

The complaint

Mr and Mrs H complain that their mortgage lender, Mortgage Express, has unfairly increased the interest rate on their mortgage. Their representative says they've been taken advantage of because they're unable to move their mortgage elsewhere.

What happened

Mrs H and a third party took out a mortgage with a lender called GMAC-RFC in March 2007. They borrowed around £117,000 over a 25 year term, on interest only terms. The mortgage offer said that a fixed rate of 5.99% would apply until 31 March 2009, followed by the standard variable rate (SVR) for the rest of the term. At the time Mrs H took the mortgage out the SVR was 7.24%. By March 2009 it had fallen to 4.84%. It remained at that level until 2016.

The mortgage was transferred from GMAC to Mortgage Express, as part of a wider transfer of business, in June 2007. In 2008 the third party was removed from the mortgage and replaced with Mr H. The mortgage continued in the names of Mr and Mrs H, with Mortgage Express as the lender, until it was redeemed in February 2021.

At the time Mortgage Express was a wholly owned subsidiary of Bradford & Bingley (B&B). During the global financial crisis of 2007 – 2009, B&B collapsed and was taken into government ownership. Mortgage Express remained a separate firm owned by the nationalised B&B.

Mr and Mrs H's representative complained to Mortgage Express in 2021, saying:

- Mortgage Express doesn't offer new interest rates to existing customers, and Mr and Mrs H were unable to move their mortgage elsewhere. Mr and Mrs H had a reasonable expectation that they would be able to take a new interest rate on the expiry of the existing one or later, but Mortgage Express failed to make one available.
- As a result Mr and Mrs H had to remain on Mortgage Express's SVR – they had no other option. Mortgage Express did not take that into account in setting the level of interest it charged.
- Mortgage Express's SVR has been consistently high, even at a time of low interest rates and when the Bank of England base rate was 0.5% or less. The SVR is excessive in comparison with other lenders in the market.
- The level of the SVR, and increases to it, were not justified by the terms of the mortgage contract – either the explicit terms, or an implied term that the SVR would not be varied arbitrarily, unreasonably, improperly, or dishonestly.
- As a result, Mortgage Express treated Mr and Mrs H unfairly and took advantage of their situation. The interest rate should be reduced to a fair rate and overpayments above that should be refunded to Mr and Mrs H. Mr and Mrs H believe this should be the Bank of England base rate plus 1.5%. Mr and Mrs H believe that it was Mortgage

Express's previously stated policy to set its SVR at around 1.5% above base rate.

Mortgage Express didn't agree. It said:

- It had not acted in breach of the mortgage terms and conditions – either an express term or an implied term (and it did not accept that there was an implied term in any case).
- There was no expectation that the SVR would track base rate, by 1.5% or at all. When Mortgage Express had varied the SVR it had done so for good reasons as permitted by the terms and conditions. Doing so was not unfair and did not amount to taking advantage of Mr and Mrs H.
- Mr and Mrs H could not have had a reasonable expectation of a new interest rate at the end of the fixed rate. The mortgage offer was clear that it would revert to the SVR without a discount after 31 March 2009 and that is what happened. Mortgage Express does not offer new interest rates to any customers, but it did not put any barriers in the way of Mr and Mrs H moving their mortgage to a new lender to get a better rate.

Our investigator reviewed the complaint and didn't uphold it, so Mr and Mrs H's representative asked for an ombudsman to make a final decision.

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 rules of the Financial Ombudsman Service provide that complaints have to be made within six years of the date of the event complained about – or, if it gives more time to complain, within three years of when the complainant knew or ought reasonably to have known of cause for complaint. Unless there's a record of an earlier complaint we can't consider a complaint made outside those timescales. We can consider an out of time complaint if the firm complained about consents – but Mortgage Express doesn't consent – or if there are exceptional circumstances that prevented a complaint being made in time. Mr and Mrs H's representative hasn't suggested there were any such circumstances.

