

## **The complaint**

Mr J complains that his mortgage lender, Mortgage Express, has unfairly increased the interest rate on his mortgage. His representative says he's been taken advantage of because he's unable to move his mortgage elsewhere.

## **What happened**

Mr J took out a mortgage with a lender called GMAC-RFC in September 2007. He borrowed around £257,000 over a 25 year term, on interest only terms. The loan balance included various fees and a higher lending charge reflective of the high loan to value. The mortgage offer said that a fixed rate of 6.55% would apply until 30 September 2009, followed by the standard variable rate (SVR). At the time Mr J took the mortgage out the SVR was 7.74%.

Mr J's mortgage was transferred from GMAC to Mortgage Express, as part of a wider transfer of business, in November 2007. Mortgage Express remained the lender at the time of this complaint – Mr J redeemed his mortgage shortly after making the complaint.

At the time Mortgage Express was a wholly owned subsidiary of Bradford & Bingley (B&B). During the global financial crisis of 2007 – 2009, B&B collapsed and was taken into government ownership. Mortgage Express remained a separate firm owned by the nationalised B&B.

Mr J complained to Mortgage Express in 2020, saying that he was unhappy with the interest rate he was being charged. Mortgage Express responded saying that interest was being charged in line with the terms and conditions and the mortgage offer.

Mr J's representative complained to Mortgage Express in 2021, saying:

- Mortgage Express doesn't offer new interest rates to existing customers, and Mr J was unable to move his mortgage elsewhere. Mr J had a reasonable expectation that he would be able to take a new interest rate on the expiry of his existing one, but Mortgage Express failed to make one available.
- As a result Mr J had to remain on Mortgage Express's SVR – he had no other option. Mortgage Express did not take that into account in setting the level of interest it charged.
- Mortgage Express's SVR has been consistently high, even at a time of low interest rates and when the Bank of England base rate was 0.5% or less. The SVR is excessive in comparison with other lenders in the market.
- The level of the SVR, and increases to it, were not justified by the terms of the mortgage contract – either the explicit terms, or an implied term that the SVR would not be varied arbitrarily, unreasonably, improperly, or dishonestly.
- As a result, Mortgage Express treated Mr J unfairly and took advantage of his situation. The interest rate should be reduced to a fair rate and overpayments above

that should be refunded to Mr J. Mr J believes this should be the Bank of England base rate plus 1.5%. Mr J believes that it was Mortgage Express's previously stated policy to set its SVR at around 1.5% above base rate.

Mortgage Express didn't agree. It said:

- It had not acted in breach of the mortgage terms and conditions – either an explicit term or an implied term (and it did not accept that there was an implied term in any case).
- There was no expectation that the SVR would track base rate, by 1.5% or at all. When Mortgage Express had varied the SVR it had done so for good reasons as permitted by the terms and conditions. Doing so was not unfair and did not amount to taking advantage of Mr J.
- Mr J could not have had a reasonable expectation of a new interest rate at the end of his fixed rate. The mortgage offer was clear that it would revert to the SVR after 30 September 2009 and that is what happened. Mortgage Express does not offer new interest rates to any customers, but it did not put any barriers in the way of Mr J moving his mortgage to a new lender to get a better rate.

Our investigator reviewed the complaint and didn't uphold it, so Mr J's representative asked for an ombudsman to make a final decision.

### **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.

The rules of the Financial Ombudsman Service provide that complaints have to be made within six years of the date of the event complained about – or, if it gives more time to complain, within three years of when the complainant knew or ought reasonably to have known of cause for complaint. Unless there's a record of an earlier complaint we can't consider a complaint made outside those timescales. We can consider an out of time complaint if the firm complained about consents – but Mortgage Express doesn't consent – or if there are exceptional circumstances that prevented a complaint being made in time. Mr J's representative hasn't suggested there were any such circumstances.

Our rules also say that when a complaint is made, and the firm complained about has issued its final response, the complaint must be referred to us within six months of the date of the final response. Again, we cannot consider an out of time complaint if the firm complained about consents – but Mortgage Express doesn't consent – or if there are exceptional circumstances that prevented a complaint being made in time. Mr J's representative hasn't suggested there were any such circumstances.

