

## **The complaint**

Mrs L, through her representative, complains that the interest rate Mortgage Express applied to her mortgage is excessive and unfair.

## **What happened**

Mrs L took out a mortgage with GMAC-RFC Limited in December 2004. Taking out an interest only mortgage over a 15-year term. The interest was discounted until 1 January 2007, before reverting to the standard variable rate (SVR). The mortgage was subject to an early repayment charge (ERC) if it was repaid before 1 January 2007.

In February 2005, Mrs L's mortgage was transferred from GMAC to Mortgage Express – the specialist lending brand of Bradford & Bingley Plc (B&B).

Subsequently, in December 2006, Mortgage Express wrote to Mrs L with an option to reschedule her loan on an interest only basis over a term of 12 years and 10 months. The interest rate was again a discounted variable rate until 31 December 2009 – reverting to the SVR on 1 January 2010. An ERC would be applicable should the mortgage be repaid before 1 January 2010. This mortgage went live in February 2007.

During the global financial crisis of 2007-2009, B&B collapsed and was nationalised. Mortgage Express remained a separate firm owned by the nationalised B&B, and it stopped offering new mortgage interest rate products. Mrs L's mortgage was still live at the date of this complaint.

In October 2021, through her representative, Mrs L complained to Mortgage Express about the interest rate she had been paying on her mortgage. In summary, she complained that:

- Mortgage Express' SVR has consistently been too high, and excessive when compared to other lenders' SVRs, particularly when the Bank of England base rate was 0.5% or less.
- Mortgage Express' 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 Mrs L.
- Mortgage Express stopped offering new interest rate products in 2009, and Mrs L was unable to remortgage elsewhere. She had a reasonable expectation that she would be able to take a new interest rate but was unable to do so – and as a result she had to keep her mortgage on Mortgage Express' 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 Mrs L unfairly, in breach of principle 6 in the Financial Conduct Authority's Handbook, and in breach of Mortgage Conduct Business rules.
- Mortgage Express should refund interest charged above the Bank of England base

rate plus 1.5%, and pay Mrs L compensation.

Mortgage Express said it had done nothing wrong and it had operated the interest rate on Mrs L'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 Mrs L's mortgage since 2010 and no other barrier to her remortgaging elsewhere if she wished.

Through her representative, Mrs L referred her complaint to this service. 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. She also said that in considering interest charged during that six-year period we could take account of earlier variations to Mrs L's mortgage interest rate, because they contributed to the rate applied during the period we could consider.

The investigator went on to consider the part of the complaint that had been brought in time and didn't recommend that it be upheld.

Through her representative, Mrs L asked for the case to be reconsidered. She didn't accept the investigator's conclusions about the application of time limits and said she didn't know she had cause to complain until public awareness of 'mortgage prisoners' increased in 2019 and she instructed her representative.

Mortgage Express accepted the outcome the investigator had reached, although it provided clarification about some of its funding arrangements.

Mrs L did not accept the investigator's opinion relating to what part of the complaint we can and can't consider. As such, before proceeding to consider the merits of this complaint, I issued a decision setting out which parts of Mrs L's complaint our service has the power to consider.

In summary, I said that our service can only consider whether Mortgage Express has treated Mrs L unfairly by overcharging her on her mortgage, during a period when it was no longer offering new mortgages – from 18 October 2015 onwards. Mrs L's complaint about events that occurred before this date had been brought too late. I'll now issue my decision on the part of the complaint that has been brought in time.

### **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.

When considering what is fair and reasonable in all the circumstances of this case, I'm required by DISP 3.6.4R of the FCA Handbook to take into account the relevant law, regulations, and good industry practice, when reaching my decision.

I've given careful consideration to all the submissions made by both parties, but I won't address each and every point that has been raised. I'll focus on the matters that I consider most relevant to how I've reached a fair outcome – in keeping with the informal nature of our service.

Having done all that, I don't think this complaint should be upheld. I realise this will be disappointing for Mrs L. But I hope the reasons I have set out below will help her to understand why I have come to this conclusion.

