



SCOTLAND – FACT SHEET NO. 14

MORTGAGE SHORTFALLS

WHAT IS A MORTGAGE SHORTFALL?

Many people find themselves being asked to pay large sums by their mortgage lender after they have been repossessed or have handed in the keys to their house. Often people think that once they have left the house their liability ends. However, this is not the case if the house is sold for less than the outstanding mortgage. The debt that remains is usually referred to as a '**mortgage shortfall**'. This usually consists of the monthly instalments and interest that has been added on to the debt until the house is sold, plus legal and estate agent costs.

WARNING

You can still be asked to pay back a shortfall a long time after you left the house as mortgage lenders may be able to pursue the debt for up to **20 years** after you stopped paying the mortgage.

HOW LONG CAN I BE PURSUED FOR THE DEBT?

If your home has been repossessed and sold, mortgage shortfall debts can be pursued against you. If the lender obtained a sheriff court decree for repayment of the debt against you they are likely to have up to 20 years to pursue you.

If on the other hand there is no court order, e.g. you gave up the house before the court date, the lender may be restricted to trying to recover the debt within five years of the date of your repossession.

ADVICE

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.

The time period starts running from the last time the lender contacted you and you agreed that you owed the money or when you last made a payment to the lender.

COUNCIL OF MORTGAGE LENDERS POLICY

Mortgage lenders who are members of the Council of Mortgage Lenders (CML) have not yet changed their policy on recovering mortgage shortfalls. You can still argue the policy to your lender as a point of good practice.

From February 2000 the policy is as follows.

The CML says anyone whose property was repossessed and sold and who has not been contacted by their lender within six years from the date of the sale will not be asked to pay the shortfall.

If your lender has already contacted you before 11 February 2000 then it appears they will continue to try and recover the shortfall even if your house was repossessed and sold more than six years ago.

If this applies to you then you should read the fact sheet for options to negotiate with the lender. You could try arguing that it is unfair for the lender to keep trying to recover the money from you if your house was sold over six years ago. Point out they have already accepted that they have a “commitment to fair and sympathetic treatment for people for whom possession cannot be avoided” and have already limited the recovery period for new cases.

INFORMATION

You can use **sample letter M4** at the end of this fact sheet if you want to write to your lender asking them not to pursue the debt under the Council of Mortgage Lenders policy.

HELP

If you have not acknowledged to the lender that you owe the debt, and not made any payments within the time limits, the debt may be prescribed and be unenforceable. Take further advice about this.

JOINTLY OWED DEBTS

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

ASK FOR DETAILS OF THE DEBT

If you have neither acknowledged the debt nor made payments, and you are contacted by your lender or their agent, the first thing to do is to ask for a detailed breakdown of how they have worked out the amount they say you owe. This should allow you to check all the figures and give you a basis for deciding if the correct procedures have been followed.



WARNING

Don't acknowledge to the lender that you owe the debt at this stage.

You should ask for details of:

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



INFORMATION

You can use **sample letter M1** at the end of this fact sheet when writing for a breakdown of the amount claimed.

WHAT IF MY LENDER DOES NOT REPLY?

If your lender is being awkward about supplying a breakdown of the mortgage shortfall account to you, then you should write to the lender and request they send you all the information held by them on computer to do with the mortgage account. This request should be made under the '**Data Protection Acts 1984 and 1998**' and refer to the “rights of subject access” under the Acts.

The lender can charge you up to a £10 fee for supplying the information. They can also write back to you requesting you to be more specific or ask you for more information. You should be sent anything held on computer but not paper or microfiche files. (**The Data Protection Act 1998** also covers paper and microfiche files but will only apply to information held from 1998).

If the lender does not comply with the request you should complain to the Information Commissioner who will take it up with the lender and can serve an enforcement notice if the information is not sent.

We suggest you phone us if you want more advice about this.

CAN I DISPUTE THE AMOUNT BEING CLAIMED?

