

The complaint

Mr R's complaint is that, without his knowledge or consent, Skipton Building Society removed its legal charge from his property title. As a result, this has triggered his Help to Buy (HTB) lender requesting repayment of its second charge shared equity loan.

To settle the complaint, Mr R wants Skipton to put things right.

What happened

I can summarise what happened briefly.

Mr R had a first charge mortgage with Skipton, and also had a HTB loan, which was registered as a second charge. The terms of the HTB loan state, amongst other things, that there must always be a first charge loan registered ahead of it. If the first charge is paid off, then this triggers repayment of the HTB loan in full.

Mr R had been making overpayments to the mortgage. In November 2022 he asked if he could reduce the mortgage account balance to £0 and still keep the legal charge. Skipton said this wasn't possible, but that, under its Mortgage Membership Service (MMS), if Mr R kept a minimum balance of £150, the legal charge would be retained at a nominal interest rate of 1%.

Mr R increased the account balance to the required £150, but in July 2023, he made two remote payments to the account, reducing the balance to £0.99.

Skipton said: *"On 26 February 2024 [Mr R's] remaining balance of £0.99 was cleared from the Skipton system by our mortgage administration team, resulting in our First charge being discharged at HM Land Registry. As part of its role, this team receives a report which identifies very small balances. Once identified, the team contact the customer to discuss the same and, usually, suggest they move onto our [MMS]. Given [Mr R's] mortgage was already on the scheme and the de minimis amount involved, exercising a right to waive receipt of such a small sum, the mortgage administration team simply wiped the sum."*

Mr R complained that Skipton shouldn't have done this, as it has had drastic repercussions for him in relation to the HTB loan.

In its final response letter Skipton said that it was its choice whether or not to remove the security, but it had reinstated the account with a £0.99 balance. However, it wasn't able to reinstate the legal charge. Skipton offered Mr R £500 towards Mr R's legal costs and to pay for the valuation required by the HTB lender.

Mr R escalated his complaint to our service. An Investigator looked at what had happened. She thought the redress offered by Skipton was fair and reasonable. Mr R disagreed and asked for an Ombudsman to consider the complaint.

Provisional decision and responses

I issued a provisional decision in which I reached the following conclusions:

First of all, I'm satisfied that Mr R knew, or ought to have known, that he'd need to keep his account balance at £150 in order to be part of the MMS and, by extension, keep the legal charge on the property. That's because he'd opted to join that scheme when he'd been told he couldn't reduce his account balance to zero.

So I fully accept that Mr R made the decision to reduce the account balance to £0.99 in July 2023. But I think it's likely, as a lay person, that he didn't understand the potential implications of doing so.

But, noting what Skipton has said about what its administrative staff did, I am not persuaded Skipton acted fairly in unilaterally writing off the account balance and removing the legal charge without Mr R's consent. It ought to have been clear from the account history that the reason Mr R wanted to be on the MMS was to avoid triggering repayment of the HTB loan – because that is the reason why he went onto the MMS in the first place.

So before simply writing off the £0.99 and removing the legal charge, Skipton should have contacted Mr R first, and told him that he'd need to bring the balance up to £150 in order to comply with the terms of the MMS. I think if Skipton had done this, Mr R would have increased the balance, because he wanted to avoid having to repay the HTB loan.

Skipton is required to treat its customers fairly, and I don't think it's done so here. It would have taken just one phone call for the situation Mr R is now in to have been avoided, including the very serious repercussions for Mr R that have now arisen.

I therefore think this complaint should be upheld, but putting things right isn't going to be easy. That's because Skipton's first legal charge has now been removed.

There is legal precedent for a lender to reinstate a legal charge that's been removed in error (*NRAM Ltd v. Evans* [2017] EWCA Civ 1013), and so this would not be impossible to do. But it will require Skipton to liaise with the HTB lender and with HM Land Registry in order to ascertain whether or not Skipton can reinstate its charge as a first legal charge.

I appreciate this is likely to be complicated, expensive and protracted, as it will involve specialist legal advice and liaison with the Land Registry and HTB lender. Whilst it would be the 'best' solution, and would restore Mr R to the position he'd have been in had Skipton not made an error, it might not be the most pragmatic.

So in the event that simple reinstatement of the legal charge as a first charge isn't possible, and repayment of the HTB loan is inevitable and unavoidable, Skipton should offer Mr R a new mortgage to pay off the HTB loan on the most favourable terms available, waiving all fees, and paying all costs associated with redemption of the HTB loan, including valuation and legal fees. There would then be only the Skipton legal charge on the property, replacing the HTB loan.

I'm also satisfied that Skipton's unilateral removal of the legal charge has caused Mr R considerable distress and inconvenience, and that this will be ongoing until the matter is resolved. I think Skipton should pay Mr R £750 compensation for this.

