

The complaint

Mrs D complains that Bank of Ireland (UK) Plc overcharged her interest on her mortgage by unfairly increasing the standard variable rate (SVR). And she complains about legal fees added to her mortgage balance.

What happened

Mrs D has a mortgage with BoI. She borrowed around £102,000 on interest only terms. The term of the mortgage came to an end in 2017, but Mrs D hasn't been able to repay the capital. She says that the property was in negative equity, having never recovered from house price falls around the time of the financial crisis.

Mrs D owns many other properties, including another residential property mortgaged to another lender – which is also out of term – and a portfolio of buy to let properties. Mrs D says that her buy to let portfolio is also in negative equity, so she hasn't been able to sell one of those properties to repay this mortgage.

Following the end of the term, and after discussions about repaying didn't result in an agreement, BoI took legal action against Mrs D. Mrs D then made a complaint that BoI hadn't treated her fairly following the end of the term, and wouldn't agree to a term extension.

I considered Mrs D's complaint, but didn't uphold it. I issued a final decision, having considered all the evidence and arguments. In that decision I said

- BoI had fairly engaged with Mrs D to try to find a way for the mortgage to be repaid – beginning some years before the term actually ended.
- Mrs D had wanted a term extension, if not for life then until age 75. She proposed to make overpayments in the meantime.
- BoI didn't agree that the property was in negative equity by this time. It thought that the loan to value was around 90%. So Mrs D could repay this mortgage by selling one or more of her other properties – or by selling this property. BoI was concerned that Mrs D wasn't actually living in this property; although Mrs D maintained that she was, I thought BoI's concerns were reasonable and supported by the evidence.
- BoI said that Mrs D didn't have a plausible strategy for repaying the mortgage at the end of any extended term. I agreed that this was likely to be the case – it was likely that Mrs D would have to sell this property or other property to repay the mortgage sooner or later. Although Mrs D had said she would make overpayments, she hadn't in fact done so despite several offers to do so.
- Given Mrs D's age and health (and that of her husband, who was not party to the mortgage), it wouldn't be in her best interests to postpone selling for several more years. By that time, Mrs D and Mr D would be older and might well be in worse health, there was no guarantee the property would increase in value and it might fall,

and she would have paid significantly more interest in the meantime. As Mrs D had no plausible repayment strategy other than the sale of this or other property, I thought that – difficult as it might be – it was better for that to be done now. It would likely be more difficult at the end of any extended term.

- Bol had given fair consideration to Mrs D's proposals but had reasonably concluded that it couldn't agree to a term extension. It had offered reasonable forbearance, and had not acted unfairly in taking repossession proceedings when Mrs D didn't repay the mortgage.

Mrs D brought a further complaint about her mortgage following the conclusion of that complaint. In this complaint she says that Bol has unfairly charged her interest – in particular, because it has charged more than 2.5% above the Bank of England base rate even though the mortgage offer said it wouldn't. And she says that Bol has acted unfairly in adding legal costs to the mortgage. The costs were excessive and unreasonable, Mrs D hadn't been given a breakdown or explanation of how they were incurred, and Bol had not acted fairly in taking legal proceedings rather than allow her to complain to the Financial Ombudsman Service as the pre-action protocol said it should.

Another ombudsman has decided our jurisdiction to deal with Mrs D's complaint. The ombudsman said we could consider the fairness of the SVR from March 2015 – which is six years before Mrs D made this complaint. In doing so we should consider all the circumstances of the case, including the history of the SVR and changes to it before March 2015 insofar as they affect the fairness of the SVR charged after March 2015. And we can consider the legal fees added to the account.

Our investigator didn't recommend that Mrs D's complaint should be upheld. So she has asked for it to be reviewed by an ombudsman.

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.

There are two aspects to Mrs D's complaint – the interest rate and the legal fees – and I'll deal with each in turn.

The interest rate

My fellow ombudsman decided that we can only consider the fairness of the interest rate since March 2015. I agree with her conclusions for the reasons she gave. I also agree that in considering the fairness of the interest rate since March 2015 it's necessary to look at all the circumstances of the case, including changes to the SVR before March 2015 which impact on the fairness of the interest rate charged after that date.

Mrs D took her mortgage out in 2007. Her mortgage had a fixed rate for the first three years, with the SVR applying from 1 September 2010. At the time she took the mortgage out, the SVR was 7.84%.

