

The complaint

Mr and Mrs R complain about their flexible mortgage with Bank of Scotland plc (BOS). They complain that BOS lent to them irresponsibly, and so the balance it's now seeking to recover is higher than it should be. They also complain that BOS has begun legal action now the mortgage term has ended and that statements it has sent for their drawdown facility didn't include all the required information.

What happened

Mr and Mrs R took out an interest-only 'Personal Choice' mortgage with BOS in 1998. This type of mortgage has flexible features, including a drawdown facility. The term ended in March 2023. The balance of the mortgage is now significantly higher than the amount Mr and Mrs R initially borrowed, and BOS has begun legal action to take possession of their property.

Mr and Mrs R complain, in summary, that:

- the amount BOS is now asking them to pay is around double the amount it should be under the terms of their mortgage contract. They say the contract only allowed lending of up to 85% of the value of the property and this means the mortgage including the drawdown facility can't exceed £231,000, yet at the possession hearing in November 2024 BOS claimed they owed around £450,000;
- the drawdown facility is regulated under the Consumer Credit Act 1974 but the statements BOS sent them over the years weren't compliant with Section 77A of the Act because they didn't include the required information, in particular about interest rates;
- BOS treated them unfairly in taking legal action instead of exploring other options such as a term extension.

Our Investigator didn't recommend that the complaint should be upheld. Mr and Mrs R didn't accept that and asked for an Ombudsman's review.

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.

Mr and Mrs R took out this mortgage more than 25 years before they made this complaint. BOS's records satisfy me that Mr and Mrs R asked for increases to the drawdown facility limit several times and they issued cheques drawn on the facility – so I think they knew how much they were borrowing and that this was more than the original mortgage loan and the initial credit limit on the drawdown facility. I also think there was enough information on the statements BOS sent them each year for them to have realised many years ago that the balance of their mortgage had increased to the extent it had.

As our Investigator explained, part of this complaint therefore falls outside the time limits I must apply. However, I have considered whether BOS's decisions to increase the amount Mr and Mrs R could borrow resulted in lasting unfairness in the relationship between them and BOS. I don't think it did.

The Personal Choice mortgage offer issued to Mr and Mrs R in January 1998 said that BOS was lending £220,000 under the mortgage (less a £4,000 retention until essential work was done to the property), against a property valued at £275,000. It also said that Mr and Mrs R could use the options under the Personal Choice scheme as long as they met the mortgage terms (such as keeping up to date with the monthly payments). The mortgage was to be paid on an interest-only basis over a term of 25 years.

One of the options of the Personal Choice scheme was a secured credit facility which would run alongside the mortgage and which could be accessed using a cheque book. Mr and Mrs R say that that facility should have been limited to no more than £11,000 because under the mortgage contract BOS couldn't lend more than 85% of the value of the property (LTV), and they consider 85% LTV to be £231,000. The mortgage was £220,000 so the drawdown facility couldn't be more than £11,000.

BOS says there was no such cap on the facility limit and it has operated the mortgage, including the drawdown facility, in line with the agreed terms. It says the amount Mr and Mrs R now owe is as much as it is because of the withdrawals they made from the drawdown facility, plus unpaid interest, fees and charges.

I've considered what both parties have said very carefully, alongside the available documents. I've seen nothing in any of the documents relating to the mortgage which says BOS could never lend Mr and Mrs R more than 85% in total of the original property valuation or more than 5% of that valuation on the drawdown facility. The 2001 Personal Choice Terms and Conditions applied to the mortgage after Mr and Mrs R applied for a credit limit increase on the drawdown facility and signed to accept the offer which BOS sent them in August 2001 and which superseded the 1998 offer. The terms and conditions say:

“automatic further advance’ means the credit limit which we make available to you under the flexible options agreement in a sum equal to five (5) per cent of the value of the property (calculated on or before the date of the flexible options agreement)”

and

“flexible options agreement’ means the agreement regulated by the Consumer Credit Act 1974 whereby we agree to make the credit limit available to you on the terms contained in and referred to in it;

‘flexible options plus’ means the credit limit (if any) which we agree to make available to you under, and which is specified in, the flexible options agreement”

and

“credit limit’ means the amount or amounts specified in the flexible options agreement provided in respect of the automatic further advance and, where agreed, the flexible options plus, which may be varied by us from time to time in accordance with clause 7. The amount of the credit limit you have used at any time will appear as a debit balance on the flexible options account”

Clause 7 says:

“7.2 We may either at your request or at our own instigation consider increasing the credit limit. Whether we grant any increase or not will be a matter entirely within our discretion.”

BOS's records say that Mr and Mrs R asked it several times over the years to increase the credit limit it made available to them under the drawdown facility. Those records also say that they called a number of times to check how much they could draw before reaching the credit limit. BOS didn't increase the limit each time Mr and Mrs R asked, and it says that when it did increase the limit it did so in line with its policy at the time.

