DRN-4335459

Financial Ombudsman Service

The complaint

Mr B and Ms C complain that the interest rate Mortgage Express has applied to their mortgage is excessive and unfair. They bring this complaint through a law firm.

What happened

Mr B and Ms C took out this mortgage with GMAC-RFC Limited in July 2007. They borrowed around £165,000 over a 20-year term, on an interest-only payment basis. The interest rate was fixed at 5.89% until 30 June 2009. It was then subject to the lender's standard variable rate (SVR) for the remainder of the term. The SVR at the time Mr B and Ms C took the mortgage out was 7.49%. By 1 July 2009 the SVR had fallen to 4.84%. It remained at that level until 2016.

In August 2007, Mr B and Ms C's mortgage was transferred from GMAC to Mortgage Express. Mortgage Express was the specialist lending brand of Bradford & Bingley Plc. During the global financial crisis of 2007-2009, Bradford & Bingley collapsed and was nationalised. Mortgage Express remained a separate firm owned by the nationalised Bradford & Bingley, and it stopped offering new mortgage interest rate products. Mr B and Ms C's mortgage has remained with Mortgage Express ever since.

In September 2021, through their representative, Mr B and Ms C complained to Mortgage Express about the interest rate they had been paying on their mortgage. In summary, they complained that:

- Mortgage Express's SVR has consistently been too high, and excessive when compared to other lenders' SVRs, particularly when Bank of England base rate was 0.5% or less.

- Mortgage Express's discretion to set and vary its SVR was subject to an implied term that it could not be exercised dishonestly, for an improper purpose, capriciously, arbitrarily, or in a way that no reasonable lender acting reasonably would do. In varying its SVR as it had, Mortgage Express had breached both this implied term and the express terms of its mortgage contract with Mr B and Ms C.

- Mortgage Express stopped offering new interest rate products in 2009, and Mr B and Ms C were unable to remortgage elsewhere. They had a reasonable expectation that they would be able to take a new interest rate when the initial fixed rate ended, but were unable to do so – and as a result they have had to keep their mortgage on Mortgage Express's SVR. Mortgage Express should have taken this into account in setting its SVR but did not do so.

- In setting its SVR at the level it had, Mortgage Express had treated Mr B and Ms C unfairly, in breach of Principle 6 in the Financial Conduct Authority's Handbook, and in breach of Mortgage Conduct of Business rules.

- Mortgage Express should refund interest charged above Bank of England base rate plus 1.5%, and pay Mr B and Ms C compensation.

Mortgage Express said it had done nothing wrong and it had operated the interest rate on Mr B and Ms C's mortgage fairly and in line with the mortgage terms. It said the SVR isn't a tracker rate and it had never described it as such. While it doesn't offer new interest rates, there had been no early repayment charge applicable to Mr B and Ms C's mortgage since 2009 and no other barrier to their remortgaging elsewhere if they wished.

Through their representative, Mr B and Ms C referred their complaint to us. Our Investigator said that time limits apply to this complaint, and these mean we can only consider the interest charged in the six years leading up to this complaint – so, since 7 September 2015. She also said that in considering interest charged during that six-year period we could take account of earlier variations to Mr B and Ms C's mortgage interest rate, because they contributed to the rate applied during the period we could consider.

The Investigator went on to look into the complaint, and didn't recommend that it be upheld. Through their representative, Mr B and Ms C asked for a review.

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.

As our Investigator explained, the scope of my power to consider this complaint is limited to the six-year period leading up to the date Mr B and Ms C made this complaint on 7 September 2021. This is because of the time limit rules I must apply. The relevant rules, which are set out in the Financial Conduct Authority's Handbook at DISP 2.8.2 R and are available online, say that complaints must be made within six years after the date of the event complained of, or, if it gives more time to complain, within three years of when the complainant knew, or ought reasonably to have known, that they had cause for complaint.

I can't consider a complaint made outside those timescales, unless there's a record of an earlier complaint, unless the business complained about consents, or unless there are exceptional circumstances to explain the complaint having been made late. Here, there's no record of an earlier complaint, Mortgage Express hasn't consented, and I don't find there are exceptional circumstances to explain the delay in complaining.

Mr B and Ms C complained to Mortgage Express about the interest rate on 7 September 2021. I think they should reasonably have known over the years what interest rate they were being charged, because Mortgage Express wrote to them regularly with details of the rate in letters and statements. So I think they ought reasonably to have known when they received rate change letters and statements that they had cause for complaint about paying the SVR and about the level of the SVR.

This means I can only consider this complaint from 7 September 2015, which is six years before Mr B and Ms C complained. In doing so, however, I will take account of earlier variations to Mr B and Ms C's mortgage interest rate because they form part of all the circumstances of this complaint leading up to the interest applied after 7 September 2015.

Mr B and Ms C's representative says that they only became aware of cause for complaint when they saw media reports about mortgage interest rates in 2019, which led them to seek legal advice. But the relevant time limit rule is not just about when Mr B and Ms C actually knew of cause for complaint, it's also about when they ought reasonably to have known.