I will also note that Mrs L had two mortgage contracts – one which ran from December 2004 to February 2007 and a second which started in February 2007 and was still live at the date of this complaint. Given the context of Mrs L's complaint and that her first mortgage contract only reverted to the SVR for a month before it was replaced by the second contract, this decision will focus on the second mortgage contract taken out in February 2007.

Mrs L's representative has raised many individual complaint points. However, I consider the overall complaint to break down into two key points:

- Mrs L's inability to access a new interest rate with Mortgage Express, which she says, by definition, made her a 'mortgage prisoner'.
- Mrs L has paid an unfairly high rate of interest compared to what she should have paid. The way in which Mortgage Express has exercised its discretion to set and vary its SVR is in breach of an 'implied term'.

I will deal with each point in turn.

#### *Access to interest rates*

As explained, our service can only consider Mrs L's complaint about her access to interest rates from 18 October 2015 onwards. In the event I recommend any redress, I would only be able to award for the period that is in scope of this complaint. That said, when considering this part of the complaint, I think it's necessary for me to set out the background to Mortgage Express' lending structure.

Mortgage Express is what's known as a closed book lender. Its parent company B&B collapsed and was nationalised in 2008. Because B&B is government owned, it can't offer new lower interest rates that would compete with other lenders. The same applies for Mortgage Express as a wholly owned subsidiary of B&B. After this date and after any customers' fixed term products ended, all B&B and Mortgage Express customers were charged the same SVR rate. It's part of the terms of the nationalisation that B&B (and Mortgage Express as its subsidiary) only offer a standard variable rate – which is comparable to the SVRs of other lenders.

I have considered the representative's point that Mortgage Express has breached Principle 6 of the FCA Handbook and MCOB – by not offering Mrs L a new interest rate. Having done so, I'm not persuaded it has. All of Mortgage Express' customers are in the same position, and Mrs L is not being treated any differently to them.

It is generally expected that new interest rates are available when an old one expires – but there's no regulatory or contractual right to a new rate. So, in light of all of the above, I don't think Mortgage Express has done anything wrong in not offering a new rate to Mrs L and I do not uphold this part of the complaint.

### *The fairness of the interest charged on Mrs L's mortgage*

The mortgage terms and conditions set out that when Mrs L's initial discounted rate expired, the mortgage would revert to the lender's SVR and that the SVR could be varied in line with terms of the mortgage. I haven't seen any evidence that persuades me Mortgage Express was obligated, contractually or otherwise, to have its SVR track the base rate. There's also nothing in the terms and conditions that entitled Mrs L to a new interest rate. To that extent, the mortgage has operated as it should.

Mrs L's representatives have said that the 'margin' between Mortgage Express' SVR and the base rate increased significantly from when Mrs L first took out the mortgage - suggesting this is evidence of Mortgage Express treating Mrs L unfairly.

However, Mrs L's mortgage contract didn't contain a 'cap' preventing Mortgage Express' SVR from increasing beyond a certain 'margin' above base rate. So, there was nothing in the contract that expressly prohibited Mortgage Express from setting the SVR at a level whereby the margin between the SVR and base rate would change. But that doesn't mean that it could set the SVR at whatever level it chose. The term enabling Mortgage Express to vary the SVR itself has to be fair (to prevent businesses taking advantage of customers), and Mortgage Express had to ensure that in varying the SVR it only did so for one of the reasons set out in the contract.

To determine whether Mortgage Express varied the SVR fairly, I've looked at all the available evidence and all the changes Mortgage Express has made to the SVR since Mrs L took her mortgage. Having done so, I am not persuaded that anything Mortgage Express has done in varying the rate has led to Mrs L being treated unfairly. I have set out why below.

For reasons of commercial confidentiality, I haven't set out in detail the evidence the B&B Group has been able to provide in full. Nor has our service provided copies of it to Mrs L. Our rules allow me to accept information in confidence, so that only a description of it is disclosed, where I consider it appropriate to do so. In this case, I do consider it appropriate to accept the information and evidence the B&B Group has provided in confidence, subject to the summary of it I have set out in this decision.