In August 2001 Mr and Mrs R signed a flexible options credit agreement confirming a credit limit of £56,610.56. In January 2003 they applied for an increase of £50,000. BOS's records say that it assessed an application based on Mr and Mrs R's income and an estimated property value of £480,000. It wrote to Mr and Mrs R confirming a new limit of £106,610.56, of which at the time they had used £55,916.

In June 2004 Mr and Mrs R applied for an increase of £75,000. On their application they said they wanted to do some work to their property which they expected would increase its value. They estimated the current value at £550,000. BOS's records say that it again assessed the application based on Mr and Mrs R's incomes and overall borrowing. In July 2004 it wrote to Mr and Mrs R confirming a new limit of £181,610.56, of which at the time they had used £100,730.87.

In 2005 BOS withdrew the credit limit when Mr and Mrs R missed a mortgage payment, to stop any further borrowing. Mr and Mrs R had used the drawdown facility in the meantime – some examples of cheques drawn on the facility are one for just under £20,000 in 2001, one for £30,000 and in 2003, and one for £70,000 in 2004.

I'm satisfied that BOS didn't simply increase the credit limit it made available to Mr and Mrs R without first reviewing their situation, and that Mr and Mrs R knew what they were borrowing and that they would be expected to pay it back. In all the circumstances, I don't find that I can fairly say the lending decisions BOS made created any lasting unfairness between it and Mr and Mrs R. I also think that, if there were any unfairness, Mr and Mrs R had the opportunity to mitigate that many years ago if they were concerned about repaying the capital they borrowed – by raising those concerns with BOS or by making a complaint if they thought they were being treated unfairly.

In reaching that conclusion I've also considered Mr and Mrs R's complaint about the information provided on the statements they received from BOS over the years about the drawdown facility. They say that the statements didn't comply with section 77A of the Consumer Credit Act and BOS is not therefore entitled to charge interest on the borrowing under the drawdown facility for the period of non-compliance.

Section 77A of the Act sets out requirements for statements in relation to fixed-sum credit agreements. But Mr and Mrs R's drawdown facility isn't a fixed-sum credit agreement. BOS didn't lend them a fixed sum under that facility; it provided them with a drawdown facility with a credit limit. Section 78 of the Act deals with running-account credit. BOS sent Mr and Mrs R regular statements to keep them up to date with the state of the account – but in any event section 78A doesn't apply to Mr and Mrs R's account because it's an agreement secured on land. Besides that, the level of Mr and Mrs R's credit limit and borrowing, from August 2001 onwards at the latest, exceeded the limit under the Act and meant the account wasn't regulated.

I'm sorry to hear about the difficult situation Mr and Mrs R are in now the mortgage term has ended, but I don't think I can fairly conclude that BOS treated them unfairly in beginning legal

action to recover the debt when it did. The term ended in March 2023 and they had agreed to repay the mortgage, including the money owed under the drawdown facility, at that point.

BOS has reviewed Mr and Mrs R's financial situation with them to see if it can offer them a new mortgage, but it concluded that a mortgage on a capital and interest repayment basis wouldn't be affordable. It suspended action until March 2024 while Mr and Mrs R looked into their options.

Mr and Mrs R have said that they always intended to repay the mortgage by taking an interest-only lifetime mortgage. Circumstances have changed however following court action in respect of a separate matter which resulted in County Court Judgments and a charging order secured against the mortgaged property. They have said that this has made it impossible for them to obtain alternative finance. I understand they may be continuing to explore legal action to try to get the charging order removed, but I don't think I can reasonably require BOS to suspend action further on that basis, given the uncertainty of timescales and success.

In the meantime the mortgage balance is increasing and the equity in the property is reducing as the mortgage is in arrears. I don't think it would be in Mr and Mrs R's interests for this to continue, and in the circumstances I can't fairly conclude that BOS should have agreed to a term extension. A lifetime mortgage with a firm in the same group would be subject to application.

Finally, if Mr and Mrs R consider that BOS or the solicitors acting on its behalf didn't present accurate information to the court in connection with the possession hearing in November 2024, which was adjourned, I'd expect them to have raised that with the court at the hearing. And, while BOS mentioned in its final response letter of 28 June 2024 that it hasn't amended the monthly mortgage payments when the interest rate has changed since the term ended, that part of the letter wasn't in response to a complaint Mr and Mrs R had made. This isn't therefore a complaint I've considered here, and Mr and Mrs R may be able to complain about the level of payments BOS has asked them for if they're unhappy with this. I also note that Mr and Mrs R have recently told our Investigator that they're unhappy with the interest rate BOS has charged them and that it capitalised part of the mortgage balance in 2008. They would need to complain to BOS about these matters before we can consider them, insofar as they haven't complained to BOS about them before. They may be able to refer fresh complaints to us later if they remain unhappy.

However, for the reasons I've explained, I make no order or award in respect of the complaint at hand here.

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 R and Mrs R to accept or reject my decision before 13 April 2026.

Janet Millington
Ombudsman