DRN-4171956

The complaint

Mr and Mrs W complain that Kensington Mortgage Company Limited wouldn't offer them a new interest rate product on their mortgage.

What happened

Mr and Mrs W took out their mortgage in July 2007 with lender G. They borrowed just under £166,000 on an interest only basis over a term of 35 years.

The mortgage was on a fixed interest rate of 7.14% for the first three years. After that, the interest rate changed to a variable rate, at 2.49% above the Barclays Bank base rate ("base rate") for the remaining term. The base rate was 5.50% when the mortgage offer was issued, so the variable rate payable at that time would have been 7.99%.

The initial fixed rate came to an end in July 2010, and since then Mr and Mrs W have been paying interest at the variable rate.

In May 2016 the mortgage was transferred from lender G to Kensington.

The contact notes show in November 2021 Kensington received a request for its consent for a second charge to be granted against the property, indicating that Mr and Mrs W had looked into borrowing further secured funds at that time, albeit it doesn't appear they went through with the application.

In September 2022 Mrs W asked Kensington for a new interest rate product on the mortgage. Kensington said it had no products available to Mr and Mrs W, but they could apply for a new mortgage through an independent financial adviser or a mortgage broker. Mr and Mrs W went on to consult an independent adviser and then Mrs W called back in October 2022 as the broker had been unable to help them.

On 3 October 2022 Mr and Mrs W complained to Kensington.

Kensington said that because the mortgage was taken out with a different lender it didn't have the functionality to vary the existing mortgage product. It said that if, in the future, Mr and Mrs W were concerned that they will be unable to maintain their payments then they should contact Kensington so it could explore what support options are available.

Unhappy with Kensington's response Mr and Mrs W referred their complaint to the Financial Ombudsman Service.

Our Investigator initially concluded that Kensington hadn't treated Mr and Mrs W fairly when it didn't offer them a new rate when they asked for one in 2022. He recommended that it re-work their mortgage in such a way that it reflected an interest rate product that would have been available to them in October 2022.

Mr and Mrs W accepted that, but Kensington did not and it provided some further reasons why it said Mr and Mrs W wouldn't have been eligible for a new interest rate product in October 2022.

Our Investigator considered that information and issued his revised opinion on the complaint. He said that because Mr and Mrs W had an outstanding fees balance (from historical arrears) of around £1,500 then they didn't meet Kensington's eligibility criteria for obtaining a new interest rate product as that stated such a balance had to be £85 or less.

Mr and Mrs W didn't accept our Investigator's revised opinion and so the case was passed to me to decide.

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 terms of Mr and Mrs W's mortgage say that, once the fixed interest rate ended in 2010, interest would be charged throughout the remainder of the term at a premium above the base rate. There is nothing in their mortgage offer or terms and conditions which obliges Kensington to offer them a new rate at any time.

That means that Mr and Mrs W's mortgage has operated as it should have done, in line with the terms and conditions they agreed to when they took it out.

I recognise that it's fairly common in the mortgage market for lenders to offer existing customers new preferential interest rates at intervals during the mortgage. And that it's common for buyers to shop around – either by taking a new rate with their existing lender, or by moving to a new lender.

I accept that, in this case, it wasn't realistically possible for Mr and Mrs W to move to another lender. They have an interest only mortgage that runs many years past their state pension ages, and their age and finances were such that it's not likely they'd have passed another lender's affordability check.

That means their only way of getting a new rate was if Kensington offered them one. However, while – as I've said – it's common for lenders to do that, not all lenders do make new rates available to existing customers. And there's no rule – either in law, or in mortgage regulation – that says a lender has to do so.

Prior to 2017, Kensington did not make new rates available to any of its customers. It was not required to do so. Mr and Mrs W's mortgage continued to operate on its existing terms and conditions, as they'd been told it would. And they were in the same situation as all other Kensington customers. In those circumstances, I don't think it was unfair that Kensington didn't make new rates available to Mr and Mrs W.