Applying the time limit rules to this case, I note that Mr and Mrs H first complained to Mortgage Express on 7 September 2021. Their complaint is primarily about two things – the ongoing failure to offer a new interest rate, and the fairness of the interest rate they were actually charged.

Each time they are charged interest, Mortgage Express has an obligation to do so lawfully and fairly. And if it doesn't, that gives rise to fresh cause for complaint each time interest is charged. That means that we can consider the fairness of each interest charging event for six years before Mr and Mrs H complained. I don't think we can go back further than that under the three year part of the rule, though. That's because Mr and Mrs H knew what interest rate they were being charged from time to time, because Mortgage Express told them that regularly in letters and statements. They would have known that the interest rate was higher than they were expecting and that it did not reduce as far as base rate fell – as they were expecting. That's enough to have told them they had cause for complaint.

Mr and Mrs H's representative says that they only became aware of cause for complaint when they saw media reports about mortgage interest rates in 2019, which led them to seek legal advice. But the rule is not just about when Mr and Mrs H actually knew of cause for

complaint, it's also about when they ought reasonably to have known. Knowledge of cause for complaint merely requires knowledge that something has gone wrong causing loss for which Mortgage Express is responsible. I'm satisfied that Mr and Mrs H ought reasonably to have realised that they were being charged a higher interest rate than they were expecting more than three years before they complained – and that's enough to say they ought reasonably to have realised they had cause for complaint.

The same is true of the ongoing failure to offer a new interest rate. Mr and Mrs H would have known they were on the SVR and that Mortgage Express hadn't offered them a new rate – as they say they expected it would. That was enough to tell them they had cause for complaint about that. And so we can only consider the failure to offer a new rate for the six years leading up to the complaint.

In both cases, therefore, I will only be considering the fairness of Mortgage Express's actions since 7 September 2015.

In considering the fairness of the interest rate charged, it will be necessary to consider the whole history of the interest rate – since earlier variations to the SVR made before the six year period may still be relevant to the interest rate charged during the six year period. As such, they form part of all the circumstances of the complaint about the fairness of interest charged in the last six years.

Offering a new interest rate

Mr and Mrs H's representative has complained that Mortgage Express didn't offer them any new interest rates, either when their fixed rate ended or later.

Mortgage Express didn't offer interest rates to any existing customers, so I don't think Mr and Mrs H were treated less favourably than other Mortgage Express customers. I don't think it was unfair that Mortgage Express didn't offer them a new interest rate after 7 September 2015. There's nothing in either the mortgage terms and conditions or the mortgage offer that says it would do so. The mortgage offer makes clear that the mortgage would be charged at the SVR after the end of the fixed rate period.

It's true that many mortgage lenders do offer new interest rates to existing customers – but not all do. There's no obligation, either in the rules of mortgage regulation, in law, or in the terms of Mr and Mrs H's mortgage that Mortgage Express would do so in their case. But Mortgage Express didn't stand in their way or prevent them from shopping around and moving the mortgage to another lender to access a better deal – there was only an early repayment charge applicable up to the end of the fixed rate, for example, so Mortgage Express didn't stand in the way of Mr and Mrs H seeking a better deal. There was no ERC from April 2009, so no barrier after 7 September 2015 in the period I can consider.

I don't therefore uphold this part of the complaint. I'll turn now to the fairness of the interest rate Mr and Mrs H were charged.

The fairness of the interest rate charged after 7 September 2015

Mr and Mrs H's mortgage was subject to the SVR from 1 April 2009. By then the SVR had reduced from 7.24% when they took the mortgage out to 4.84%. It remained at that level until 2016. Between 2016 and when Mr and Mrs H redeemed the mortgage in February 2021 the SVR varied in line with Bank of England base rate.