Applying the time limit rules to this case, I note that Mr J's representative first complained to Mortgage Express on 7 September 2021. His complaint is primarily about two things – the ongoing failure to offer a new interest rate, and the fairness of the interest rate he was actually charged.

But that was not the first complaint Mr J made. He'd previously made a complaint – without a representative – in 2020. That complaint was about the level of the SVR Mr J was being charged at that time, but not about access to a new fixed rate.

That means there are two separate time limits for the two separate parts of the complaint. In

respect of the fairness of the SVR, we can only consider Mr J's complaint about interest charged since 24 May 2020. All interest charged before that point was covered by the final response issued at that time. As Mr J didn't refer that complaint to us within six months, this part of his complaint is out of time.

Mr J's representative doesn't agree about that. It says that this is a different complaint, because – in particular – in 2020 Mr J didn't make the arguments about the term his representative says should be implied into the terms and conditions. I've taken that into account. But I don't think that, in reality, these are different complaints. While the 2021 complaint raises new arguments not made in 2020, those are not new complaints – the underlying complaint is the same, that the level of the SVR was unfair. The time limits apply to complaints, not arguments. Making the same complaint but with additional arguments does not mean we can set aside the earlier time limit. I'm satisfied that we cannot consider this part of the complaint before 24 May 2020.

In considering the fairness of the interest rate charged, it will be necessary to consider the whole history of the interest rate – since earlier variations to the SVR made before 24 May 2020 may still be relevant to the interest rate charged during that period. As such, they form part of all the circumstances of the complaint about the fairness of interest charged in the period that is in time.

In respect of the complaint about the ongoing failure to offer a new interest rate, this wasn't included in the 2020 complaint and therefore the six year / three year limit applies rather than the six month limit. Mr J would have known he was on the SVR and that Mortgage Express hadn't offered him a new rate – as he says he expected it would. That was enough to tell him he had cause for complaint about that. And so we can only consider the failure to offer a new rate for the six years leading up to the later complaint, that is since 7 September 2015.

#### *Offering a new interest rate*

Mr J's representative has complained that Mortgage Express didn't offer him any new interest rates, either when his fixed rate ended or later.

Mortgage Express didn't offer interest rates to any existing customers, so I don't think Mr J was treated less favourably than other Mortgage Express customers. I don't think it was unfair that Mortgage Express didn't offer him a new interest rate after 7 September 2015. There's nothing in either the mortgage terms and conditions or the mortgage offer that says it would do so. The mortgage offer makes clear that the mortgage would be charged at the SVR after the end of the fixed rate period.

It's true that many mortgage lenders do offer new interest rates to existing customers – but not all do. There's no obligation, either in the rules of mortgage regulation, in law, or in the terms of Mr J's mortgage that Mortgage Express would do so in his case. But Mortgage Express didn't stand in Mr J's way or prevent him from shopping around and moving his mortgage to another lender to access a better deal – there was only an early repayment charge applicable up to the end of his fixed rate, for example. So during the period I can consider, after 7 September 2015, there was no ERC, and nothing that Mortgage Express did which would have prevented Mr J moving his mortgage to another lender in search of a better deal. Mr J's representative says that he was unable to do so, but if that was the case it wasn't because of any barriers Mortgage Express put in his way.

I don't therefore uphold this part of Mr J's complaint. I'll turn now to the fairness of the interest rate Mr J was charged.

### *The fairness of the interest rate charged after 7 September 2015*

Mr J's mortgage was subject to the SVR from 1 October 2009. By that time the SVR had fallen to 4.84%, having been 7.74% when Mr J took the mortgage in 2007. It remained at 4.84% until 2016. Between 2016 and when Mr J complained the SVR varied at the same time, and by the same amount, as the Bank of England base rate.