In 2017, Kensington did start to make new interest rates available to some existing customers. As I say, it wasn't obliged to do so – but from 2017, it chose to do so.

Where a lender chooses to make new interest rates available, it should treat any application for a new rate fairly. It's not unreasonable to have eligibility criteria – meaning that not all customers get the same rate, and even that some customers are not eligible for rates at all – but this should be done on a fair basis.

Kensington has said that Mr and Mrs W failed to meet three parts of its eligibility criteria for new preferential interest rates in that:

- The mortgage didn't originate with Kensington.
- The reversion margin on any potential new product is higher than the reversion margin of their current product. By that Kensington means that Mr and Mrs W's current variable rate is base rate plus 2.49%, whereas any potential new product would revert (after the fixed rate period) to Kensington's variable rate plus 4%.
- Mr and Mrs W had an outstanding fees balance of more than £85.

Kensington's policy in 2022 meant that Mr and Mrs W had to stay on their existing variable interest rate, move their mortgage to another lender, or re-apply to Kensington as new borrowers and take a new mortgage with it.

Mr and Mrs W consulted a mortgage adviser, as Kensington suggested. Mr and Mrs W have said that their personal and financial situation meant their broker was unable to find an alternative mortgage for them. This led to this complaint being made; Mr and Mrs W have no other options and are trapped on their variable interest rate as their circumstances are such that they don't meet other lenders' requirements in order for them to borrow as much as they need to repay the Kensington mortgage.

I need to decide whether, in all the circumstances, the reasons Kensington gave were a fair and reasonable basis on which to refuse Mr and Mrs W a new interest rate product.

In thinking about this, I've taken account of the rules, provisions and guidelines of mortgage regulation, known as MCOB. MCOB 11.8.1 E says:

'When a customer is unable to:

(1) enter into a new regulated mortgage contract or home purchase plan or vary the terms of an existing regulated mortgage contract or home purchase plan with the existing mortgage lender or home purchase provider; or

(2) enter into a new regulated mortgage contract or home purchase plan with a new mortgage lender or home purchase provider;

the existing mortgage lender or home purchase provider should not (for example, by offering less favourable interest rates or other terms) take advantage of the customer's situation or treat the customer any less favourably than it would treat other customers with similar characteristics. To do so may be relied on as tending to show contravention of Principle 6 (Customer's interests).'

Principle 6 says

'A firm must pay due regard to the interests of its customers and treat them fairly.'

In MCOB 11.8.1 E, the suffix "E" means that this is an evidential provision, not a rule. Conduct of the sort set out in the provision may tend to show unfairness – but equally it may not, depending on the individual circumstances. The provision is clearly intended to ensure that borrowers who can't shop around for a better deal aren't taken advantage of or treated less favourably than those who can.

Kensington says it wasn't offering new interest rate products to any customers whose mortgages didn't originate with it, and for those where the reversionary rate would be higher on the new mortgage product. In effect, it is saying it treated Mr and Mrs W the same as all its other customers who were in their position – that is, those who took out their mortgage originally with lender G and were on a variable rate that was lower than the reversionary variable rate on any potential new product.

I don't consider this was a fair and reasonable approach for Kensington to have taken.

MCOB 11.8.1 E is intended to ensure that customers who have similar characteristics aren't treated differently – and I don't think that who the original mortgage was with is a characteristic of a customer on which it's reasonable to rely in deciding which customers will be offered another preferential rate many years later.

I'm also not persuaded by Kensington's argument about the new product's reversionary rate being higher than the variable rate Mr and Mrs W are currently on. That's because, under 11.8.1 E, there should be no reason for Mr and Mrs W to move to that reversionary rate because it follows that if it would have been fair to give Mr and Mrs W a new rate in 2022 then it would likely also be fair for Mr and Mrs W to get another new rate when the 2022 preferential rate ends.

As I don't think either of the first two reasons should have been a barrier to Mr and Mrs W obtaining a new rate in 2022 I now turn to the third reason, that is that Mr and Mrs W had an outstanding fees balance of more than £85 (their outstanding fees balance was over £1,000).