In changing the interest rate from time to time, Mortgage Express was limited in its actions by the terms of the mortgage contract. The terms and conditions are the ones entered into

by GMAC – they remained in force and applicable after the transfer. There's a term which says that the lender (GMAC, then Mortgage Express) could only vary the interest rate in certain circumstances:

3.1 If the *interest rate* is the *standard variable rate* we may vary it for any of the following reasons:

- (a) to reflect a change which has occurred, or which we reasonably expect to occur, in the *Bank of England base rate* or *interest rates* generally;
- (b) to reflect a change which has occurred, or which we reasonably expect to occur, in the cost of the funds we use in our mortgage lending business;
- (c) to reflect a change which has occurred, or which we reasonably expect to occur, in the interest rates charged by other mortgage lenders;
- (d) to reflect a change in the law or a decision by a court; or
- (e) to reflect a decision or recommendation by an ombudsman, regulator or similar body.

Mr and Mrs H's representative says that there should also be an implied term that Mortgage Express shouldn't exercise its power to vary the interest rate arbitrarily, improperly, unreasonably, or dishonestly. That's really a question of contract law, but I don't think it's something I need to decide for the purposes of this complaint – since I don't think it adds anything substantial to the central question I need to consider. That's whether it acted fairly in setting the rate during the period I can consider. Deciding that question includes consideration of the circumstances in which it used condition 3.1 to vary the interest rate. If Mortgage Express did exercise its contractual power arbitrarily, improperly, unreasonably, or dishonestly, it would follow that it wasn't acting fairly whether or not there was an implied term to that effect.

Mr and Mrs H's representative hasn't specifically argued that condition 3.1 is an unfair term within the meaning of the Unfair Terms in Consumer Contracts Regulations, though this is something I've considered too as it's relevant law for me to take into account. But while I've taken into account the law, in deciding what's fair and reasonable in all the circumstances in respect of interest charged after 7 September 2015, I think the central question for me is whether Mortgage Express acted fairly in setting the rate during that period – which includes taking account of the way Mortgage Express made use of the terms and conditions.

During the period that's in time, the interest rate was varied only to reflect changes to the Bank of England base rate. That's something explicitly allowed for in the terms and conditions, and I note it's been said that this is something Mr and Mrs H expected would happen. I don't think the variations to the SVR between 2015 and February 2021, when Mr and Mrs H repaid their mortgage, were unfair.

I've also thought about whether the SVR was set at a fair level at the start of the period that's in time. And to consider that I've thought about the historic variations to the SVR, which – from the starting point of when Mrs H and the third party took the mortgage out – cumulatively led up to the rate they were charged from 7 September 2015 onwards. That's because if one of those earlier changes was not made in accordance with the contract, for example, it might not be fair to charge an interest rate from 7 September 2015 which relied – in part – on that earlier variation.

In making the changes to the SVR it made from when the mortgage was taken out to when it

reached 4.84% in late 2008 – which was the rate when Mr and Mrs H became subject to the SVR, and after which there were no further changes before 7 September 2015 – Mortgage Express has told us that it relied on condition 3.1 (b) – to reflect actual or anticipated changes in the cost of funding its mortgage lending business.

Mortgage Express has given us detailed information about the cost of funding its mortgage lending business. I'm satisfied it's appropriate to receive that information in confidence, as permitted by our rules, subject to providing a summary of it.

In summary, the information shows that Mortgage Express was funded by its parent company, B&B, in the form of loan facilities. B&B in turn, before its collapse and nationalisation, raised funding on the wholesale markets.

Wholesale market funding costs are generally driven by or related to the LIBOR rate, not the Bank of England base rate. Prior to the financial crisis, LIBOR and base rate were broadly comparable. But during the financial crisis base rate was reduced substantially as a tool of wider macro-economic policy, whereas the cost of wholesale funding also reduced but not to the same extent. The result was that there was a greater divergence between base rate and LIBOR during this period.

That divergence was reflected in the fact that across the industry – not just in respect of Mortgage Express – lenders' SVR rates reduced (reflecting the reductions in LIBOR) but not by as much as base rate (reflecting the disconnect between the two). In other words, the margins between base rate and SVRs increased at this time. I'm aware that this was the case from my knowledge of other complaints and my knowledge of the mortgage industry, supported by contemporary and later reports of market conditions.