Knowledge of cause for complaint merely requires knowledge that something has gone wrong causing loss for which Mortgage Express is responsible. I'm satisfied that Mr B and Ms C ought reasonably to have realised that they were being charged a higher interest rate than they were expecting more than three years before they complained – and that's enough to say they ought reasonably to have realised they had cause for complaint.

The same is true of the ongoing failure to offer a new interest rate. Mr B and Ms C would have known they were on the SVR and that Mortgage Express hadn't offered them a new rate – as they say they expected it would. That was enough to tell them they 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 complaint.

Turning now to the merits of this complaint, I don't think that Mortgage Express did anything wrong in not offering Mr B and Ms C a new interest rate after 7 September 2015. There was nothing to say that it had to do so, either in the mortgage offer and terms and conditions, or in law or the rules of mortgage regulation.

Mortgage Express didn't offer new rates to any of its existing customers either, so in not offering Mr B and Ms C a rate it wasn't treating them less favourably than other customers. And no early repayment charges applied to the mortgage after the fixed rate ended in June 2009, so Mortgage Express didn't stop Mr B and Ms C from applying for better rates with other lenders.

I've carefully considered the fairness of the interest rate Mortgage Express charged Mr B and Ms C. Their mortgage was subject to Mortgage Express's SVR from 1 July 2009 onwards. The SVR had reduced between July 2007, when Mr B and Ms C took out the mortgage, and July 2009 – it had fallen from 7.49% to 4.84%. Bank of England base rate fell further during that period – from 5.75% to 0.5%.

The SVR remained at the same level until 2016. Between 2016 and September 2021, when Mr B and Ms C made this complaint, the SVR varied at the same time, and by the same amount, as Bank of England base rate.

In changing the interest rate from time to time, Mortgage Express was limited by the terms of the mortgage contract. The terms and conditions are the ones entered into by GMAC – they remained in force and applicable after the transfer. There's a term in those terms and conditions which says that 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:
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> (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;
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> (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."

There's nothing in the mortgage offer or terms and conditions to say that the SVR must track Bank of England base rate, with or without a margin. That said, for the period I can consider, from 7 September 2015, the SVR did only vary to reflect changes to the Bank of England base rate. That's explicitly provided for in the terms and conditions, and so I don't think the variations to the SVR from 7 September 2015 onwards 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. In order to do so, I've taken account of historic variations to the SVR, which – from the starting point of when Mr B and Ms C took the mortgage out – cumulatively led up to the rate they were charged from 7 September 2015 onwards. That's because if one of those earlier changes wasn't 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. It has given us detailed information about these costs. 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, Bradford & Bingley, in the form of loan facilities. Bradford & Bingley, before its collapse and nationalisation, predominantly raised funding on the wholesale markets. These wholesale market funding costs were generally driven by or related to the London Interbank Offered rate (LIBOR), not the Bank of England base rate. Before the financial crisis, LIBOR and base rate were broadly comparable. But during the financial crisis there was a significant dislocation between LIBOR and base rate, such that reductions in base rate weren't matched by corresponding reductions in LIBOR – and, therefore, reductions in Bradford & Bingley's cost of wholesale funding.

This divergence meant that while Mortgage Express's SVR reduced (reflecting the reductions in LIBOR), it didn't reduce by as much as base rate. This was the case across the mortgage industry, not just for Mortgage Express's SVR.

Following Bradford & Bingley'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 2007 and 2008, it did so relying on condition 3.1. I'm further satisfied that it was entitled to rely on condition 3.1 and, in particular, 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 B and Ms C's mortgage.

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 vary it. In other words, Mortgage Express has the power to change the SVR – but only if certain conditions are met. 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 change the SVR.

I don't accept Mr B and Ms C's representative's argument that Mr B and Ms C had a reasonable expectation that the SVR would always be at 1.5% or a similar margin above

Bank of England base rate. That's not in the mortgage offer or terms and conditions, and I've seen no evidence of such a policy or, if there was one, that it applied to Mr B and Ms C's mortgage. Mr B and Ms C's representative has referred to an archived webpage, but that refers to Mortgage Express's variable interest rate products, not its SVR. It also pre-dates the financial crisis. I've seen nothing to indicate that GMAC made any such commitment, and Mr B and Ms C can't have relied on something Mortgage Express said when they took out their mortgage with GMAC, a different lender.

Mr B and Ms C's representative has also said there is an implied term that Mortgage Express shouldn't exercise its power to vary the interest rate dishonestly, for an improper purpose, capriciously, arbitrarily, or in a way that no reasonable lender acting reasonably would do. I've explained why I've found that Mortgage Express acted fairly in varying its SVR during the period I can consider, and in reaching my conclusions I've also kept in mind the Unfair Terms in Consumer Contracts Regulations, as well as the relevant rules about mortgage lending and FCA requirements. I don't think Mr B and Ms C's representative's argument about an implied term adds anything substantive for me to consider.

In all the circumstances, I'm satisfied that Mortgage Express acted in line with the mortgage terms in varying the SVR as it did, and I don't consider that it applied interest to Mr B and Ms C's mortgage unfairly for the period I can consider.

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 B and Ms C to accept or reject my decision before 11 January 2024.

Janet Millington
Ombudsman