

## **complaint**

Mr B complains that Bank of Scotland Plc (trading as Birmingham Midshires) isn't following rules set by the regulator and that a debt it's pursuing him for is unenforceable. Mr B's partner (Ms B) has represented him in bringing this complaint.

## **background**

Mr B had a mortgage with Birmingham Midshires. His property was taken into possession and sold in 2006. Mr B says he thought the balance had been repaid in full at that time.

In 2014 a third party company contacted Mr B about a debt owed to Birmingham Midshires. Mr B says he didn't know what this was for, so he made a subject access request (SAR) to Birmingham Midshires. Mr B says he didn't receive a response to his SAR or any further contact from the third party.

In 2018 a different third party business contacted Mr B, saying he had an outstanding debt with Birmingham Midshires. Mr B replied to the third party, again asking about the origin of this debt. He said that he hadn't had a response to the SAR he made previously so didn't understand where the balance had come from. The third party passed this information to Birmingham Midshires.

Birmingham Midshires says it wrote to Mr B in 2007 and 2008 about the shortfall. It says it responded to Mr B's SAR in 2014 and re-sent the SAR information to Mr B in late 2018. Mr B says the debt isn't enforceable as Birmingham Midshires didn't make sufficient efforts to contact him within the relevant time limits. He says Birmingham Midshires position that the SAR made in 2014 is acceptance of the balance being owed is wrong.

Our investigator didn't recommend that the complaint be upheld. He said Birmingham Midshires had provided evidence of the debt owed and that it had tried to contact Mr B about it within relevant timescales.

Mr B didn't agree. Ms B said Birmingham Midshires didn't start recovery action within legal time limits. She says the debt owed is made up of interest (not capital) and, in law, had to be claimed within six years.

The complaint came to me for a decision. As I didn't agree with all of the investigator's recommendations, I sent a provisional decision to the parties to explain what I thought about the complaint. In summary, I said I hadn't seen evidence that Birmingham Midshires made reasonable efforts to contact Mr B within six years of the property sale to tell him it intended to recover the shortfall. I don't think it was fair for Birmingham Midshires to first notify Mr B it intended to recover the debt some eight years after the property was sold – and this didn't meet the rules in MCOB. I said unless Birmingham Midshires could provide evidence of its efforts to contact Mr B before the end of 2012, I intended to require it to stop pursuing Mr B for the debt.

Both parties responded to say they agreed. The findings and outcome below are substantially the same as those in my provisional 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. Where the evidence is incomplete, inconclusive or contradictory, I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in light of the available evidence and the wider circumstances.

Birmingham Midshires provided a copy of the completion statement for the sale of Mr B's property in December 2006 and correspondence with its solicitors. These show the sales proceeds as less than the balance owed. The shortfall was about £13,800. I think this is sufficient evidence of the shortfall.

The shortfall wasn't automatically written off when Mr B's property was sold. I haven't seen anything to suggest Birmingham Midshires told Mr B in 2006 that no debt was owed.

Ms B says Birmingham Midshires has missed time limits to enforce the debt through the courts. And she says it hasn't complied with regulations and agreed codes of conduct.

The Limitation Act 1980 says that a lender has 12 years to use court action to recover a principal sum of money secured by a mortgage. The 12 years starts from the date the property is sold – when the amount of the shortfall is known. The court action doesn't have to be an actual court application, a form of pre-action would be sufficient – for example notification that borrower needs to pay or the lender would start court proceedings.

The Limitation Act says the period during which the lender can recover arrears of interest is six years. However, the mortgage terms and conditions say payments are applied first to interest arrears, then interest due, then costs and lastly to the principal amount. On this basis, the shortfall debt owed by Mr B would be of principal.

Birmingham Midshires says it sent a notice to Mr B about the shortfall in early 2007, to the property address. The notice sets out details of the sale and that there was a shortfall.