Mr R accepted the provisional decision. He said his preference was for Skipton to offer him a new mortgage to replace the HTB loan.

Skipton did not accept my provisional decision, and has provided a detailed response, which I can summarise as follows:

- Mr R is not a lay person, because he is educated, his degree allows him to work in a particular field, he's been able to pay lump sums off his Skipton mortgage and at the time of these events he was managing "several" mortgages.
- It is incorrect to assume Skipton had any obligation to assist Mr R achieve his objectives in relation to his HTB loan.
- Skipton wasn't required to seek consent to discharge its own security or wipe out the debt, and there was no duty on Skipton to contact Mr R before doing so.
- The standards of what is fair and reasonable do not require the Financial Ombudsman Service to find fault with Skipton's conduct; rather, it was Mr R's decision to breach the terms of the MMS.
- The assumption that Skipton would or should have recorded details of Mr R's conversation with it about his wish to retain the HTB loan is incorrect. This would be a breach of the General Data Protection Regulation (GDPR).
- The first charge was, literally, valueless at £0.99. In no circumstance imaginable could Skipton have had an interest in maintaining such a charge. Given this, Skipton questions why it should be required to maintain, let alone seek consent, to remove its own valueless security.
- The mere fact that Mr R "*casually*" informed Skipton he didn't wish to repay the HTB loan did not impose any requirement on Skipton to help him achieve his financial aims;
- Skipton wasn't required to warn Mr R that the consequences of paying down the MMS balance would result in Skipton removing its charge without notice to him.
- Skipton is under no obligation to consider whether its actions are likely to have any unintended consequences or actually result in consequences for its customers and Skipton should not be held responsible for any potential consequences of its actions in terms of their effect on any third party.
- There is no obligation to assist Mr R or seek his consent prior to it carrying out any actions that may have affected his intentions.
- Mr R has suffered no loss. If the HTB lender sought to enforce its second charge, Mr R would have the right to bring a complaint to our service and have the terms of the HTB Charge and the "*proper meaning of 'Redemption Event' determined.*"
- The sum of £0.99 has been restored and remains due and owing, so Mr R has not paid the First Charge in full. Therefore there is no event that would trigger payment of the HTB loan and so it cannot be enforced.

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 will explain first that the Financial Ombudsman Service is independent of both consumers and the businesses they are complaining about. This means that we don't act for either party to a complaint, nor do we take instructions from consumers or businesses, or allow a party to direct the course of our investigations; were we to do so, it would compromise our

independence and impartiality. It's up to us to determine what evidence we need in order to consider a complaint.

So although I've noted everything Skipton has said, it's up to me, not Skipton, to decide what evidence and arguments are relevant and what I should take into consideration in reaching my decision.

I've summarised the main points of Skipton's submission as it is lengthy, and there are points raised which I consider to be either irrelevant or outside the scope of this service. For example, I have no power to decide how a contractual term should be interpreted or applied, as that is a matter for the courts.

Skipton has provided a lengthy analysis of why it considers Mr R not to be a lay person in relation to financial services. However, I am satisfied that Mr R is a lay person. Whilst I agree he is educated, he holds no financial qualifications and is not a finance professional. Mr R has confirmed to us that when he was a student he worked for six months in a call centre for a credit card company, and that is his only involvement in the financial services industry.

Moreover Mr R has confirmed that he has only ever had this Skipton mortgage and the HTB loan. He was not, therefore, "*managing several mortgages*" (and in this context, I'm satisfied that "*several*", by its ordinary definition means "*more than two*").

Skipton believes that Mr R's "*lack of curiosity about the potential impact of his actions*" ought to be factored into my decision "*rather than being attributed to some vague and unsupported lack of understanding*". However, Mr R's misunderstanding of the position is borne out by his mistaken belief that, whilst there was a second charge registered, Skipton would not be able to remove its first charge, and that is why he (foolishly, he acknowledges now) reduced the balance to £0.99.

That is not the level of understanding of someone who would, or should, have been aware of the implications of reducing the balance of the MMS. It is the action of a lay person, not a person who would be expected to have any knowledge of Skipton's "*de minimis*" policy (which, as Skipton has previously acknowledged, it failed to follow on this occasion).

It's up to Skipton to decide what evidence to provide, and it's not produced its contact notes. Skipton has claimed that it would be a breach of GDPR for it to have kept a written record of its conversations with Mr R. I don't agree about that. Mr R agreed to Skipton retaining his personal data when he took out the mortgage, and it's not reasonable to suggest that a lender can't keep a record of its discussions with its customers – indeed Skipton has kept a record of its interactions with Mr R. Skipton was aware, before it wrote off the £0.99 balance, that Mr R was on the MMS, and so there clearly must have been a record of this in the account history.