Building societies have an obligation to find the 'best price which can be reasonably obtained' whilst banks have a 'duty of care' to the borrower. From **31 October 2004** the FSA mortgage rules say that all lenders must obtain the "best price that might reasonably be paid". It is possible to dispute the amount being claimed by the mortgage lender in some cases.

- If you can show that the house was sold for substantially below the proper market price, taking into account the market conditions at the time of sale.
- If the house was not marketed sufficiently to obtain a good sale price.
- If you arranged a sale which was refused by the lender, but after repossession the house was sold by the lender for a much lower price.
- If the house stood empty for a very long time and you can argue that the mortgage company should have rented it out and therefore offset possible rental income against the shortfall balance.
- If the lender decides to leave the house empty and not sell it; then you may have an argument for asking the court to order a sale.

ADVICE
If you feel any of these examples may apply to you **phone us for advice.**

WHO DO I COMPLAIN TO?

From **31 October 2004** the Financial Services Authority (FSA) has taken over the regulation of mortgage lending and problems with existing

i INFORMATION
Contact details for the Information Commissioner are listed under the 'Useful addresses' section at the end of this fact sheet.

MORTGAGE INDEMNITY INSURANCE

You also need to check whether you had a mortgage indemnity guarantee (MIG) on the house. This is an insurance that covers the mortgage lender against a loss. You would usually have paid it out as a lump sum when you first bought the house or it could have been deducted from your mortgage advance at the time.

You need to check that your mortgage lender has made a claim on any insurance available. This could limit the amount you owe to the mortgage lender although the insurance company can ask you to pay back the amount they pay out to the mortgage lender. The insurance company sometimes asks the lender to collect their share for them. From **31 October 2004** your lender must inform you in writing if your mortgage shortfall debt may be pursued by another company.

Some people argue that the indemnity policy should cover the borrower for any shortfalls as they paid for the insurance in the first place. This is a complicated area. Following a case called '**Woolwich v Brown**' in 1995 the English Court of Appeal has decided that generally mortgage indemnity insurance only covers the lender and not the borrower. This case is likely to be followed by Scottish courts.

mortgages where the lender had a first charge over the property and at least 40% of the property is 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 **phone us for advice**.

The new rules say that the lender must market the property as soon as possible and obtain the “best price that might reasonably be paid” taking into account factors such as market conditions and the increasing amount you owe on the mortgage debt.

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. The contact details are in the ‘Useful addresses’ section.

NEGOTIATING REPAYMENTS

The debt owed to either the mortgage lender or the insurance company can be treated in the same way as any other unsecured credit debt. One of these options may be possible.

- We suggest you read through the NDL information pack, ‘Dealing with your debts’ and prepare a detailed personal budget working out your current income and essential outgoings. If you can afford to make payments one option is to contact the lender in writing enclosing a copy of your personal budget and make an offer of payment.



WARNING

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.

- If your house has been repossessed and you are now in rented accommodation, you need to explain to them that you no longer have any assets such as a house and outline your exact financial position. This should help persuade your lender that there is little point in pursuing you for the debt.
- If you can afford to make a very small offer of payment per month and have no assets then you might want to suggest that they don’t pursue the debt as you are never going to be able to pay it back. Mortgage and insurance companies do not always take action to recover the debt when they can see it is pointless for them to do so, (e.g. they write off the debt).



INFORMATION

You can use **sample letter M2** if you want to ask the lender to write off the debt.

- It may also be possible to offer a part payment in the form of a lump sum in ‘full and final settlement’ of the debt if you have no long-term prospects of clearing the full balance. If you can’t pay anything ‘up front’, this could be in the form of instalments over time, e.g. to pay £3,000 in full and final settlement over 5 years at £50 per month. This sort of offer has the advantage of giving the creditor something giving you something to aim for at the same time.



WARNING

You should make sure that your full and final settlement offer has dealt with the whole shortfall and you do not still owe money to the insurance company for the amount paid out under any mortgage indemnity insurance.