In changing the interest rate from time to time, Mortgage Express was limited in its actions by the terms of the mortgage contract. In respect of the initial mortgage, the terms and conditions are the ones entered into by GMAC – they remained in force and applicable after the transfer. There's a term which says that the lender (GMAC, then Mortgage Express) could only vary the interest rate in certain circumstances:

3.1 If the *interest rate* is the *standard variable rate* we may vary it for any of the following reasons:

- (a) to reflect a change which has occurred, or which we reasonably expect to occur, in the *Bank of England base rate* or *interest rates* generally;
- (b) to reflect a change which has occurred, or which we reasonably expect to occur, in the cost of the funds we use in our mortgage lending business;
- (c) to reflect a change which has occurred, or which we reasonably expect to occur, in the interest rates charged by other mortgage lenders;
- (d) to reflect a change in the law or a decision by a court; or
- (e) to reflect a decision or recommendation by an ombudsman, regulator or similar body.

Mr J's representative says that there should also be an implied term that Mortgage Express shouldn't exercise its power to vary the interest rate arbitrarily, improperly, unreasonably, or dishonestly. That's really a question of contract law, but I don't think it's something I need to decide for the purposes of this complaint – since I don't think it adds anything substantial to the central question I need to consider. That's whether it acted fairly in setting the rate during the period I can consider. Deciding that question includes consideration of the circumstances in which it used condition 3.1 to vary the interest rate. If Mortgage Express did exercise its contractual power arbitrarily, improperly, unreasonably, or dishonestly, it would follow that it wasn't acting fairly whether or not there was an implied term to that effect.

Mr J's representative hasn't specifically argued that condition 3.1 is an unfair term within the meaning of the Unfair Terms in Consumer Contracts Regulations, though this is something I've considered too as it's relevant law for me to take into account. Having done so, I think the Mortgage Express term in particular – which allows it to vary the interest rate for any reason if there is no early repayment charge – is very broad and gives Mortgage Express a wide discretion without making clear how it would be exercised. But while I've taken into account the law, in deciding what's fair and reasonable in all the circumstances in respect of interest charged after 7 September 2015, I think the central question for me is whether Mortgage Express acted fairly in setting the rate during that period – which includes taking account of the way Mortgage Express made use of both sets of terms and conditions.

During the period that's in time, the interest rate was varied only to reflect changes to the Bank of England base rate. That's something explicitly allowed for in the terms and conditions, and I note it's been said that this is something Mr J expected would happen. I don't think the variations to the SVR between 2016 and September 2021, when Mr J

complained, were unfair.

I've also thought about whether the SVR was set at a fair level at the start of the period that's in time. And to consider that I've thought about the historic variations to the SVR, which – from the starting point of when Mr J took the mortgage out – cumulatively led up to the rate he was charged from 7 September 2015 onwards. That's because if one of those earlier changes was not made in accordance with the contract, for example, it might not be fair to charge an interest rate from 7 September 2015 which relied – in part – on that earlier variation.

In making the changes to the SVR it made from when the mortgage was taken out to when it reached 4.84% in late 2008 – after which there were no further changes before 7 September 2015 – Mortgage Express has told us that it relied on condition 3.1 (b) – to reflect actual or anticipated changes in the cost of funding its mortgage lending business.

Mortgage Express has given us detailed information about the cost of funding its mortgage lending business. I'm satisfied it's appropriate to receive that information in confidence, as permitted by our rules, subject to providing a summary of it.

In summary, the information shows that Mortgage Express was funded by its parent company, B&B, in the form of loan facilities. B&B in turn, before its collapse and nationalisation, raised funding on the wholesale markets.

Wholesale market funding costs are generally driven by or related to the LIBOR rate, not the Bank of England base rate. Prior to the financial crisis, LIBOR and base rate were broadly comparable. But during the financial crisis base rate was reduced substantially as a tool of wider macro-economic policy, whereas the cost of wholesale funding also reduced but not to the same extent. The result was that there was a greater divergence between base rate and LIBOR during this period.

That divergence was reflected in the fact that across the industry – not just in respect of Mortgage Express – lenders' SVR rates reduced (reflecting the reductions in LIBOR) but not by as much as base rate (reflecting the disconnect between the two). In other words, the margins between base rate and SVRs increased at this time. I'm aware that this was the case from my knowledge of other complaints and my knowledge of the mortgage industry, supported by contemporary and later reports of market conditions.

