

The complaint

Mr and Mrs B, complain that Bank of Scotland plc trading as Halifax (“BOS”) treated them unfairly by overcharging them on their mortgage.

What happened

In 2008, Mr and Mrs B received a mortgage offer from BOS – the mortgage completed shortly afterward. The offer confirmed an initial rate of 5.72% would apply to the mortgage until 30 September 2011, after which, BOS’ standard variable rate (“SVR”) would apply.

On 17 November 2021, Mr and Mrs B’s previous representative sent a letter of complaint to BOS on their behalf. The letter set out that Mr and Mrs B sought to claim damages in relation to being overcharged interest on their outstanding mortgage balance due to the “unlawful interest rates” and any variations in the interest rates charged by BOS.

The letter set out that Mr and Mrs B consider that the mortgage offer issued in September 2008 contained unfair terms pursuant to the Unfair Terms in Consumer Contracts Regulations 1999 (“UTCCR”). Elaborating on this point, Mr and Mrs B’s then representative argued:

- Section four of the offer letter is unfair as the term within did not explain what was meant by the “Standard Variable Rate”, and Mr and Mrs B were misled into believing that this rate would vary in accordance with the Bank of England base rate, rather than at BOS’ discretion.
- Mr and Mrs B do not accept that the mortgage general terms and conditions, which defined the “Standard Variable Rate” were incorporated into the contract.
- It is unfair to expect consumers, such as Mr and Mrs B, to “pore over the small print” to understand the meaning of a key term like the interest rate.
- The meaning of the “Standard Variable Rate” and particularly the fact that BOS could vary it at its discretion, should have been set out in the mortgage offer. The failure to do so, renders the term within section four of the mortgage offer unfair for the purposes of UTCCR such that BOS is unable to rely on it.
- A term included within a contract allowing a lender to vary interest rates entirely at its own discretion without providing grounds to do so is unfair.
- The term lacks transparency and Mr and Mrs B did not have an effective right to termination due to the presence of an Early Repayment Charge (ERC), as well as other costs associated with discharging their mortgage and switching to another lender.
- Section 15 of The Supply of Goods and Services Act should be deemed to apply in this case. This allows for the consideration of a ‘reasonable rate’ being applied to Mr and Mrs B’s mortgage balance rather than BOS’ SVR.
- BOS’ actions constitute a breach of Principle 6 of the FCA Handbook whereby a firm must pay due regard to the interests of its customers and treat them fairly. And a

breach of MCOB 11.5(1)(b) which requires a firm to treat customers fairly by assessing, before deciding to vary a regulated mortgage contract or home purchase plan; whether the consumer will be able to repay the sums borrowed and interest.

- Mr and Mrs B seek to claim the difference between the amount of interest they paid on their mortgage and the amount they would have paid had it been subject to what they deem to be a reasonable rate.

BOS responded to the letter of complaint on 29 November 2021, disagreeing with Mr and Mrs B's allegations. In summary, BOS argued:

- The mortgage documentation clearly explained that its SVR could change and the bank is allowed to change its SVR in the circumstances set out in the mortgage conditions.
- The descriptions of the interest rate set out in the mortgage offer are worded in accordance with the requirements of the MCOB rules.
- The mortgage conditions expand on the offer and include details of the bank's right to change the variable rate. It does not agree that, by virtue of them being set out separately from the mortgage offer, Mr and Mrs B shouldn't be expected to have read them.
- The ERC ceased to apply to the mortgage once the fixed rate came to an end. So, Mr and Mrs B were able to repay the mortgage without incurring any charges under the terms of the mortgage contract.
- There is nothing in the terms and conditions of the mortgage that suggest a change in the Bank of England base rate would, or should, result in a change to its SVR. It does not agree that the mortgage documentation suggests, implies or states that the Mr and Mrs B's mortgage would track base rate.
- It disagrees that the terms are unfair contract terms.
- BOS also set out that it thought Mr and Mrs B ought to have been aware that their mortgage did not track base rate at the outset of the mortgage from the mortgage documentation they received and from the financial advice they received before entering the mortgage. It also highlights that it wrote to Mr and Mrs B in March 2012 to notify them of a change to the bank's SVR. The change in SVR at that time was not linked to any change in the Bank of England base rate and it considers this was made clear in its letter.

Unhappy with BOS' response, Mr and Mrs B's representative referred their complaint to our service on 17 March 2022.

Prior to one of our investigators reviewing Mr and Mrs B's complaint, their representative decided they no longer wished to pursue this complaint on their behalf and chose to withdraw from acting as their representative. Mr and Mrs B said they still wished to continue with the complaint on their own.

