rather than there being a requirement for a lender to review how the facility is being used.

So I think it's important to look at overall circumstances of a customer's overdraft usage as part of considering their overall financial position. And, in this case, I've considered Ms D's incomings and outgoings as well as any overdrawn balances and thought about whether it was possible for her to have stopped using her overdraft, based on this.

In the first instance, I can't see Ms D notified BOS that she was struggling and that paying these charges was proving difficult for her, at any stage prior to making this complaint. If she had done so, BOS would have known that the charges were causing harm and I would have expected it to act. However, even though I can't see that Ms D directly told BOS that she couldn't afford to pay these charges, I've considered whether her account activity ought to have alerted it to this being the case.

As Ms D didn't tell BOS that she was struggling to pay these charges, it would need to have been objectively clear to BOS, rather than a matter open to interpretation, that the overdraft charges were clearly making things worse and they were harmful as a result.

I've therefore considered whether BOS acted fairly and reasonably towards Ms D, in this light. In other words, I've considered whether there were periods where BOS continued charging Ms D even though it ought to have instead stepped in and taken corrective measures on the overdraft as it knew, or it ought to have realised, that she was in financial

difficulty.

In considering this matter, I'm mindful that in order to help with determining whether it is objectively the case that a customer was experiencing financial hardship, the regulator has set out guidance on what it considers to be potential indicators of financial difficulty. The '*Guidance on financial difficulties*' states that things such as a customer failing to meet consecutive payments to credit, being unable to meet their commitments out of their disposable income, having adverse credit or other insolvency information recorded against them, or being in a debt arrangement should be considered as potential signs of a customer being in financial difficulty.

However, having looked at Ms D's account statements, I've seen no indication that the potential signs of financial difficulty contained in the guidance, were obviously and persistently present in her circumstances such that it ought reasonably to have taken action. I appreciate that more recently some of Ms D's account credits have been from pension payment. But I don't think that this in itself means she shouldn't have been lent to. Indeed, BOS taking such an approach would be discriminatory and it is difficult to see how acting in this way would be fair and reasonable.

Equally I also can't see anything in Ms D's statements which suggest that BOS should have known that she was borrowing from payday or other high-cost lenders, which although not contained in the regulator's guidance, is generally accepted to be an indication that a borrower could be struggling too.

I've also looked at Ms D's incomings and outgoings as well as her overdrawn balances and determined whether it was possible for her to have stopped using her overdraft, based on this. I think that if Ms D was locked into paying charges in circumstances where there was no reasonable prospect of her exiting her overdraft then her facility would have been unsustainable for her, even where the indicators of financial difficulties I've set out above weren't clearly present in her circumstances, when looking at the account transactions.

In reviewing this matter, I've noted that throughout the period of time I'm looking at, Ms D's accounts were in receipt of credits that were sufficient to clear the overdraft within a reasonable period of time. Indeed, there were times where Ms D received a significant influx of funds into her account and there were also often periods where Ms D had a credit balance.

I'm therefore satisfied that Ms D's case isn't one where the borrower was marooned in their overdraft with no prospect of exiting it. Furthermore, while I'm not seeking to make retrospective value judgements over Ms D expenditure, there are significant amounts of non-committed, non-contractual and discretionary transactions going from Ms D's account.

I accept that Ms D may well have had other credit commitments at this time. But this in itself does not mean that she was reliant on credit to meet her essential expenditure. And from Ms D's BOS account statements, it isn't immediately obvious to me that Ms D was borrowing from unsustainable sources – in order to pay for these overdraft charges, or meet other committed expenditure either.

Of course, I accept neither of these things in themselves (or when taken together) mean that Ms D wasn't experiencing difficulty. And I'm sorry to hear about the financial difficulties that Ms D has told us she experienced. However, I don't think that Ms D's account conduct and overdraft usage obviously show that she was struggling in this way. And bearing in mind I'm satisfied that Ms D did not directly tell BOS that she was experiencing financial difficulty, that's what I'd need to be persuaded of in order to uphold her complaint.

Looking from the outside, I think that BOS was reasonably entitled to conclude that Ms D had the funds to be able to reduce the amount that she used her overdraft. Therefore, I don't think that Ms D was obviously locked into using her overdraft and paying the charges for doing so.

Finally, and for the sake of completeness, I would add that the earliest statements I've seen, which are from well over a decade ago, do suggest the possibility that Ms D's circumstances might have been worse than what they were in more recent times and certainly since the regulator's overdraft repeat use rules came into force. In these circumstances, I accept the possibility that unfairness may have existed a number of years ago.

Although the regulatory regime in place at this time was substantially different and it's difficult to say it's more likely than not BOS should have intervened in these circumstances. Nonetheless, there is a theoretical possibility that BOS could have applied charges in circumstances where it shouldn't have a number of years before Ms D complained.

However, just because there may have been unfairness in a debtor's relationship with a creditor doesn't automatically mean it would be fair to refund any and all of the interest and charges on an account. And in giving careful thought to whether I should direct a refund in this case, I'm mindful that in *Smith v Royal Bank of Scotland Plc*¹, the Supreme Court pointed out that remedies for unfair relationships are at the court's discretion and the court may deny a remedy where the claimant had knowledge of the facts relevant to their claim, but substantially delayed making that claim.

There is no fixed period of delay that brings this principle into play, but the Supreme Court approved the District Judge's comment in the case that a court would be slow to remedy unfairness in a situation where the claimant delayed more than six years after knowing the facts.

Therefore, in determining a fair and reasonable outcome to Ms D's complaint it's important for me to take this into account as relevant law. Indeed, it is this relevant law that has resulted in me being able to look at Ms D's complaint in the first place. I consider that a complainant would have knowledge of the facts that caused any unfairness when they became aware of a problem and that they were suffering a loss.

I think that Ms D had enough to know whether she considered the overdraft charges excessive and unfair when she had to pay them. She would also have known whether these charges were keeping her in her overdraft too. I'm therefore satisfied that this is sufficient for her to have had knowledge of the relevant facts from at least January 2008² and certainly by the time Ms D took out a loan to repay the overdraft and reduce her limit in mid-2017.

Ms D didn't do anything about this complaint until she complained in April 2025. So I don't think that it would be right for me to direct a refund of interest and charges in circumstances where, for the reasons I've explained above, the lending relationship between Ms D and BOS has not been unfair to Ms D, for a significant number of years.

As this is the case, the fact that Ms D might have been experiencing difficulty around a decade prior to when she complained, hasn't persuaded me that it would be fair and reasonable for me to now uphold the complaint where that difficulty no longer exists and hasn't been present for a number of years.

Overall and having considered everything, I don't think that it would be fair and reasonable to

¹ *Smith and another v Royal Bank of Scotland plc* [2023] UKSC 34.

² When she first began being charged for using her overdraft.

require BOS to do anything in this instance. So while I can understand Ms D's sentiments and appreciate why she is unhappy, I'm nonetheless not upholding this complaint. I appreciate this will be very disappointing for Ms D. But I hope she'll understand the reasons for my decision and that she'll at least feel her concerns have been listened to.

My final decision

For the reasons I've explained, I'm not upholding Ms D's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms D to accept or reject my decision before 9 March 2026.

Jeshen Narayanan
Ombudsman