



## Mortgage shortfalls

Fact sheet no. 14 SCOT Mortgage shortfalls

May 2018

This fact sheet tells you about your options when you have a mortgage shortfall debt. A mortgage shortfall can happen if your home has been repossessed, or you have handed back the keys and the amount your home has been sold for, is less than any outstanding mortgage or secured loans.

Use this fact sheet to:

- find out how long you can be pursued for a mortgage shortfall debt;
- check your rights if you owe a mortgage shortfall debt jointly with someone else;
- find out if it is worthwhile disputing the amount your lender says you owe;
- see if you can complain about your mortgage lender; and
- get some practical advice about your options to deal with your mortgage shortfall debt.

### What is a mortgage shortfall?

In some situations where you have had your home repossessed, or have handed back the keys to your mortgage lender, you may later be told you still owe money. This happens when the amount your home is sold for is not enough to pay the outstanding mortgage and any secured loans.

Money you still owe to your mortgage or secured loan lender in this situation is called a 'mortgage shortfall'.

Sometimes the debt includes the monthly instalments and the interest added to the debt while your home is being sold. Until the house is sold, you are liable for these costs, as well as legal and estate agent's fees.

### How long can I be pursued for the debt?

There are rules about how quickly a lender should contact you after sale of the property if they want to recover the shortfall. See the next two sections '**Financial Conduct Authority rules**' and '**UK Finance policy**'.

There are different legal views about whether a lender has **5 or 20 years** to take court action to recover a mortgage shortfall debt in Scotland. You may need specialist legal advice if:

- your lender is trying to recover a mortgage shortfall debt;
- you have not made any payments towards it recently; and
- you have not written to the lender about the shortfall recently.

**Contact us for advice** about how to find the right type of legal help.

#### Extra advice: seek further help



This is a complicated area of law known as 'prescription and limitation' under the **Prescription and Limitation Act 1973**. You should seek advice from a solicitor if you think this rule applies to you.



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## The Financial Conduct Authority Rules

On **1 April 2013** the Financial Conduct Authority (FCA) took over the regulation of mortgage lending, and problems with existing mortgages.

The **FCA's Mortgages and Home Finance: Conduct of Business sourcebook (MCOB)**, says that a lender must deal fairly with any customer who has a mortgage shortfall debt. A lender does not have to recover a shortfall debt, but if they do, they must tell you in writing within **five years** of the date your home was sold. If they don't you can complain to the Financial Ombudsman Service (FOS). See **Useful contacts** later in this fact sheet.

## UK Finance policy

The UK Finance policy is now part of the FCA's MCOB rules. If your property was taken into possession and sold **more than five years ago**, and you have not been contacted by your lender to recover any outstanding debt, you should not now be asked to pay any shortfall.

The UK Finance part of MCOB is a voluntary code, but lenders should follow it as good practice. MCOB only covers lenders that are regulated by the Financial Conduct Authority (FCA). If you are not sure if your lender is covered by MCOB, **contact us for advice**.

## When can I use these rules?

It is important to understand that the MCOB rules, including the UK Finance policy, operate separately to the **Prescription and Limitation Act 1973**. This means that making a payment or acknowledging the debt in writing does not matter if you are relying on these rules to argue you should not have to pay.

MCOB and the UK Finance policy are useful if you cannot use the **Prescription and Limitation Act 1973** as a legal defence why you should not have to pay.

You can use the [Ask your mortgage lender not to pursue the mortgage shortfall sample letter](#) if you want to write to your lender asking them not to pursue the debt under the UK Finance policy.

### Warning:



#### when do FCA's MCOB rules apply?

Most first mortgages taken out on or after **31 October 2004** will be regulated by the FCA's MCOB rules. If you are unsure whether your mortgage is regulated, **contact us for advice**.

### Information:

INFO

#### older mortgage shortfall cases

The UK Finance policy will not apply to you if you made a repayment arrangement with your lender before **11 February 2000**. It will also not apply if your lender contacted you before this date, even if it was **five years** or more since your house had been sold.

### Extra advice:



#### what does 'contact' mean?

Contact from your lender can mean a letter or a phone call. It doesn't matter if you opened the letter or not. A letter written to you at an address where you were not living at the time will not usually count as contact unless the letter was forwarded to you. **Contact us for advice**.



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## What can I do?

- Work out when you last made a payment or acknowledged the debt. If you think your lender cannot pursue the debt because they are out of time under the **Prescriptions and Limitations Act 1973**, you should seek advice from a solicitor.
- Check if your mortgage lender is a member of UK Finance. If they did not contact you before **11 February 2000** and it is **five years** or more since the house was sold, without any contact from your lender, you can use the UK Finance policy. Use the [Ask your mortgage lender not to pursue the shortfall sample letter](#).
- Has your lender sent you a letter within **five** years of the sale, confirming that there is a mortgage shortfall and that they intend to recover the debt? If you did not receive this letter, you may be able to complain to the Financial Ombudsman Service (FOS). Ask your lender for a copy of their complaints policy and follow this first.