ADVICE

Do not pay any sort of part payment until you have the creditor's written agreement that they have accepted your offer in 'full and final settlement'. It is a good idea to send the payment via a third party as this makes the deal more legally binding. If someone else is to make the payment on your behalf then they should only provide the money on condition that the offer is accepted.

INFORMATION

You can use **sample letter M3** at the end of this fact sheet, which you can adapt when writing to the creditor.

- It is important to get the creditor to agree to mark your credit reference file as 'satisfied' before you make the payment (see the section 'Mortgage Possessions Register' at the end of this fact sheet.)

INFORMATION

You need to bear in mind that the Council of Mortgage Lenders maintains a Mortgage Possessions Register with credit reference agencies. Details of your previous mortgage and any shortfall debt are likely to remain on file for approximately six years even if you are no longer being pursued for a shortfall debt. This may make it difficult to obtain a mortgage again in the future.

WHAT IF THE COMPANY TAKES FURTHER ACTION?

If the company still writes back threatening further action, once you have written to them enclosing a personal budget sheet and explaining your financial position, we suggest you **phone us for further advice** to discuss your options. If you cannot reach an agreement with the mortgage or insurance company about repaying

the debt they may decide to take further court action against you.

SHERIFF COURT

Given that the debt is likely to be over £1,500, 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.

FACT SHEET

We have a fact sheet on 'Going to court a DIY guide', which may be of assistance to you. **Phone us for a copy.**

BANKRUPTCY

The mortgage or insurance company may threaten to make you bankrupt. This is not always a bad idea but will depend upon your current circumstances.

The point of bankruptcy is to allow any assets you have to be sold to go towards paying your debts. If you have no assets such as a house, valuable car, pension or savings then you will need to tell your lender. Write to them and explain your circumstances. Point out that if they make you bankrupt they will not get any of the debt back. Under bankruptcy rules your debt will be written off if there are no assets that can be sold. If the company can see there is no financial point in making you bankrupt they will usually decide not to.

If you have no assets but a lender is still trying to recover a shortfall from you then bankruptcy can even be a solution. If this happens you need to seek detailed information.



FACT SHEET

If your lender is threatening to make you bankrupt you need to look at how this will affect you. We have a fact sheet on 'Bankruptcy' which may be of assistance to you. **Phone us for a copy.**



WARNING

If you are thinking about bankruptcy you need detailed advice about how you will be affected. **Phone us for advice.**

USEFUL ADDRESSES

Financial Ombudsman Service

South Quay Plaza
183 Marsh Wall
London
E14 9SR

Tel: 0845 080 1800

www.financialombudsman.org.uk

Financial Services Authority

25 The North Colonnade
Canary Wharf
London
E14 5HS

Consumer Helpline: 0845 606 1234

www.fsa.gov.uk

Information Commissioner

Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Tel: 01625 545 745

www.dataprotection.gov.uk

Council of Mortgage Lenders

3 Savile Row
London
W1S 3PB

Tel: 020 7437 0075

www.cml.org.uk

SAMPLE LETTER M1

ASK YOUR LENDER FOR A BREAKDOWN OF THE BALANCE CLAIMED

(Your home address)

Date: _____

To: _____

Dear Sir/Madam

WITHOUT PREJUDICE

Account No: _____

Thank you for your letter/telephone call concerning the above account.

I/we do not acknowledge the claim. Please supply me/us with a full breakdown of the balance claimed under the above account.

In order for me/us to deal with the matters you raised, I/we should be grateful if you would supply me/us with answers to the following points:

- When did the arrears begin?
- When was the last payment made on the account?
- When was any possession order given?
- When was the house sold?
- What valuations were made on the property before the sale?
- What costs were involved in maintaining the property during the period between the repossession and the sale?
- How was the house marketed and sold and at what price?
- What costs were involved in selling the property?
- Has a claim been made against the indemnity insurance and how much was recovered?
- How has interest been calculated from the start of the arrears?

