

## **The complaint**

This complaint is about a mortgage Mr J holds with The Mortgage Business Plc (TMB). The essence of the complaint is that during a defined period, the rates of interest TMB charged were higher than the mortgage contract allowed it to charge. Mr J's complaint is presented by a third party intermediary I'll refer to as H.

## **What happened**

Mr J's mortgage started in 2006. Initially, the mortgage was on a tracker rate, which ran until 31 December 2011. Since then, no interest rate product has been attached (TMB had become a closed lender and stopped offering new rate products in 2008) and instead interest has been charged at TMB's standard variable rate (SVR). Mr J repaid the mortgage in 2020.

In September 2021, H submitted a complaint on Mr J's behalf. The main points of the complaint were, in summary:

- Mr J had been a mortgage prisoner since new affordability rules were introduced in 2014, and therefore stuck with TMB on SVR; and
- TMB's SVR was unfairly high, as the margin between it and Bank of England Base Rate had widened, in breach of an implied term in the contract limiting TMB's discretion to vary rates.

TMB rejected the complaint, and it was passed to our service. Our investigator's opinion was that our remit was confined to looking into the six-year period leading up to the start date of the complaint. As the complaint had started on 7 September 2021, he explained that this meant his consideration of the complaint would run from 7 September 2015.

In the same document, the investigator also set out his reasons for not recommending either part of the complaint be upheld. H asked for Mr J's complaint to be referred to the ombudsman.

By way of a jurisdiction decision dated 26 September 2023, I confirmed that my remit to consider the merits of this complaint was confined to the interest charging events that took place after 21 September 2015.

## **What I've decided – and why**

I'll start with some general observations. We're not the regulator of financial businesses, and we don't "police" their internal processes or how they operate generally. That's the job of the Financial Conduct Authority (FCA). We deal with individual disputes between businesses and their customers. In doing that, we don't replicate the work of the courts.

We're impartial, and we don't take either side's instructions on how we investigate a complaint. We conduct our investigations and reach our conclusions without interference from anyone else. But in doing so, we have to work within the rules of the ombudsman service, and the remit those rules give us.

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

As summarised above, there are two components to Mr J's complaint; I'll address them in reverse order, by considering first whether the rates TMB charged Mr J were fair.

The starting point here is the agreement Mr J entered into for the interest rate product immediately preceding the mortgage going onto SVR. That was in November 2006, when Mr J accepted a tracker rate running until 31 December 2011.

That agreement set out, under the heading **Description of this mortgage**, what would happen when the tracker product ended. It said:

*"Your loan reverts to TMB's Standard Variable Rate currently 6.990% after 31 December 2011."*

Meantime, TMB stopped offering new interest rate deals in 2008. That being the case, I'm satisfied that the interest rate that TMB was permitted to charge under the terms of the mortgage during the period I can consider was its SVR.

One of the considerations that I am required to take into account is relevant law. I consider that the application of the Unfair Terms in Consumer Contracts Regulations (UTCCRs) to the relevant terms in this case falls into that category of relevant law. The way the UTCCRs apply to the relevant terms of Mr J's mortgage contract is ultimately a matter for the courts. But they are a relevant consideration I must take into account when determining what is fair and reasonable in all of the circumstances of this case.

The crux of this is whether any of the terms, contrary to the requirements of good faith, cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. As part of this, relevant considerations are:

- the extent to which the terms are sufficiently clear and transparent;
- the extent to which there were any significant barriers to Mr J being unable to exit the contract.

As regards clarity and transparency, I accept that it's possible a court may find the terms to be unfair under UTCCR but this in itself is not determinative of this complaint. I also need to consider whether the application of these terms has led to Mr J being treated unfairly. And for the reasons set out above, I don't think this is the case.

Lastly, there was no early repayment charge applicable to Mr J's mortgage account at the point it reverted to SVR. So, if TMB had exercised its rights as set by the variation terms, and Mr J was unhappy with the decisions it made, he was free under the contract to seek a re-mortgage with another lender. In saying that, I am aware of the possibility that there may have been external factors that might have impacted on Mr J's ability to re-mortgage to another lender. But if there were, they will not have been imposed by TMB.

At a general level, interest variation clauses such as those that applied to Mr J's mortgage have a legitimate purpose and are common in financial services consumer contracts, particularly those of long or indeterminate duration, such as mortgage agreements.

A fair variation term can benefit both consumers and lenders, by providing flexibility and a wider choice to consumers and enabling firms to provide competitively priced products,

knowing they can vary the interest rates they charge to reflect changes in circumstances, particularly in their own cost of funding. A reversion rate also permits lenders to provide for future changes that justify increases in the rate, and a lender's own costs of funds are by nature difficult to foresee.

The time period I'm looking at (21 September 2015 up to redemption in 2020) followed on from a time of significant change in the wider market as a result of the financial crisis in 2008/09. This had impacted on the funding costs of businesses and was reflected in changes to a number of lenders' interest rates charged across the market at the time and subsequently.