Whilst Skipton has argued that a £0.99 debt is "*worthless*" and that it is within its rights to deal with this in any way it sees fit, this in itself contradicts Skipton's previous submission that its "*usual policy*" would be to contact the customer to seek instructions.

Skipton also says that it is not a condition of the HTB scheme that the borrower must have a first charge on the property. "*The terms merely acknowledge that a commercial mortgage loan will be needed, it will be secured by a first charge and that the [HTB] loan will inevitably then be a second charge but there is no contractual requirement that it always be such. That is a misunderstanding which the Ombudsman has mistakenly adopted as a fact.*"

The HTB terms and conditions state at clause 5.3 that repayment of the HTB loan is triggered by, amongst other things, *“repayment in full of the First Charge unless at the same time the Borrower take out another First Charge in accordance with Clause 11;...”*

Clause 11 states that the HTB mortgage has priority *immediately after* one prior legal charge securing an amount advanced to the borrower.

Skipton argues that, by reinstating the £0.99 account balance (albeit without reinstating the legal charge), the mortgage *hasn't* been repaid in full and there is therefore no event that can trigger repayment of the HTB loan. But I think it is clear from Clause 11 that the HTB mortgage has to sit *behind* an existing first legal charge. As there is no longer a first legal charge (because Skipton removed it when it wrote off the £0.99 debt), I'm satisfied that the HTB loan is required to be repaid. Indeed, this has been confirmed by the HTB administrator, and that confirmation has previously been provided to Skipton.

Skipton has readily accepted that, whilst its usual policy is for a member of staff to contact the borrower where there is a £0.99 balance on an account, in this case, Skipton decided not to follow its usual policy and instead chose to write off the balance. Skipton says that it was completely entitled to do this, that it didn't need Mr R's consent to write off the balance or remove the legal charge, and that it didn't need to consider whether this might have any effect on Mr R or result in any harm.

Skipton says that my provisional decision *“effectively imposes on Skipton an obligation to check a customer's account history before writing off any debt, no matter how small, arguing fairness warrants a background check to identify potentially unintended consequences.”*

I'm satisfied that Skipton *is* under a duty to take reasonable steps throughout the customer relationship to ensure that its actions avoid causing foreseeable harm to Mr R. Skipton is also required to enable and support Mr R to pursue his financial objectives.

In addition, Skipton is obliged to focus on putting Mr R in a better position to make decisions in line with his needs and objectives. Skipton must also ensure that it communicates relevant information to Mr R in a way that supports effective decision-making, providing an appropriate opportunity for him to review the information and, where relevant, assess his options. All of these obligations are embodied in PRIN 2A and Principle 12 of the Financial Conduct Authority's Principles for Business, and is known as Consumer Duty.

I remain of the view that Skipton's decision to clear Mr R's account balance and remove the legal charge without contacting Mr R first (contrary to its usual policy) was an error, and that it was unfair and unreasonable for Skipton to do this. Skipton has failed to fulfil the Consumer Duty obligations I've outlined above, and in doing so, has caused harm to Mr R that it could have avoided had it contacted him.

In the circumstances, I am not minded to change my opinion that this complaint should be upheld.

Putting things right

In my provisional decision I said that, generally, we'd expect a business to put a customer back in the position it would have been in had an error not been made, but in the circumstances of this case, reinstating the Legal Charge was likely to be difficult. Instead, I thought Skipton should offer Mr R a new mortgage to replace the HTB loan.

Mr R has confirmed that his preference is to be offered a new mortgage by Skipton, and that he can fund part of the redemption of the HTB himself. Mr R believes he will need a mortgage of between £15,000-£17,000, depending on the HTB valuation.

To settle the complaint, I therefore require Skipton Building Society to offer Mr R a new mortgage to replace the HTB loan, on the most favourable terms available, waiving all fees and paying all costs associated with redemption of the HTB loan, including valuation and legal fees. I think it's fair to require Skipton to cover the costs of redeeming the HTB loan even though Mr R would always have had to redeem it at some point, incurring those costs. That's because he had no obligation to do so for many years. It's not possible to know what costs he would have had to pay when doing so, which would in any case depend on unknowable factors such as whether the future redemption would be following sale of the property or not. And by being forced to redeem against his will many years before he might otherwise have done, Mr R would be out of pocket for those costs if they were not covered by Skipton.

For the distress and inconvenience its actions of caused Mr R, I also direct Skipton Building Society to pay Mr R £750 compensation.

My final decision

My final decision is that I uphold this complaint. I direct Skipton Building Society to settle the complaint as set out above.

This final decision concludes the Financial Ombudsman Service's review of this complaint. This means that we are unable to consider the complaint any further, nor enter into any discussion about it.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before **6 August 2024**.

Jan O'Leary
Ombudsman