

## The complaint

Mr M and Ms S have complained about their mortgage they hold with Bank of Scotland plc trading as Birmingham Midshires.

## What happened

Mr M and Ms S took out their mortgage in January 2008. Their interest rate was fixed at 7.69%, and then from 1 March 2011 it reverted to a variable rate which was Bank of England base rate ("base rate") plus 2.69% for the remainder of the mortgage term.

Mr M and Ms S have raised various complaints over the years, and Birmingham Midshires issued the following final response letters:

- 25 June 2017
- 18 October 2017
- 23 October 2017
- 18 February 2019
- 6 September 2020
- 10 August 2021
- 5 May 2022
- 28 September 2022
- 16 November 2022
- 18 November 2022

Mr M and Ms S referred their complaint to our service in December 2022. Since then Birmingham Midshires issued further final response letters on:

- 19 January 2023
- 9 June 2023

Our Investigator said we could only consider the final response letters that had been issued between 28 September 2022 and 9 June 2023. She said the earlier complaints hadn't been referred to us within the six-month time limit set out in our rules, or if they had been referred to us we'd already considered (or excluded) those points so we wouldn't look at them again. In respect of the issues we can consider our Investigator said:

- Birmingham Midshires had already done enough to put right most of the issues raised.
- Mr M and Ms S' interest rate had tracked base rate since March 2011 in line with their mortgage contract.
- The original advice was given by an independent mortgage broker, so any complaint about the mortgage being mis-sold would need to be made to the broker, not to Birmingham Midshires.
- Birmingham Midshires was unable to change the mortgage to repayment and extend the mortgage term in 2023 as Mr M and Ms S didn't meet its affordability criteria.
- Birmingham Midshires is a closed book lender and doesn't offer new interest rate products to its customers, and if a new rate is wanted then a customer would need to

remortgage (either externally, or through the internal remortgage process to another part of the banking group).

- Although Mr M and Ms S are in negative equity and didn't meet its criteria for changes to the mortgage, it offered to discuss a five-year fixed rate with them to help manage their payments for the remaining term.
- There was no record of the third-party authority form being received, so our Investigator recommended Mr M and Ms S submit it again.

Overall our Investigator said Birmingham Midshires had done enough to put things right for the issues we were able to consider and so she didn't think anything more needed to be done.

Mr M and Ms S didn't agree and said they wanted an Ombudsman to consider their complaint.

Earlier this month I issued a decision about our jurisdiction in which I said we can only consider the complaint responses of 28 September 2022, 16 November 2022, 18 November 2022, 19 January 2023 and 9 June 2023 as the other's didn't fall within our jurisdiction.

I've now reviewed the complaint on that basis and I issue this decision as the final stage of our process.

### **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.

Although I've read and considered the whole file, I'll keep my comments to what I think is relevant. If I don't comment on any specific point it's not because I've not considered it but because I don't think I need to comment on it in order to reach the right outcome.

I'll separate the complaint points out by final response letter.

#### 28 September 2022

Mr M and Ms S had agreed with Birmingham Midshires that an arrangement would be set on their account so they paid £700 a month by direct debit, and the remainder of the monthly payment due would be paid by the department for work and pensions ("DWP").

Unfortunately Birmingham Midshires made a mistake and the arrangement wasn't set up correctly, which led to the direct debit collecting the full monthly payment, rather than the £700 that had been agreed.

In its response to the complaint Birmingham Midshires apologised for the mistake, paid £75 compensation and also returned the £170.92 extra that shouldn't have been taken.

It said whilst the arrangement had now been set up correctly for October 2022, Mr M and Ms S had said the DWP would no longer be making any contributions and so they would be looking to make the full monthly payments going forward. Birmingham Midshires said that for that reason the direct debit would revert to collecting the full payment from November 2022, and if Mr M and Ms S were concerned about making that payment then they should get in contact so any potential support options could be discussed.

Birmingham Midshires admitted it got things wrong here and whilst I acknowledge how frustrating it is when a business makes mistakes, mistakes do happen. Birmingham

Midshires has accepted it let Mr M and Ms S down by collecting an incorrect amount and it has apologised for that, paid £75 compensation and refunded the extra amount.

That is in line with what I would have awarded had Birmingham Midshires not already taken that action, and so I don't require Birmingham Midshires to do anything more to resolve this part of the complaint.

16 November 2022

Unfortunately Birmingham Midshires took the higher payment in error again in October 2022 rather than the agreed £700. Birmingham Midshires offered to refund the extra amount, but this time Mr M and Ms S said it wasn't necessary. In addition Mr M and Ms S complained about how long they had to wait for their calls to be answered, and for a call back to be made, as well as the content of (and delays in receiving) letters.