Please supply me/us with a full breakdown of the balance claimed under the above account.

I/we look forward to receiving your reply as soon as possible.

Yours faithfully

(Your signature)

REMEMBER

To keep copies of all letters you send to your creditors.

SAMPLE LETTER M2

ASKING YOUR CREDITOR IF THEY WOULD CONSIDER WRITING OFF YOUR DEBT

(Your home address)

Date: _____

To: _____

Dear Sir/Madam

Account No: _____

Further to my/our recent **letters/telephone calls**, I/we enclose a copy of my/our personal budget sheet which gives details of my/our present financial circumstances.

As you can see my/our outgoings are more than my/our income and I am/we are experiencing extreme financial hardship.

I/we would be very grateful if you would consider writing off the outstanding debt owing. I/we have always taken very seriously our financial responsibilities but unfortunately my/our circumstances are so bad that I/we cannot realistically maintain payments of any kind. I/we understand that under the '**FSA Mortgage: Conduct of Business Rules**' a lender is not required to recover a mortgage shortfall debt where it is considered unviable to do so. Please take the following special information into account when making your decision.

(Include a paragraph outlining the special circumstances you have that you want the creditor to take into account, e.g. illness, disability, age, bereavement. Include evidence of your medical condition if possible or supporting letters from a doctor, social worker etc. Also include information about why your situation is unlikely to improve.)

As you can see my/our situation is very unlikely to improve in the future and my/our continued high debt level may have a serious effect on my/our physical and mental wellbeing. I/we would therefore be grateful if you would seriously consider my/our request for the debt to be written off.

I/we would appreciate any help you can give me/us.

Yours faithfully

(Your signature)

REMEMBER

To keep copies of all letters you send to your creditors.

SAMPLE LETTER M3

TO HELP YOU NEGOTIATE A FULL AND FINAL SETTLEMENT OFFER WITH YOUR LENDER. THIS IS THE TYPE OF OFFER WHERE YOU ASK THE LENDER TO ACCEPT PART OF THE AMOUNT YOU OWE AND WRITE OFF THE REST.

(Your home address)

Date: _____

To: _____

Dear Sir/Madam

Account No: _____

I/we write with reference to the money which you are claiming on the above account.

I/we can confirm that I am/we are unable to offer to pay the money which I/we owe in full. (**Add details of your circumstances and financial situation.**) However, I/we can raise £ (**put the amount which you can afford to pay**) and I/we want to offer this as an ex-gratia payment in full and final settlement of the account.

This offer is made on the clear understanding that, if accepted, neither you nor any associate company will take any further action to enforce or pursue this debt in any way whatsoever and that I/we will be released from any further liability.

I/we also request that, if accepted, you will make an entry on a credit reference agency file relating to the above account as 'satisfied' in full.

Payment can be made within (**put the number of days or weeks within which you will pay**) of receiving your written agreement to this offer and indication of your preferred method of payment.

I/we look forward to receiving your reply.

Yours faithfully

(Your signature)

REMEMBER

To keep copies of all letters you send to your creditors.

SAMPLE LETTER M4

TO BE USED WHEN YOUR HOUSE WAS SOLD MORE THAN 6 YEARS AGO AND YOU WERE FIRST CONTACTED BY THE LENDER AFTER 11 FEBRUARY 2000. LENDERS SHOULD NOT PURSUE THE MORTGAGE SHORTFALL UNDER THE COUNCIL OF MORTGAGE LENDERS POLICY. YOU CAN ARGUE THE POLICY APPLIES TO YOU AND THE DEBT SHOULD NOT BE PURSUED.

(Your home address)

Date: _____

To: _____

Dear Sir/Madam

Account No: _____

You have contacted me/us regarding the amount you claim is owed as a shortfall on the mortgage following the sale of my/our property.

I/we understand you are a member of the Council of Mortgage Lenders (CML). As you will be aware, the CML has the following policy on obtaining repayment of mortgage shortfall debts. This applies to all CML members.