Following B&B's collapse, it was less exposed to movements in the wholesale markets and became primarily government funded. There were certain conditions and costs associated with its government funding – which in turn influenced the funding it, as the parent company, was able to provide to Mortgage Express.

Having considered all this information, I'm satisfied that when Mortgage Express made changes to the SVR between 2006 and 2008, it did so relying on condition 3.1. I'm further satisfied that it was entitled to rely on condition 3.1 at this time. In particular, it was entitled to rely on condition 3.1 (b) when reducing the SVR but increasing the margin over base rate, because the cost of funding its mortgage lending business was in fact changing, and the changes to the SVR reflected the changes to the cost of funding its mortgage lending business. It's true that Mortgage Express ceased to be an active mortgage lender, seeking out new business. But it still operated a mortgage lending business in respect of its existing loan book, which included Mr J's mortgage.

Mr J's representative says that Mortgage Express had a policy, and Mr J had a reasonable expectation, that its SVR would be kept at around 1.5% above base rate – and by increasing the margin it therefore acted unfairly. I've seen no evidence that there was such a policy, or

that if so it included Mr J's mortgage. The archived website Mr J's representative refers to simply says that Mortgage Express's variable rate products are set at around 1.5% above base rate. It's not clear that this is referring to the SVR – as opposed, for example, to its base rate tracker rates – and if it is, this is at best a general statement of Mortgage Express's aspirations around the time it made the statement. It's not a binding contractual commitment to Mr J.

This statement was also made before the financial crisis – which, as I've said, led to a dislocation between base rate and the cost of funding mortgage lending. And so even if it was a statement of Mortgage Express's general aspirations in managing its SVR – which I haven't found to be the case – that doesn't mean that in the very different conditions of the financial crisis and its aftermath Mortgage Express is barred from making changes to its SVR merely because they contradict something it said – non-contractually – in the years before the crisis.

There's no such linkage between the SVR and base rate in Mr J's mortgage offer or terms and conditions, and I've not seen any evidence that GMAC led Mr J to believe that his specific mortgage would behave in that way before he took it out. And of course Mr J cannot have relied on this statement in making the decision to take out his mortgage, since he took it out with GMAC not Mortgage Express. I don't think it would be reasonable to conclude that a general statement of how Mortgage Express managed its rates at a particular moment in time, a statement that was not in the contemplation of either GMAC or Mr J when the mortgage was taken out and which it is not clear was even referring to the SVR, binds its hands forever even if it was referring to the SVR.

I don't therefore think this online statement is of any particular weight in considering whether Mortgage Express acted in line with the terms and conditions of Mr J's mortgage when it varied the interest rate. And it's not of any particular weight in considering whether the interest rate from 7 September 2015 was fair and reasonable in all the circumstances.

It's also important to note that condition 3.1 gives Mortgage Express the power to vary the interest rate, but it doesn't create an obligation to do so. In other words, if but only if certain conditions are met Mortgage Express has the power to change the SVR. But if those conditions are not met it has no power to change the SVR – and even if they are met, it is not obliged to do so.

Finally, Mr J's representatives say that there was a special responsibility on Mortgage Express not to take advantage of Mr J because he was unable to shop around and had no option but to remain with Mortgage Express. I'm satisfied that Mortgage Express acted in line with the terms and conditions of Mr J's mortgage and didn't treat him less favourably than any other borrower. I don't think Mortgage Express's SVR is significantly higher than that of other lenders, whether active or closed. I'm not persuaded that it unfairly took advantage of him.

Taking all that into account, I'm satisfied that Mortgage Express acted in accordance with the terms and conditions in varying the SVR in the way that it did. And there is no other basis on which I can safely conclude that the interest rate charged to Mr J from 7 September 2015 onwards was unfair.

## **My final decision**

My final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J to accept or reject my decision before 15 January 2024.

Simon Pugh  
**Ombudsman**