As Mr M and Ms S said they didn't want the extra funds back, and Birmingham Midshires again apologised for the error, that part of the complaint has been resolved, other than deciding what a fair level of compensation would be.

Birmingham Midshires apologised for the waiting times for calls to be answered, and it suggested what times of day may be best for calls to be made, as it may be less busy at those times. It also apologised for the delay in making a call back to Mr M and Ms S.

In respect of the letters Birmingham Midshires has a regulatory responsibility to send certain letters when an account falls behind. One letter was sent warning of potential legal action due to the error in the payment arrangement not being set up correctly. That was clearly a mistake by Birmingham Midshires and some compensation is due for that.

Having considered everything I'm satisfied the £125 offered by Birmingham Midshires for all the issues raised under this part of the complaint is fair and reasonable as it is in line with what I would have awarded had that offer not already been made.

18 November 2022

Birmingham Midshires was unable to put an arrangement in place for Mr M and Ms S as its system didn't recognise that a payment had been made on 24 October when it had been.

It is unclear what the problem was, but whatever the reason the outcome was that Birmingham Midshires was unable to key the arrangement onto its system and Mr M and Ms S were caused upset by what happened.

Birmingham Midshires said it would try again to key the arrangement onto its system once Mr M and Ms S made their November payment without needing any further discussions or contact with them, and it said if it still didn't work then it would find a way to resolve matters internally. It put a hold on any collections activity so Mr M and Ms S weren't contacted when it wasn't their fault, and it also offered to review any extra costs Mr M and Ms S incurred due to the length of time they were on the phone.

It is unfortunate that there were system issues and that it was unclear what the problem was, but I think Birmingham Midshires did enough to put things right with its apology, payment of £40 compensation and confirmation it would fix things without needing anything further from Mr M and Ms S.

19 January 2023

Mr M and Ms S were unhappy about the wording of the quarterly arrears statement, and they also complained about the increases to their interest rate due to it tracking base rate.

As I mentioned earlier, Birmingham Midshires has a regulatory responsibility to send certain letters and documents when an account is in arrears. It also has to include certain wording in those letters and documents. It doesn't have a choice whether or not to do so. This was a quarterly arrears statement, and these still have to be sent even when the borrower has entered into an arrangement if the account is in arrears.

Birmingham Midshires acknowledged that the wording worried Mr M and Ms S, and it apologised for that. It also told Mr M and Ms S that these would be issued every three months whilst their account remained in arrears, so it suggested they mark the dates on their calendar, so they are expecting the statements and are ready for them. That seems a reasonable suggestion as Birmingham Midshires has to send the quarterly statements with certain wording, so that way Mr M and Ms S can be prepared when they receive them.

Mr M and Ms S' original mortgage offer set out the contract they were entering into. That was that their interest rate was fixed at 7.69%, and then from 1 March 2011 it would revert to a variable rate which was base rate plus 2.69% for the remainder of the mortgage term. I've not seen anything to suggest that Birmingham Midshires haven't varied the interest rate in line with that contract.

Having considered everything I don't uphold this part of the complaint.

9 June 2023

Mr M and Ms S complained that their interest only mortgage was mis-sold. They were also unhappy that Birmingham Midshires turned down their request to change to repayment and extend the mortgage term. Mr M and Ms S said they were mortgage prisoners.

The advice to take out the mortgage was given by an independent mortgage broker, so if Mr M and Ms S feel their mortgage was mis-sold then that would be the business that they'd need to raise a complaint about. Birmingham Midshires wasn't responsible for checking the advice given was suitable. This was explained to Mr M and Ms S by our service in 2018 when they referred a previous complaint to us.

Birmingham Midshires is a 'closed book' lender within the Lloyds Banking Group. It stopped offering new mortgage products to its customers in 2011. After this date and after any customers preferential interest rate products ended, all Birmingham Midshires customers remained on their reversionary rates (here that is base rate plus 2.69%).

Birmingham Midshires offers its customers the option of a specialist remortgage to Bank of Scotland, subject to eligibility. This means that Birmingham Midshires customers have the option to apply for a new preferential interest rate product by making an application for a remortgage to Bank of Scotland. So although Mr M and Ms S consider themselves to be mortgage prisoners, they have the option to apply to move to another lender by applying through the specialist remortgage process to move to Bank of Scotland.

I understand Mr M and Ms S have been in arrears for a number of years, with the arrears then being capitalised in April 2023. Once the arrears had been capitalised that wasn't a barrier to the specialist remortgage process being carried out, but it would have been a barrier to Mr M and Ms S moving their mortgage to a different lender outside of the banking group. That's because part of the criteria for the modified affordability assessment for

mortgage prisoners is that the mortgage is not currently in arrears and has not been in arrears at any point in the last 12 months.