Birmingham Midshires says it appointed a third party to recover the debt. It hasn't provided evidence that the third party contacted – or tried to contact – Mr B. But it's not disputed that Birmingham Midshires sent a notice to Mr B in December 2014. This said it was "*writing to you regarding your mortgage shortfall debt with Bank of Scotland Plc (trading as Birmingham Midshires)*". It said a third party was instructed to recover the outstanding balance of £13,800 and enclosed a letter from the third party. This said it was instructed to collect a debt related to the sale of Mr B's previously mortgaged property, which was sold in December 2006 for £82,500, leading to a mortgage shortfall of £13,800. The letter asked Mr B to contact the third party about agreeing an affordable repayment plan. It said if it didn't hear from Mr B it would "*progress with further collections activity*".

In June 2018 a debt recovery business contacted Mr B saying it had been appointed to collect the debt owed to Birmingham Midshires. Contact has been ongoing since then. The debt recovery business put collection activity on hold while Mr B's queries and concerns were dealt with.

Birmingham Midshires sent notice of the debt to Mr B in early 2007, to his last known address. And its contacts in December 2014 and June 2018 – both within the 12 years time limit – made it clear it intended to recover the debt. I think it's clear from the letters that the

debt related to the property taken into possession, although I can understand that Mr B wanted to establish that the amount claimed was correct.

As far as I can tell from the available evidence, Birmingham Midshires didn't start legal proceedings or give notice of its intention to do so within the 12 years. However, it did get in contact with Mr B and agreed to put recovery action on hold while Mr B's queries and complaints were dealt with. I think this was reasonable. However, if Birmingham Midshires did take the matter to court, it would be for the court to decide whether the relevant time limits are met and whether the debt is enforceable.

But that's not the end of the matter for me. Because as well as the legal time limits I need to consider whether Birmingham Midshires acted fairly and in accordance with relevant regulations and good industry practice when trying to recover the shortfall.

It's likely this was a regulated mortgage. So the rules set out in the part of the Financial Conduct Authority's handbook related to mortgages (known as MCOB) applied. The rules in force at the end of 2006 say the lender should inform the borrower as soon as possible of any shortfall debt. And, if it intends to recover the debt, it must notify the borrower of this within six years of the date of sale.

The Council of Mortgage Lenders (CML) also says its members should begin recovery action within six years.

The intention is to ensure that borrowers are treated fairly – it wouldn't be fair for a lender to leave a long period before contacting a borrower about a debt. Borrowers should provide up to date contact details to the lender. But, if they don't, I'd expect to see evidence that the lender made efforts to contact them.

Birmingham Midshires sent a notice to Mr B about the shortfall in early 2007 to the property address, which had of course been sold. I understand why it did this. Mr B hadn't provided his new address, so this was likely to be the best way to contact him. Mr B might have left a forwarding address or arranged for post to be re-directed. But Birmingham Midshires would have known there was a risk Mr B wouldn't receive the letter. And, while the notice sets out details of the sale and that there was a shortfall, it didn't say that Birmingham Midshires intended to pursue Mr B for the debt.

It's not necessarily unfair that Birmingham Midshires didn't *succeed* in contacting Mr B within six years to tell him it intended to recover the debt – especially if Mr B didn't tell Birmingham Midshires where he could be contacted. I would though expect Birmingham Midshires to try and get in contact with him and it hasn't provided evidence that it did so. Birmingham Midshires' terms and conditions set out its right to recover the debt. I'm not disputing that. But what I haven't seen is evidence that Birmingham Midshires made reasonable efforts to contact Mr B within six years of the property sale and tell him it intended to recover the shortfall.

I don't think it was fair for Birmingham Midshires to first notify Mr B it intended to recover the debt some eight years after the property was sold – and this didn't meet the rules in MCOB.

I said in my provisional decision that unless Birmingham Midshires can provide evidence of its efforts to contact Mr B before the end of 2012, I intended to require to stop pursuing Mr B for the debt. Birmingham Midshires responded to say it agreed with my provisional decision. So I see no reason to change the outcome from my provisional decision.

**my final decision**

My decision is that I uphold this complaint. I order Bank of Scotland Plc (trading as Birmingham Midshires) to stop pursuing Mr B for the shortfall debt.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 12 July 2020.

Ruth Stevenson  
**ombudsman**