Following Mr and Mrs B's decision to continue with their complaint, one of our investigators issued an assessment explaining the limitations to our jurisdiction and what this meant for Mr and Mrs B's complaint, before also going on to not uphold the part of their complaint that had been brought in time.

In summary she said:

- The complaint was raised on 17 November 2021, so the investigator concluded that a complaint about all of the interest charging events that took place within six years prior to this, had been raised in time. Which would be from 17 November 2015 onward. So, she was satisfied that she could consider whether the sums charged from 17 November 2021 onward were fair and reasonable.
- She noted that DISP 2.8.2(R) has two parts, the second providing for a scenario where the consumer seeks to bring a complaint more than six years after the event complained of. Specifying such a complaint must be brought within three years from the date the consumer became aware, or ought reasonably to have become aware, that they had cause for complaint. But she thought Mr and Mrs B ought reasonably to have been aware they had cause for complaint from September 2011 when their mortgage reverted to the SVR (given what their representative said they knew at the time they took out the mortgage) or, at the very latest, by March 2012 when they received a letter explaining that their SVR was going to change, despite there not being a corresponding change in the Base Rate. So, she didn't think this gave them any more time.
- In considering the part of the complaint that had been brought in time, the investigator set out that she had taken into account the relevant law, regulations and what is fair in all the circumstances, meaning whether the term used to vary the SVR was unfair and whether BOS' use of those terms led to unfairness. Having done so, she didn't think BOS' actions in varying its SVR led to Mr and Mrs B being overcharged interest on their mortgage.
- She accepted that the Bank of England base rate had reduced significantly since Mr and Mrs B first took out their mortgage but noted that BOS were not contractually obligated to have its SVR track base rate. Instead, she was satisfied BOS had varied its SVR in line with the terms and conditions of Mr and Mrs B's mortgage and had exercised those terms fairly.

BOS responded to say it didn't have any further comments following the investigator's assessment.

Mr and Mrs B responded to say they had been complaining about their interest rate and the impact it was having on their financial circumstances for over 15 years. So, they disagreed with the investigator's findings that part of this complaint was out of time and her finding that it should not be upheld.

As the complaint could not be resolved informally, it has been passed to me for a final decision.

Why I can only look at part of this complaint

BOS' previously raised an objection to our service considering Mr and Mrs B's complaint, in short, it thought Mr and Mrs B had brought their complaint too late under the DISP rules. In contrast, Mr and Mrs B disagree that any part of this complaint should be out of time – they say they've been in discussions with BOS about the interest rate and its impact on them for over 15 years.

The rules of the Financial Ombudsman Service – set out in the DISP section of the Financial Conduct Authority (FCA) Handbook – prescribe the time limits applicable to complaints. DISP 2.8.2R provides that

“The ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:

...

(2) more than

(a) six years after the event complained of; or (if later)

(b) three years from the date on which the complainant became aware (or ought to have become aware) that he had cause for complaint;

Unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received;

Unless

(3) in the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2R or DISP 2.8.7R was as a result of exceptional circumstances...

In this case BOS has not consented to our consideration of any matter that is out of time and while Mr and Mrs B say they have raised concerns about the interest rate before, they acknowledge that they do not have a record of this. I also haven't been made aware of any exceptional circumstances that prevented Mr and Mrs B from being able to raise their complaint in time.

In respect of whether this complaint was brought in time, I'm satisfied I have the jurisdiction to consider the complaint from 21 November 2015, being six years before Mr and Mrs B first brought this complaint. And I'm satisfied complaints about charges and interest before this date are out of time pursuant to DISP 2.8.2R, since Mr and Mrs B knew or ought reasonably to have known – of cause for complaint.

If Mr and Mrs B expected their SVR to track base rate (as stated in their original complaint letter to BOS), then it would have been clear to them that it had not done so when they reverted to the SVR in 2011 with a margin higher over base rate than they had expected would be the case. And if not then, certainly by March 2012 when they received a letter informing them of an impending change to their SVR which was not aligned to a change in base rate.

In considering the fairness of the interest charged from 21 November 2015 onwards, I need to consider the whole history of the interest rate, including before 21 November 2015. That is because each time BOS made a decision to change the SVR, the SVR remained at that revised level until it made a further decision to change it – from the starting point of the level resulting from the previous variation. Therefore, the SVR charged from 21 November 2015 is the sum of the parts of the history that went before. And if any of those parts were themselves potentially unfair, that *might* mean that the SVR charged from 21 November 2015 is itself unfair.

I will also need to consider whether the variation clause is itself an 'unfair term' as a matter of law. Both of those things are part of 'all of the circumstances of the case' that I am required to consider under the DISP rules and are potentially relevant to whether interest charged from 21 November 2015 onwards is fair and reasonable.