The mortgage offer included a special condition, which said:

Unless we give you notice to the contrary, our standard variable rate (SVR) will not exceed Bank of England Base Rate plus 2.5% during any period when you are being charged interest on the loan at SVR (or any rate which is set by reference to SVR) and during which you may be obliged to pay an early repayment charge in

accordance with this Offer (except for up to thirty days after the announcement by the Bank of England of any change in its Base Rate). If we give you notice that SVR will exceed Bank of England Base Rate plus 2.5% and you are paying us interest at SVR (or a rate which is set by reference to SVR) when such notice is given, then if you repay the loan in full during the period of ninety days following the date of the notice, you will not be obliged to pay us any early repayment charge specified in this Offer. You will be taken to have received a notice from us under this condition if we have sent it by post either to the property or to your last known address.

Mrs D says that this means that Bol couldn't charge her an SVR that was set at more than 2.5% above Bank of England base rate, and because Bol did in fact charge more than that from 2012, it was acting unfairly.

But I don't think that's what the special condition says. It said that the SVR "will not exceed Bank of England Base Rate plus 2.5% during any period when you are being charged interest on the loan at SVR... and during which you may be obliged to pay an early repayment charge". In other words, the cap of 2.5% above base rate only applies where Mrs D is both paying the SVR *and* is subject to an early repayment charge (ERC).

The mortgage offer says that an ERC only applied until 31 August 2010, while Mrs D was on the fixed rate. There was no period where she was on the SVR and also subject to an ERC – and therefore no period when the cap of 2.5% above base rate applied to her mortgage.

When Mrs D reverted to the SVR, in September 2010, it was 2.99% - having fallen to that level from the 7.84% it was set at when she took the mortgage out in 2007. At the time base rate was 0.5%, and so the SVR was 2.49% above base rate. Even though Mrs D's own mortgage wasn't subject to the cap of 2.5% above base rate, therefore, in practice the SVR was set at that level.

In 2012, Bol increased the SVR, first to 3.99% in June of that year, then to 4.49% in September. There was no change to base rate at this time, so the margin between base rate and the SVR increased from 2.49% to 3.49% and then to 3.99%.

I'm satisfied that in increasing the SVR in this way, Bol did not act in breach of the special condition in Mrs D's mortgage offer. As she was not subject to an ERC at the time, the cap of 2.5% above base rate did not apply and by increasing the SVR to more than 2.5% above base rate, Bol was not therefore acting in breach of the cap.

As well as the special conditions in the mortgage offer, Mrs D's mortgage was also subject to the general terms and conditions. The general terms and conditions limit how Bol can change the interest rate. They say:

We may change the standard variable rate at any time for one or more of the following reasons:

- to reflect changes in our cost of funds (i.e. the cost of borrowing the money we use in our mortgage lending business), for example, caused by changes in market interest rates or by other factors outside our control;
- to enable us to increase the rate we pay to depositors to the level needed to retain their money;
- to reflect changes in the interest rates which other mortgage lenders charge on residential mortgage loans (including buy to let mortgage loans);

- to ensure that the amount we receive from borrowers will enable us to maintain a prudent level of reserves and to meet any other regulatory requirements that apply to us;
- to ensure that the amount we receive from borrowers will enable us to maintain the long-term sustainability of our mortgage lending business;
- to reflect changes in the costs we reasonably incur in administering borrowers' accounts;
- to reflect a change in the risk of shortfalls on borrowers' accounts which we reasonably believe to have occurred as a result of general economic factors;
- to reflect any change in taxation which affects the profit we earn from our ordinary activities;
- to reflect a change in the law, or in any code of practice which applies to us, or a decision or recommendation by a court, ombudsman or regulator.

Mrs D says that this is an unfair term within the meaning of the Unfair Terms in Consumer Contracts Regulations. I've taken the regulations into account as relevant law. I don't think it's likely a court would consider this to be an unfair term. It's not inherently unfair to have a term allowing the variation of an interest rate in a long-term mortgage contract, and this term is reasonably clear about the reasons for which the power to do so can be exercised. There was no ERC applicable to Mrs D's mortgage at the time she was subject to the SVR and so no barrier to exit. In any case, I think the key question for me to decide is whether there was any unfairness to Mrs D in the interest rate she was charged after March 2015 – which involves considering why Bol increased the SVR as well as its contractual power to do so.

Bol has explained to us why it increased the SVR in 2012. We've received that information in confidence. I'm satisfied it's appropriate to do so, subject to providing the summary of that information which follows.

Bol has explained that while not all its mortgages were subject to a cap on the SVR (as, for example, Mrs D's wasn't), in practice it managed its SVR by keeping within the cap. This meant that by the time of the end of the financial crisis the Bol SVR had fallen to 2.99% - significantly lower than the SVRs of most other comparable lenders. Most lenders had reduced the SVRs during the crisis as base rate fell, but had not reduced them to the same extent as falls in base rate – because at this time there was an increasing divergence between base rate and the cost of raising funds to lend on the wholesale markets. Those costs also fell, but did not fall to the same degree that base rate did.