Going back to MCOB 11.8.1 E, I don't think it was unfair for Kensington to say that is a reason why Mr and Mrs W weren't eligible for a new interest rate product as having an outstanding fee balance due to historical arrears is a characteristic of a customer on which it's reasonable to rely in deciding which customers will be offered another preferential rate.

However, acting fairly and reasonably, Kensington ought to have told Mr and Mrs W that the outstanding fees balance was a barrier to them obtaining a new rate.

Our Investigator explored this point with Mr and Mrs W over the phone. He asked Mrs W if they'd been offered a fixed interest rate at the time, but it was higher than the rate they were already on, whether they would have taken it. To which Mrs W only replied that there was a possibility they might have done so. Later in that call Mrs W told our Investigator that they'd cashed in Mr W's pension to repay some other debts to reduce their outgoings and enable them to afford the mortgage each month. They said this would impact their retirement.

In terms of paying the outstanding fees balance (of over £1,000) Mr and Mrs W told our Investigator that they might have decided to pay it. Mrs W reiterated that Mr W had to cash in a pension so that they could pay off some debts and lower their monthly outgoings, which would have an effect on their retirement. She said to pay the fees balance they could have looked at borrowing the money from a relative or cashing in more of Mr W's pension.

Mr and Mrs W have said they were making some small monthly payments towards the outstanding fees balance. Those payments were £10 a month from February to May 2021, £20 a month in June and July 2021, and then £30 a month from August 2021 until February 2022. Those payments then stopped in March 2022 when Mr and Mrs W's contractual monthly payment increased from £380 to £414.

To get a new fixed interest rate product Mr and Mrs W would have had to pay a lump sum of over £1,000 to clear the fees balance and agree to a higher interest rate than they were paying at that time. If I set that against the fact they'd already drawn money from Mr W's pension to clear some debts to make the (lower) mortgage payment affordable, and the information I've set out above, I'm not persuaded it is more likely than not (which is the test I must use) that they would have chosen to go ahead in October 2022.

Even in April 2023, with the benefit of hindsight, Mrs W only said it was possible they would have opted for a higher rate product, rather than they definitely would have done so. And in terms of the fees balance, again with the benefit of hindsight, Mrs W only said they may have paid it in full, rather than they definitely would have done so. Whilst with the benefit of hindsight it might have been better for Mr and Mrs W to take a fixed rate which was higher than their current variable rate – to guard against future rate rises – that couldn't have been known at the time. I must bear in mind that Mr and Mrs W were struggling to pay the lower (variable) amount in deciding whether they would have chosen to pay a higher (but fixed) amount based on what they knew at the time.

To uphold this complaint I need to not only decide that Kensington did something wrong, but also what I think Mr and Mrs W would have done differently had nothing gone wrong. Unfortunately, there simply isn't enough here for me to say it is more likely than not that Mr and Mrs W would have chosen to pay the fees balance, been able to raise the funds to pay it and done so on the understanding their new interest rate would be higher than the one they were currently being charged.

I understand from Kensington that, despite being aware that this was a barrier to them getting a new rate since April 2023, Mr and Mrs W still haven't paid the fees balance, which again doesn't support that they would have chosen to - and been able to – pay it in October 2022 had they been aware that was a barrier to getting a new rate. However, if they now pay the fees balance off I would expect Kensington to consider any new rate application fairly, and not use the other two points as a reason to reject it. If Mr and Mrs W pay the fees balance and are then subsequently turned down by Kensington for a new rate then that's a new complaint they could make at the time.

Finally, Mr and Mrs W said to our service that it would have been helpful if Kensington had provided some options, such as a mortgage holiday or reduced payments for a period of time. As that didn't form part of the original complaint that was made I can't consider it here. Although I would say, as Kensington said in its response to the complaint, if Mr and Mrs W are struggling with their payments then they should call Kensington and it can go through the options that are available for them.

My final decision

I don't uphold this complaint. Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs W to accept or reject my decision before 2 January 2024.
Julia Meadows
Ombudsman