Following B&B's collapse, it was less exposed to movements in the wholesale markets and became primarily government funded. There were certain conditions and costs associated with its government funding – which in turn influenced the funding it, as the parent company, was able to provide to Mortgage Express.

Having considered all this information, I'm satisfied that when Mortgage Express made changes to the SVR between 2006 and 2008, it did so relying on condition 3.1. I'm further satisfied that it was entitled to rely on condition 3.1 at this time. In particular, it was entitled to rely on condition 3.1 (b) when reducing the SVR but increasing the margin over base rate, because the cost of funding its mortgage lending business was in fact changing, and the changes to the SVR reflected the changes to the cost of funding its mortgage lending business. It's true that Mortgage Express ceased to be an active mortgage lender, seeking out new business. But it still operated a mortgage lending business in respect of its existing loan book, which included Mr and Mrs H's mortgage.

Mr and Mrs H's representative says that Mortgage Express had a policy, and Mr and Mrs H had a reasonable expectation, that its SVR would be kept at around 1.5% above base rate – and by increasing the margin it therefore acted unfairly. I've seen no evidence that there was such a policy, or that if so it included Mr and Mrs H's mortgage. The archived website the representative refers to simply says that Mortgage Express's variable rate products are set at around 1.5% above base rate. It's not clear that this is referring to the SVR – as opposed, for example, to its base rate tracker rates – and if it is, this is at best a general statement of Mortgage Express's aspirations around the time it made the statement. It's not a binding contractual commitment to Mr and Mrs H.

This statement was also made before the financial crisis – which, as I've said, led to a dislocation between base rate and the cost of funding mortgage lending. And so even if it was a statement of Mortgage Express's general aspirations in managing its SVR – which I

haven't found to be the case – that doesn't mean that in the very different conditions of the financial crisis and its aftermath Mortgage Express is barred from making changes to its SVR merely because they contradict something it said – non-contractually – in the years before the crisis.

There's no such linkage between the SVR and base rate in Mr and Mrs H's mortgage offer or terms and conditions, and I've not seen any evidence that GMAC led Mrs H and the third party to believe that their specific mortgage would behave in that way when they took it out. And of course Mrs H and the third party cannot have relied on this statement in making the decision to take out their mortgage, since they took it out with GMAC not Mortgage Express. I don't think it would be reasonable to conclude that a general statement of how Mortgage Express managed its rates at a particular moment in time, a statement that was not in the contemplation of either GMAC or Mrs H when the mortgage was taken out and which it is not clear was even referring to the SVR, binds its hands forever even if it was referring to the SVR.

I don't therefore think this online statement is of any particular weight in considering whether Mortgage Express acted in line with the terms and conditions of Mr and Mrs H's mortgage when it varied the interest rate. And it's not of any particular weight in considering whether the interest rate from 7 September 2015 was fair and reasonable in all the circumstances.

It's also important to note that condition 3.1 gives Mortgage Express the power to vary the interest rate, but it doesn't create an obligation to do so. In other words, if but only if certain conditions are met Mortgage Express has the power to change the SVR. But if those conditions are not met it has no power to change the SVR – and even if they are met, it is not obliged to do so.

Finally, Mr and Mrs H's representatives say that there was a special responsibility on Mortgage Express not to take advantage of Mr and Mrs H because they were unable to shop around and had no option but to remain with Mortgage Express. I'm satisfied that Mortgage Express acted in line with the terms and conditions of the mortgage and didn't treat Mr and Mrs H less favourably than any other borrower. I don't think Mortgage Express's SVR is significantly higher than that of other lenders, whether active or closed. I'm not persuaded that it unfairly took advantage of them.

Taking all that into account, I'm satisfied that Mortgage Express acted in accordance with the terms and conditions in varying the SVR in the way that it did. And there is no other basis on which I can safely conclude that the interest rate charged to Mr and Mrs H from 7 September 2015 onwards was unfair.

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 Mr and Mrs H to accept or reject my decision before 3 January 2024.

Simon Pugh
Ombudsman