Having decided that I only have the power to consider Mr and Mrs B's complaint from 21 November 2015 onwards, I will now go on to consider the merits of the part of their complaint that is in time.

What I've decided on the part of the complaint that is in time – 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, I am required by DISP 3.6.4R of the Financial Conduct Authority's ("FCA") Handbook to take into account:

'(1) relevant:

- (a) law and regulations;
- (b) regulators' rules, guidance and standards;
- (c) codes of practice; and

(2) (where appropriate) what [I consider] to have been good industry practice at the relevant time.'

I also focus on what I think is material and relevant to reach a fair and reasonable outcome. So, although I have read everything that has been supplied to me, I may not address every point that has been raised.

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

Mr and Mrs B's previous representative raised many individual complaint points both to BOS directly and to this service and as Mr and Mrs B have not presented any additional complaint points of their own, it is the complaint letter submitted by the representative in November 2021 that frames the scope of this complaint. Overall, I consider the complaint to break down into two key points:

- Mr and Mrs B had an expectation that their mortgage would track the Bank of England base rate once it reverted to the variable rate. As it did not do so, BOS has treated them unfairly.
- Mr and Mrs B have paid an unfairly high rate of interest compared to what they should have done from 21 November 2015 onwards because in varying the SVR BOS (i) relied on an unfair term and/or (ii) did not vary the SVR for a reason allowed by the terms and conditions.

I will deal with each point in turn.

Did BOS' actions cause Mr and Mrs B to have a legitimate expectation that their mortgage would track the Bank of England Base Rate?

Mr and Mrs B's representative considered BOS' actions to have given Mr and Mrs B a legitimate expectation that their mortgage would track base rate.

The mortgage documentation is clear in that Mr and Mrs B's mortgage would revert to the SVR once their fixed interest period expired and that the SVR could go up as well as down. And I haven't seen any evidence that persuades me that BOS was obligated, contractually or otherwise, to have its SVR track Base Rate.

I am aware Mr and Mrs B's representative argued that, as the mortgage general terms and conditions were not included in the mortgage offer letter, they should not form part of the mortgage contract. I disagree with this conclusion.

BOS was not obligated to set out all the terms and conditions governing its mortgages in one document. And while I appreciate this means Mr and Mrs B would need to read more than one document to understand and appreciate the terms that governed their mortgage, given this was a substantial liability, secured on their principal asset, I think Mr and Mrs B ought reasonably to be treated as if they had read all of the information provided.

I'm also not aware of any evidence that can properly be said to show that BOS acted in a way where it committed to keep the margin between base rate and the SVR the same – the fact that this margin didn't substantially change over a period of time isn't sufficient to indicate that BOS had agreed to give up its right as set out in the contract, and I think that in commercial terms this would have been an odd decision, given the extent to which funding costs can change. Finally, I am not aware of any principle of law that, on the facts of this case, would obviously commit BOS to doing so.

So, it follows that I do not uphold this part of Mr and Mrs B's complaint.

The fairness of the interest charged on Mr and Mrs B's mortgage

I must consider whether from 21 November 2015 onwards, Mr and Mrs B have paid an unfairly high rate of interest. To assess the fairness of the interest rate terms, it is helpful to first set out the relevant terms themselves:

The relevant section of mortgage offer issued to Mr and Mrs B by BOS in September 2008 set out that their three-year fixed interest rate would operate as follows:

"4. Description of this mortgage

...

- a fixed rate of 5.720% which ends on 30/09/2011.

Your loan reverts to Halifax standard variable rate, currently 7.000%, after 30/09/2011 until the end of the term.

...

The interest rate(s) applicable to this mortgage can go up or down..."

The relevant terms and conditions dated 2007 say:

"6. The interest we charge

...

6.10 We can change the interest we charge on any part of the capital at any time, unless the offer, any extra agreement or any flexible options agreement says we cannot. We can change the interest rate for any of the following reasons.

(a) to reflect changes in the cost to us of raising the money we lend to our customers with mortgages of residential property.

...."

The mortgage terms and conditions set out that when the initial fixed rate expired in 2011, the mortgage would revert to the lender's SVR and that the SVR could be varied in line with terms of the mortgage.

I've considered whether the terms in Mr and Mrs B's agreement go further than reasonably necessary to protect BOS' legitimate interests and whether the variation clauses are sufficiently transparent. Having done so, and while overall I am satisfied with fairness of the variation clause, I accept that there is a possibility that a court might conclude that parts of the clause are overly broad and could be more transparent. But I think it's important to be

clear that whatever the answer to this question, the central issue I need to decide is whether there has been any unfairness to Mr and Mrs B from 21 November 2015 onwards. The fairness of the underlying variation clause will not of itself properly answer that question.