We expect lenders to treat all customers fairly. Lenders, whether for a mortgage or unsecured borrowing, structure their interest rates according to risk. If they think there's a high risk they won't get all their money back, the interest rate will be higher to compensate. It also means that if they consider the risk to be too high they aren't willing to lend at all.

Mr M and Ms S are in negative equity, so if a lender ever had to repossess the property, it's unlikely it would get back all the money owed. That means that even if Mr M and Ms S were treated as mortgage prisoners it is very unlikely they'd be able to find a lender willing to take over their mortgage, even if the affordability requirements were waived. It is unlikely that Mr M and Ms S are inside any lender's credit risk appetite, and if they did manage to find a lender willing to take over their mortgage in negative equity it is possible the interest rate would be higher – in recognition of the level of credit risk - than they are currently paying.

Despite Mr M and Ms S being in negative equity I understand Bank of Scotland was still willing to discuss a new preferential interest rate product with them, saying in 2023 it could offer a five-year fixed rate by rounding their term up by a few months so the remaining term was the same as the fixed rate period (as at that time the mortgage term had less than five years remaining).

The fall in value of Mr M and Ms S' property is neither their fault, nor the lender's fault. It's that fall, coupled with having taken an interest only mortgage, which has caused the problem. But the lack of fault on the part of Mr M and Ms S doesn't mean Birmingham Midshires is required to treat Mr M and Ms S any differently to all its other customers with similar characteristics.

And, while Mr M and Ms S' reversionary rate is higher than the new preferential interest rates other lenders offer, it is in line with, or lower than, the standard variable rate (which is often used as the reversionary rate) other lenders charge.

There's nothing in the terms and conditions to prevent Mr M and Ms S moving their mortgage to another lender. They're not subject to an early repayment charge, for example. I understand Mr M and Ms S' circumstances make it hard – or even impossible - for them to move their mortgage, but Birmingham Midshires isn't responsible for that. As I said, Birmingham Midshires' customers are able to use the specialist remortgage process to apply to move to Bank of Scotland. As Bank of Scotland would be taking on their mortgage, it's entitled to set eligibility criteria before doing so and Bank of Scotland, not Birmingham Midshires, is responsible for Bank of Scotland's criteria for taking on new mortgages.

I understand Mr M and Ms S asked about switching to repayment and extending their mortgage term. Because those changes would be material to the affordability of the mortgage then a lender must carry out an affordability assessment to check if the changes are affordable, both now and over the longer term.

I appreciate how worried Mr M and Ms S are about what will happen when their interest only mortgage term comes to an end. As I've said, mortgage lenders are under an obligation to carry out an affordability assessment whenever an existing borrower requests a change to their mortgage – unless the change isn't a change that would have a material impact on affordability. The rules say that changing the term of a mortgage and moving from interest only to repayment are both changes likely to be material to affordability.

Lenders have a discretion to set aside the affordability assessment, provided the change is otherwise in the borrower's best interests. I understand that Mr M and Ms S would feel

strongly that a switch to repayment with a term extension would be in their best interests as they want to continue to be able to live in the mortgaged property – their home.

When assessing whether it's in a consumer's best interests for a lender to not apply a full affordability assessment a number of factors must be considered. Affordability will still be taken into account to some degree – an application can still be at its core unaffordable and not just because it failed the additional stress tests, for example. It's not in a consumer's best interest for a lender to go ahead with something the consumer can't afford. Here the assessment didn't demonstrate affordability to allow Mr M and Ms S to switch to repayment at the time in question (over the maximum term available). There's nothing stopping Mr M and Ms S making a further request as and when things change, and if such an application is turned down in the future then that is a new complaint they can make to Bank of Scotland at the time.

The rules were intended to make it easier for borrowers like Mr M and Ms S to move to a different lender. But, in practice, lenders can still exercise their commercial discretion when considering applications made by borrowers under the new rules, especially those where the application is for a change that is material to affordability such as changing to repayment. That is what the lender has done here, and there's no basis on which I can conclude that it was wrong to have done so. It didn't treat Mr M and Ms S any differently to other applicants with similar characteristics, it followed its usual process, and it applied the relevant criteria.

Whilst I empathise with the situation that Mr M and Ms S are in, I don't think that Birmingham Midshires have treated them unfairly.

I appreciate that this decision is likely to be disappointing for Mr M and Ms S, but for the reasons set out above, I don't uphold this part of the complaint.

### Summary

Clearly mistakes have been made, but I'm satisfied Birmingham Midshires has already done enough to put things right. It seems all the offered compensation has already been paid to Mr M and Ms S and so I don't think Birmingham Midshires needs to do anything more.

### **My final decision**

I don't uphold this complaint in the sense that I'm satisfied Bank of Scotland plc trading as Birmingham Midshires has already done enough to put things right. Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M and Ms S to accept or reject my decision before 26 July 2024.

Julia Meadows  
**Ombudsman**