Following the financial crisis, there was a change to prudential regulation of the banking industry in both the UK and Ireland. Those changes required banks to hold greater capital to offset their lending risk than had previously been the case. That meant that Bol had to increase its capital reserves. It was also subject to restrictions on the funds it raised to finance its mortgage lending business.

I'm therefore satisfied that the evidence shows that Bol needed to increase the amount it received from its borrowers to "enable us to maintain a prudent level of reserves and to meet any other regulatory requirements that apply to us" and to "ensure that the amount we receive from borrowers will enable us to maintain the long-term sustainability of our mortgage lending business". The terms and conditions allow it to increase the SVR for those reasons. I'm further satisfied that the amount of the increase was proportionate to the need for it. It follows that Bol was entitled, under the terms and conditions, to increase the SVR in

2012.

This means that by the start of the period I can consider, in March 2015, the SVR was 4.49%. And for the reasons I've set out above, I don't think that was an unfair rate.

Mrs D says that Bol should have reduced the SVR again after 2012. Once it had raised the capital it needed, it didn't need to keep doing so and could have reduced the rate. I've considered this. But I note that the terms and conditions permit Bol to change the SVR – but don't require it to do so. And I don't think it acted unfairly in not reducing the SVR in the period I can consider, from March 2015. The reasons for the increase weren't a one off; it had an ongoing need to maintain a prudent level of capital to comply with its regulatory obligations and to meet the cost of its funding.

Since March 2015, up to when Mrs D made this complaint, the SVR has varied only at the same time as, and to the same extent as, changes in the Bank of England base rate. The terms and conditions allow it to change the SVR to reflect changes in market rates that impact its cost of funds. I don't think these changes to the SVR were unfair.

Taking all that into account, I don't uphold this part of the complaint. Mrs D's mortgage was not subject to a cap on the SVR at any point, so Bol did not act in breach of the offer in charging her an interest rate that was more than 2.5% above base rate from March 2015 onwards. Nor was the interest charged unfair for any other reason; changes before March 2015 that led to the rate being set at the level it was in March 2015 were in line with the terms and conditions, as were the changes to the SVR from March 2015 onwards. I'm not persuaded that Bol charged Mrs D interest unfairly from March 2015 onwards.

The legal fees

In my previous final decision I found that Bol had acted fairly and reasonably at the end of the mortgage term in trying to reach an arrangement with Mrs D for her mortgage to be repaid within a reasonable time. I found that it was reasonable for Bol to decline Mrs D's proposal for a lengthy term extension when there was no prospect of repaying the mortgage at the end of an extended term that wasn't already available to her, and a term extension risked making a bad situation worse. And I found that in light of that it was reasonable that Bol had started legal proceedings as a last resort when no agreement could be reached.

I'm not going to revisit those conclusions in this decision. Under the rules of the Financial Ombudsman Service, a final decision is just that – final. Where a matter has been decided in a previous complaint, we wouldn't revisit it or re-open the complaint unless there is material new evidence, likely to affect the outcome, which has since become available. That's not the case here. There is no new evidence that wasn't available when I made my previous decision.

That being the case, I am not considering here whether it was fair and reasonable for Bol to take legal action in 2018. I've already decided it was. But I will consider whether later action, and the addition of the costs of legal action (including the action in 2018) to the mortgage balance, were fair and reasonable.

The terms and conditions of Mrs D's mortgage say, at section 14

(a) In this condition, "costs" means:

(i) all costs, charges and expenses (including VAT) we reasonably incur in connection with the mortgage deed or the security it gives us, including (but not limited to) the examples given in condition 14(b); and

(ii) any administration fees we charge under condition 14(c).

(b) Examples of the costs, charges and expenses mentioned in condition 14(a) are:

- the costs of any legal proceedings brought by or against you or anyone else in connection with the mortgage deed, the property, the security the mortgage deed gives us or the valuation of the property;
- the costs of recovering money secured by the mortgage deed, protecting or preserving the property or the security the mortgage deed gives us or exercising any of our rights and powers under the general law or these conditions;

...

(d) You must pay our costs in full so long as they are reasonably incurred and are reasonable in amount.

(e) You must pay our costs when we ask for them.

(f) If we incur any costs, we will charge interest on them under condition 6(a) from the date on which we ask you to pay them under condition 14(e).

There is also a special condition in the mortgage offer which says:

Condition 14(d) of our Residential Mortgage Conditions is amended by this Offer so that the existing words in 14(d) are deleted and replaced with the following "You must pay our costs on what is called the indemnity basis. This means that you must pay them in full unless they were unreasonably incurred or are unreasonable in amount."