Our service is required to consider what is fair and reasonable in all the circumstances. That includes, but is not limited to, relevant law. So, while I've taken account of the relevant law regarding unfair contract terms, I've also thought more broadly about whether, and the extent to which, the way in which the terms have been used has resulted in unfair treatment for Mr and Mrs B. I think that is the ultimate question I need to answer in deciding whether to uphold this case.

Has BOS exercised the terms fairly?

In answering this question, I have explained that although I'm only able to consider the fairness of interest charged to Mr and Mrs B's mortgage since 21 November 2015, why it's necessary for me to consider historic changes to BOS' SVR.

I've considered all the available evidence and all of the changes BOS has made to the SVR since Mr and Mrs B took their mortgage. Having done so, I am not persuaded that anything BOS has done in varying the rate has led to Mr and Mrs B being treated unfairly. I have set out why below.

For reasons of commercial confidentiality, I haven't set out in detail the evidence the BOS has been able to provide in full. Nor has our service provided copies of it to Mr and Mrs B. 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 BOS has provided in confidence, subject to the summary of it I have set out in this decision.

Between September 2008 (when Mr and Mrs B took out their mortgage) and September 2011 when their fixed interest period ended, the difference between the Bank of England Base Rate and the SVR (the 'margin') increased from 2.35% to 4.34%. Whilst the SVR did reduce during this period, it didn't reduce by the same proportion as the reduction in the base rate.

I've already set out that Mr and Mrs B's mortgage was not a tracker mortgage, so BOS was not contractually obligated to set its SVR at a level that tracked the base rate for duration of the mortgage term. Nor is it the case that Mr and Mrs B's mortgage had a 'cap' preventing BOS' SVR from increasing beyond a certain 'margin' above base rate. So, there was nothing in the contract that expressly prohibited BOS 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 BOS to vary the SVR itself has to be fair (to prevent businesses taking advantage of customers), and BOS had to ensure that in varying the SVR it only did so for one of the reasons set out in the contract.

At this time, the mortgage market was going through a period of significant change as a result of the global financial crisis. This impacted the funding costs of businesses, including BOS, 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 and that are not directly linked to base rate. So, I think there are likely to be objectively justifiable reasons why BOS did not reduce its SVR at the same level as the reduction in the Bank of England Base Rate.

BOS has told us it experienced unusual volatility in its long-term funding costs at this time and it has been able to show the resulting impact on its overall margins as well as illustrating the spread between its cost of funding and the reductions in base rate.

It is accepted that 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 BOS' 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.

While the evidence provided by both parties is limited, I have not seen any evidence to suggest the changes BOS made were arbitrary, excessive, or unfair. Rather, the evidence I've seen satisfies me that BOS acted to protect its legitimate interests while balancing its obligation to treat Mr and Mrs B fairly. And I'm further satisfied that, albeit limited, the evidence BOS *has* been able to provide for this period is corroborated by evidence of wider market conditions at the time.

Following the financial crisis, Mr and Mrs B's SVR followed the movements in base rate on all but one occasion, in 2012. At this point, BOS increased the SVR by 0.25% outside of any change to base rate. It wrote to Mr and Mrs B to let it know of the proposed change and has shared evidence with this service that the change was in line with its terms and conditions and for genuine business reasons.

So even if I were to conclude that the relevant terms were unfair pursuant to UTCCR, I am not persuaded that BOS operated them in an unfair manner when setting and varying the interest rate that applied to Mr and Mrs B's mortgage. That being the case, I don't think there is any basis to say that they somehow contributed to Mr and Mrs B being charged an unfairly high rate of interest on their mortgage during the period I can consider, and I've seen no evidence to say that the interest they were charged during that period was unfair for any other reason.

I have also considered the representative's point that BOS has breached Principle 6 of the FCA Handbook and MCOB 11.5(1)(b). Having done so, and for much the same reasons set out above, I'm not persuaded it has.

Finally, I am aware Mr and Mrs B have mentioned that the interest rate charged by BOS caused them to experience financial difficulty. I am sorry to hear this, but as I have found BOS charged interest in line with the terms and conditions that govern their mortgage and did so fairly, I am not upholding this complaint. I have not seen evidence that Mr and Mrs B have complained to BOS about how it did or did not support them during their financial difficulties, so I have not commented on that point in this decision.

My final decision

For the reasons set out above, I do not uphold this complaint and therefore make no award against Bank of Scotland plc trading as Halifax.

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

Lucy Wilson
Ombudsman