## Joint debts

If your mortgage was in joint names, you need to check what the other borrower has done. If they have acknowledged the debt, it doesn't affect you. **However**, if they have made a payment towards the debt, the limitation period starts running again from the beginning for **both** of you from the date they last made a payment.

## Ask for details of the debt

If you are contacted by your lender or their agent, the first thing to do is ask for a detailed breakdown of what they say you owe. You can use the [Ask your mortgage lender for a breakdown sample letter](#).

Check all the figures and decide if you think the correct procedures have been followed. You should ask for details of:

- the exact sale price of the house;
- details of any valuations made on the property;
- how your lender has worked out the interest that has been added on up to, and since, the sale; and
- any solicitors', estate agent's fees, or court costs that have been added on.

### Warning:



#### before contacting your lender

Be very careful when writing to your lender, as you may not want to acknowledge the debt. If this happens, you will start time running again and will not be able to argue that the lender is out of time to make you pay the debt. This only applies if the debt is not already out of time to be pursued. If you have not heard from your lender for **nearly five years, contact us for advice** before contacting your lender.



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## If my lender does not give me the information I want

If your lender is being awkward about supplying a breakdown of the mortgage shortfall account to you, try asking them in writing for all the information held by them to do with the mortgage account. This request should be made under the **Data Protection Act 2018**. The information should be free unless it is unreasonable.

### Information:

INFO

#### Data Protection Act

The Data Protection Act allows your lender to give you information about payments made by a joint account holder, such as your partner or ex-partner. However, it does not force them to do so. You can ask your lender to provide this information under the Data Protection Act but they are within their legal rights to say no.

## Mortgage indemnity insurance

Mortgage indemnity insurance, sometimes known as a mortgage indemnity guarantee (MIG), is insurance that covers the mortgage lender against a loss. Usually it is paid as a lump sum when the mortgage is taken out, or it can be taken off your mortgage advance at the time.

Check if you had a mortgage indemnity insurance policy. If so, make sure your lender made a claim.

### Extra advice:



#### paying your lender back

If the insurance company has made a payment to your lender, they can ask you to pay them back this amount. **Contact us for advice** if you think this applies to you.

## Can I dispute the amount being claimed?

The FCA's MCOB rules say that all lenders must obtain the "best price that might reasonably be paid" when they sell your house. If you do not think they have done this, it might be possible to dispute the amount they say you owe. You have **five years** from the date of sale to make a claim against the lender. You will need proof to support your case, such as valuations for your house at the time.

If you think any of the examples below apply to you, **contact us for advice**.

- The house was sold for a lot less than the market value at the time of sale.
- The house was not marketed well enough to obtain the best price.
- You arranged a sale which was refused by the lender. After repossession the house was sold by the lender for a much lower price.
- The house stood empty for a very long time and you can argue that the mortgage company should have rented it out to offset rental income against the shortfall balance.
- Check who bought the property. Your lender should not have sold it to a related company.



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## Who do I complain to?

On **1 April 2013** the Financial Conduct Authority (FCA) took over the regulation of mortgage lending and problems with existing mortgages. Most mortgages taken out on or after **31 October 2004** will be regulated. This also applies to all new mortgages where the lender had a first charge over the property and at least **40%** of the property was occupied by you and/or your immediate family. It does not apply to secured loans regulated by the **Consumer Credit Act 1974**. If you are not sure what type of loan you had **contact us for advice**.

If you are not happy with the way in which your lender has dealt with your mortgage shortfall, you can complain to the Financial Ombudsman. See **Useful contacts** later in this fact sheet.

### Extra advice:



#### contact us for advice first

Mortgage shortfall debts can be complicated. It can be hard to remember exactly what happened, or get hold of the paperwork from the time. Before making a complaint to the Financial Ombudsman Service (FOS), **contact us for advice**.

## Negotiating with your lender

If your mortgage shortfall debt can definitely be pursued by the mortgage lender, you will need to decide how to deal with it. In most cases, mortgage shortfall debts, or claims for repayment of insurance policies, can be treated as non-priority debts.

This means treating them the same as credit card or catalogue debts. These are non-priority debts because these creditors have limited powers to make you pay. You cannot usually go to prison, be evicted from your home or lose an essential service for not paying non-priority debts.

### Extra advice:



#### decrees

You should only treat the debt as non-priority if no court action has already been taken. If a decree has been made, **contact us for advice**.

## Making a payment arrangement

If you are going to try to make a payment arrangement with your lender, you need to do a **budget**. This will help you work out what you can afford to pay towards your mortgage shortfall debt. Your lender will also usually want to see your **budget** so they know that your offer is reasonable. If you need help writing your letter, **contact us for advice**.

## Ask your lender not to pursue the debt

If your mortgage shortfall debt is large, and your budget shows that you can only afford very small payments, or none, tell your lender. Use your budget to explain your financial situation.

If you have other difficult circumstances, such as disability or illness, explain this to your lender.