This means that under the terms and conditions, Bol is entitled to add to the mortgage balance the costs of legal proceedings, unless it was unreasonable to incur them, or unless they are unreasonable in amount. The terms and conditions are relevant for me to take into account in deciding whether Bol has acted fairly and reasonably in all the circumstances.

When no agreement could be reached in 2018, Bol referred Mrs D's mortgage to its solicitors for legal action to be taken. It instructed solicitors in July 2018, and the solicitors prepared for and issued legal proceedings.

In December 2018 a court date was set for January 2019, and Mrs D complained to Bol. In January 2019 Mrs D told Bol that she intended to bring her complaint to the Financial Ombudsman Service and asked for the court proceedings to be stayed. Bol agreed to a stay – but the bank and Mrs D couldn't agree to the terms on which they would be stayed. Mrs D wanted an indefinite stay, but Bol would only agree to a three month stay. In February 2019 the court stayed the proceedings until June for us to consider Mrs D's complaint.

In July 2019 our investigator didn't uphold Mrs D's complaint. As she didn't respond, we closed the case file. Bol returned the case to its solicitors to resume legal action and a court date was set for March 2020.

Just before the hearing, Mrs D got back in touch with us and said that she didn't agree with the investigator's view and wanted an ombudsman to review her complaint. Bol agreed to adjourn the hearing for a month, until April 2020.

By then, the coronavirus pandemic had begun. One of the measures for the duration of the

pandemic was a moratorium on possession proceedings. So Bol took no action during 2020. In 2021 Mrs D brought this complaint, and Bol has not taken further action pending the outcome of the complaint.

The legal fees were therefore incurred in respect of the court action between 2018 and 2020. I've already said, in my previous decision, that it wasn't unreasonable for Bol to have begun legal action in 2018 when no agreement for repayment of the mortgage could be reached.

Bol then agreed to stay the proceedings to allow Mrs D to bring her complaint to the Financial Ombudsman Service. It only resumed proceedings when our investigator didn't uphold the complaint and, because Mrs D didn't reply, the complaint appeared to be at an end. The proceedings were stayed again when Mrs D requested an ombudsman's decision just before the re-listed hearing.

The following costs have been added to the mortgage balance:

Invoice date	Amount	Detail
16 January 2019	£814.60	Includes £355 court fee and Land Registry search fees
19 February 2019	£3,091.20	Includes preparation for and attendance at the February 2019 hearing on whether the proceedings should be stayed and for how long. Total legal fees £3,270 plus VAT, capped to £2,500 plus VAT, plus disbursements
26 March 2019	£414	Work following the hearing in February
25 April 2019	£360	Various emails
24 May 2019	£414	Updating on progress on complaint to Financial Ombudsman Service
29 October 2019	£162	Contacting Mrs D and matters arising
27 February 2020	£864	Work done to re-start proceedings ahead of March 2020 hearing
23 March 2020	£2,793.60	Preparing for March 2020 hearing, adjourned at the last minute when Mrs D requested an ombudsman's decision

I'm satisfied that Bol actually incurred these costs, and that it was reasonable to do so. Of the two larger invoices, the first relates to the initial hearing that was stayed when Mrs D brought her complaint. Before that, she had requested adjournments because she was going to be away, and there was also disagreement about how long the stay should be. I think the costs are reasonable in relation to the amount of work done at this time. The second larger invoice relates to the re-started proceedings in 2020. The March 2020 hearing was listed and prepared for, and only adjourned at the last minute – because Mrs D requested an ombudsman's decision just before the hearing, even though it was several months after the investigator had given her outcome. Again, I think these costs were reasonable in the

circumstances.

Overall, I'm satisfied that under the terms and conditions Bol was entitled to add its costs to the mortgage balance. Those costs reflected work that was actually done, in circumstances where it was reasonable for Bol to take legal action because no agreement to repay the mortgage had been reached. The costs are larger than they might otherwise be because Mrs D repeatedly requested adjournments and a final decision at the last minute. I don't think the sums Bol has added to the balance are unreasonable in all the circumstances and so I don't uphold this part of the complaint either.

Now that Mrs D's complaint is at an end, and the coronavirus moratorium has ended, it's possible that Bol will restart proceedings. I hope Mrs D has used the time since the last action in 2020 to find a way to repay the mortgage balance. If she has new proposals, Bol will need to give them fair consideration, bearing in mind repossession is a last resort. But it is entitled to expect the mortgage to be repaid.

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 Mrs D to accept or reject my decision before 15 January 2024.

Simon Pugh
Ombudsman