“Lenders are committed to fair and sympathetic treatment of people who have suffered repossession, and accept that individuals should not face long delays before lenders contact them to discuss repayment of the shortfall.”

“From **11 February 2000**, lenders who are members of the CML have agreed voluntarily that they will begin all recovery action for the shortfall within the first 6 years following the sale of a property in repossession. Anyone whose property was taken into possession and sold more than 6 years ago, and who has not been contacted by their lender about recovering any outstanding debts will not now be asked to pay the shortfall.”

I/we would point out that the property in question was sold on (**insert the date**). Also the first contact I/we had from you was by phone/in writing on (**insert the date**). I/we therefore suggest that under the CML policy my/our property was sold more than 6 years ago and I/we have not been contacted by you within that time. Therefore I/we should not be asked to pay any shortfall debt outstanding.

I/we would point out that from **31 October 2004** the Financial Services Authority (FSA) has issued ‘**The Mortgage: Conduct of Business Rules**’ which say that if a lender decides to recover a

mortgage shortfall debt they must make sure the borrower is informed of this within 6 years of the date of sale.

I/we look forward to your confirmation, in writing, that any outstanding shortfall debt will not be pursued against me/us any further.

Yours faithfully

(Your signature)

REMEMBER

To keep copies of all letters you send to your creditors.

MORTGAGE POSSESSIONS REGISTER

WHAT IS THE MORTGAGE POSSESSIONS REGISTER?

The Council of Mortgage Lenders (CML) keeps a register of people who have been repossessed or who have handed in the keys on their home. The information is passed on to the credit reference agencies Experian, Equifax and Callcredit, and appears on your credit reference file. The information is only available to members of the CML and the register may be checked if you apply for a new mortgage.

The aim is to stop people taking out a new mortgage without telling their new lender they have previously lost their home. It is not necessarily impossible to get a mortgage if you are on the register but it may be more difficult, especially if you still owe money to your previous lender.

You may have to shop around for a mortgage and be prepared to explain why you lost your home and how your circumstances have now changed. Every mortgage company has its own lending policy and should make decisions on an individual basis, taking all the facts into account.

WHAT DETAILS WILL BE KEPT ABOUT ME?

The register will have details of anyone who has been repossessed since 1989 and the information will stay on the credit reference files for 6 years from the date of repossession or when you handed the keys in to the lender. The register does not include details of actual arrears on the account.



WARNING

This does not mean the debt is written off after 6 years. Mortgage lenders may try and recover a mortgage shortfall for up to 20 years.

Details will include:

- your full name;
- the date actual possession took place;
- the address of the repossessed property;
- any previous addresses they may have for you; and
- your forwarding or current address.

i INFORMATION

This will only apply once you have actually left your home. If you are still in your home you will not be on the register just because you already have a court order against you.

HOW DO I CHECK WHAT THE REGISTER SAYS ABOUT ME?

The mortgage possession register information will be on your credit reference file. You can order a copy of our credit file in the normal way to see if any mortgage information is included.

For information on how to check what the credit reference agencies say about you see 'Credit Explained', a booklet published by the Information Commissioner (see the 'Useful addresses' section.) This is available from National Debtline or directly from the Information Commissioner. It describes how to check what your file says and what to do next if you think the information is wrong. **Phone us for advice.**

WHAT CAN I DO IF THE INFORMATION ON THE REGISTER IS WRONG?

You have the right to ask credit reference agencies for full details of the information they hold about you. If the information is wrong then you can correct the file.

You do not have the right to have a correct entry removed but the file should be marked 'satisfied' if you pay the outstanding arrears or shortfall, or if the proceeds from the sale of the house cover any outstanding debt.

FACT SHEET

We have a fact sheet on 'Credit reference agencies', which may be of assistance to you.

Phone us for a copy.

Remember: You can always contact us for advice about any difficulty you have in dealing with your debts.

Freephone 0808 808 4000 Website www.nationaldebtline.co.uk

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