Mrs L reverted to the SVR briefly in 2007 and then again in 2010 – as set out above, it appears Mrs L's core complaint relates to her second mortgage contract given she was only on the SVR for approximately one month in 2007. So, I have focused my decision on the time Mrs L spent on the SVR from 2010.

In the years preceding Mrs L reverting to the SVR for a second time, the mortgage market went through a period of significant change as a result of the global financial crisis. This impacted the funding costs of businesses, including B&B and was reflected in changes to a number of lenders' interest rates charged across the market at the time. This was clear at the time and has been the subject of analysis by both the Bank of England and the FCA since. Whilst the base rate did reduce significantly during this period, the cost to lenders of funding their businesses changed, as did their prudential requirements. These were made up of several factors that are not directly linked to base rate. There was a substantial risk to all lenders during this period and they all had to find ways to mitigate that risk while balancing the need to treat customers fairly.

The B&B Group has told us that, like many lenders at the time, B&B was predominantly funded by wholesale funding. The cost of which was in the most part, contractually defined by reference to LIBOR and LIBOR generally followed base rate prior to the financial crisis. As a result, changes in base rate tended to result in changes to cost of funding. Before the

financial crisis, changes in costs of its retail funding also tended to correspond to changes in base rate.

However, during the financial crisis, there was a significant dislocation between LIBOR and base rate, such that reductions in base rate were not matched by commensurate reductions to LIBOR or to B&B's cost of wholesale funding. In addition, access to wholesale funding became harder to come by as lenders became more concerned at the risk of default – B&B in particular has shown how its credit rating was impacted and the implications this had on its ability to raise funds and the cost of its funding – including how this impacted the cost of the inter-company loan it sourced to Mortgage Express.

To avoid collapse, State Aid in the form of a Working Capital Facility loan was extended to B&B from September 2008. With the aid came several conditions on how B&B could operate and obligations on how and when it should look to repay the loan. Understandably, this significantly impacted its commercial strategy and with it, the cost of funding mortgages like Mrs L's. To add to this, B&B was nationalised in 2008 and its entire share capital was transferred to HM treasury (such that B&B became a wholly owned subsidiary, and Mortgage Express an indirect subsidiary of HM Treasury).

So, whilst the State Aid extended to B&B also benefitted Mortgage Express, it came with certain obligation on B&B which also filtered through to the operation of Mortgage Express and as such are relevant factors when considering the impact this had on the setting of Mortgage Express' SVR.

Mortgage Express reduced the SVR on several occasions during this period, just not by the same proportion as the base rate. Given the documented increase in cost of funding across the industry, including the B&B Group specifically, and the obligations surrounding Government requirements and the Working Capital Facility loan, I am satisfied B&B (and subsequently Mortgage Express) balanced its own financial position and obligations at the time with the impact such changes would have on customers like Mrs L's.

From 2009 onwards, the only changes Mortgage Express made to the SVR were made soon after changes were made to the base rate and by the same amount.

I have not seen any evidence to suggest the changes Mortgage Express made to the SVR were arbitrary, excessive, or unfair. Rather, the evidence I've seen satisfies me that Mortgage Express acted to protect its legitimate interests while balancing its obligation to treat Mrs L fairly. And, as explained, I'm further satisfied that the evidence Mortgage Express has provided is corroborated by evidence of wider market conditions at the time.

So, to conclude, I am not persuaded that Mortgage Express operated the terms in an unfair manner when setting and varying the interest rate that applied to Mrs L's mortgage.

I don't think there is any basis to say that it somehow contributed to Mrs L being charged an unfairly high rate of interest on her mortgage during the period I can consider, and I've seen no evidence to say that the interest she was charged during that period was unfair for any other reason.

Finally, I note that Mrs L's representative argues that Mortgage Express has breached what it says was an implied term, not to exercise its discretion to vary the SVR arbitrarily, capriciously, perversely or irrationally. For the reasons set out above, if there was such a duty in the present case, I'm satisfied that Mortgage Express did not breach it since it approached the question of varying the SVR in line with the terms of the contract.

**My final decision**

For the reasons set out above, I do not uphold this complaint and I make no award against Mortgage Express.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs L to accept or reject my decision before 12 February 2024.

Lucy Wilson  
**Ombudsman**