If your house was repossessed and you are now in rented accommodation, explain to your lender that you no longer have any assets such as a house. This may help to persuade your lender that there is little point in pursuing you for the debt.

### Information:

INFO

#### sample letter

See the **Ask your mortgage lender to write off the debt sample letter**.



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## Full and final settlement

If you have no long-term prospects of clearing the full balance, it may be possible to offer part payment in 'full and final settlement' of the debt. If you can't pay a lump sum, this could be in the form of instalments over time. For example, you could pay **£3,000** in full and final settlement over **5 years** at **£50** per month.

Creditors may ask you to fill in their own budgeting form. It may ask you for extra details you do not wish to provide. If they have not been to court, you do not have to give employer, tax or bank details, but your lender may be less likely to help if you refuse.

Before making a full and final settlement payment, **contact us for advice**.

See the [Ask your mortgage lender to accept a full and final settlement offer of payment sample letter](#).

## What about my credit rating?

From **July 2010**, UK Finance stopped keeping information about people who had been repossessed or who had handed in the keys of their home. This information used to be kept in a mortgage possessions register and was passed on to credit reference agencies. The information held on the register has been destroyed, but existing information may still be on your credit file.

If you have fallen behind with your mortgage, this will show as a 'default' on your credit file and will stay on there for **six years**. If you are not sure what information is on your credit file, you can check this by applying for a copy. **Contact us for advice**.

In some cases, details of how much you still owe will also appear on the file. This may affect your ability to get a new mortgage, especially if you still owe money to your previous lender.

### Information:

INFO

#### your credit file

Your credit file should be marked as 'satisfied' if the sale of your house covers the outstanding debt. If you clear any mortgage shortfall, your file should also be marked as satisfied.

### Extra advice:

#### dealing with the whole mortgage shortfall

Make sure that your full and final settlement offer deals with the whole shortfall, and you do not still owe money to an insurance company for money paid out under a mortgage indemnity insurance policy.

### See our fact sheet:

#### Full and final settlement offers.

### See our fact sheet:

#### Credit reference agencies and credit reports.





## What if my lender takes court action

If you cannot come to an agreement with your lender or their collector, they may try and take court action to make you pay.

### Sheriff court

Given that the debt is likely to be over **£5,000**, the action is most likely to be raised in the sheriff court under ordinary cause proceedings. It may even be raised in the Court of Session, but this is less likely. Both procedures can be complex.

**See our fact sheet:**  
**Sheriff court action for debt.**



### Debt Arrangement Scheme (DAS)

The Debt Arrangement Scheme (DAS) is a legal scheme run by the Scottish Government. It allows you to pay off your debts over a reasonable length of time through a 'debt payment programme'.

**See our fact sheet:**  
**Debt Arrangement Scheme (DAS).**



- Whilst a debt payment programme is in place, all interest, fees and charges on your debt will be frozen from the date that you apply.
- As long as you fully complete the debt payment programme and pay off your debts, the frozen interest, fees and charges will be written off.

DAS can also give you protection from creditors making you bankrupt, or using court action against you to enforce your debts. Enforcing a debt through the courts is often known as 'diligence'.

Even if some of your creditors have started to use court action against you, in most cases joining DAS will stop this action from going any further.

### Bankruptcy

If you owe more than **£3,000**, your lender may threaten to make you bankrupt. In Scotland this is also known as sequestration. They will usually only do this if they think you have assets, such as another house, that would be sold to pay your debt if you were bankrupt.

**See our fact sheet:**  
**Bankruptcy.**



You may also be able to make yourself bankrupt. There are different ways of going bankrupt and different rules about how much you need to owe. Bankruptcy is a last resort, but it can be a suitable option if you have lots of debt you cannot pay back. There are important disadvantages, and a fee to pay, so it is very important that you get full advice first to make sure it is right for you. If you are threatened with bankruptcy, or would like to talk about making yourself bankrupt, **contact us for advice**.



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## Useful contacts

### The Building Societies Association (BSA)

Phone: 020 7520 5900

[www.bsa.org.uk](http://www.bsa.org.uk)

### Financial Conduct Authority (FCA)

Phone: 0800 111 6768

[www.fca.org.uk](http://www.fca.org.uk)

### Financial Ombudsman Service

Phone: 0800 023 4567 or 0300 123 9123

[www.financial-ombudsman.org.uk](http://www.financial-ombudsman.org.uk)

### Information Commissioner's Office - Scotland (ICO)

Phone: 0303 123 1113 or 0131 244 9001

[www.ico.org.uk](http://www.ico.org.uk)

### The Money Advice Service

Information and advice on money matters.

Phone: 0300 500 5000

[www.moneyadviceservice.org.uk](http://www.moneyadviceservice.org.uk)

### UK Finance

Does not deal directly with consumers but has useful information on their website.

[www.ukfinance.org.uk](http://www.ukfinance.org.uk)



National Debtline endeavour to keep our fact sheets as up-to-date as possible, however, we cannot be held responsible for changes in legislation or for developments in case law since this edition of the fact sheet was issued.

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