I'm also mindful that the FCA has noted the adverse impact the financial crisis had on lenders' costs during that period, and that it hasn't seen that SVR variation terms have generally been relied on unfairly to cause widespread detriment to consumers (see for example the May 2018 Guidance Consultation GC18/2 Fairness of Variation terms in financial services consumer contracts under the Consumer Rights Act 2015 paragraphs 2.8 to 2.10).

TMB has provided the Financial Ombudsman Service with detailed information about the reasons why it varied its SVR in the way that it did. The information TMB has given us is commercially sensitive, so can be treated as confidential. The information has been reviewed in line with TMB's mortgage documentation, relevant law and regulations. I've considered whether TMB acted fairly overall. Having done so, I'm satisfied it varied the SVR in line with the mortgage terms and conditions and that TMB exercised those terms fairly. This means that I'm satisfied TMB did not overcharge interest on Mr J's mortgage account between 21 September 2015 and the redemption date.

Whilst the base rate had reduced significantly leading up to this period, the costs to lenders of funding their businesses changed, as did their prudential requirements. These are made up of several factors that are not directly linked to base rate. There was a substantial increase in risk to all lenders before and during that period, and that led to them having to mitigate that risk in different ways. So there are objectively justifiable reasons why TMB did not always reduce the applicable rate at the same level as the reduction in Bank of England base rate.

Overall I am not persuaded there is any basis to say that the variations TMB made to its SVR resulted in Mr J being charged an unfairly high rate of interest on his mortgage during the period I can consider. Nor does the evidence lead me to conclude that the interest rate applied during that period was unfair for any other reason.

That latter point brings me to the second element of the complaint is about whether TMB either:

- placed obstacles in the way of Mr J getting a new rate; and/or
- failed to take reasonable steps to let him know this was a possibility for him to explore.

As I've already set out, TMB had become a closed lender whilst the tracker rate was running. That meant that there would not be an opportunity for Mr J to take a new deal with TMB, rather than go onto SVR, when the fixed rate ended on 31 December 2011. However, that in itself wouldn't have prevented Mr J from looking for a better deal by re-mortgaging to another lender.

Again, my remit is confined to what happened after 21 September 2015, but I must also consider if events prior to that date impacted on what happened after it.

TMB told Mr J in 2008 that it would no longer be offering new rate deals, but that if he wanted to, he could speak to an advisor about the possibility of a new mortgage with another lender (which I'll refer to here as BM) in the same banking group. However, in October 2011, shortly before Mr J's then current product was due to end, TMB wrote to say BM was no longer offering new deals either, and that if he wanted one Mr J should speak to an independent advisor about what other options might be available elsewhere.

In 2014, the FCA introduced the new, stricter, rules that Mr J says made him a mortgage prisoner unable to move to another lender. Around the same time, TMB reintroduced the option of borrowers stuck on SVR having the opportunity to apply for a new mortgage with a different lender (I'll call this one S) in the same banking group. However, it seems Mr J wasn't told about this until 2019 when a narrative to that effect was introduced into the annual statement.

What that leaves for me to decide is whether the 2014 omission to tell Mr J about the possibility of re-mortgaging to S, which I agree it should have done, is the sole or primary reason he remained with TMB on the SVR after 21 September 2015 until he repaid the mortgage altogether in 2020. On balance, after carefully considering all the circumstances, I'm not persuaded I can safely reach that conclusion.

Much as the investigator concluded, if securing a lower rate than SVR was a priority for Mr J, then I'd expect him to have responded immediately to the message in the 2019 statement. H has said the reason he did not was because he redeemed the mortgage in 2020 – so would only have had a short period to benefit from a new rate – and no longer wished to be a TMB customer.

I've thought hard about what H has said there, and overall I don't find it a wholly persuasive argument. First of all, if Mr J no longer wished to be a TMB customer, that would have been an incentive to explore the possibility of moving to S, not a reason not to. As for the mortgage being redeemed in 2020, the offer for the tracker rate from 2006 showed the mortgage as having around 24 years to run, which would mean it was scheduled to end in 2030, not 2020.

It follows from this that redemption in 2020 most likely came about because Mr J either re-financed with another lender completely outside the banking group of which TMB is a member, or sold the mortgaged property. Given his argument that being a mortgage prisoner ruled out the former, and noting that the address on his complaint form is different from the mortgaged property address on the 2006 offer, the latter seems the more likely of the two. That said, the outcome of the complaint isn't dependent on exactly how Mr J came to redeem the mortgage when he did.

Regardless of the means by which the mortgage was redeemed in 2020, I accept it's possible that Mr J already had his plan in mind when he got the 2019 statement. But I have to keep in mind that in the period between 31 December 2011 and the change of rules in 2014 that Mr J says made him a mortgage prisoner, he seemingly took no action to try and re-mortgage with another lender on better terms.

Putting everything together, it seems to me that the same inertia, rather than knowledge of the impending redemption of the mortgage, is the more likely reason Mr J didn't explore new options when he became aware of them in 2019. Had he been made aware of those options in 2014, as he should have been, it's hard to conclude that he would most likely have responded any differently.

**My final decision**

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

My final decision concludes this service's consideration of this complaint, which means I'll not be engaging in any further consideration or discussion of the merits of it.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J to accept or reject my decision before 6 November 2023.

Jeff Parrington

**Ombudsman**