DRN-4311148

The complaint

Mrs S complains that the interest rate Mortgage Express has applied to her mortgage is excessive and unfair. She brings this complaint through a law firm.

What happened

Mrs S took out this mortgage with GMAC-RFC Limited in August 2007, jointly with her husband, Mr S. They borrowed just over £250,000 over a 25-year term, on an interest-only payment basis. The interest rate was fixed at 6.19% until 30 September 2009. It was then subject to the lender's standard variable rate (SVR) for the remainder of the term. The SVR at the time Mr and Mrs S took the mortgage out was 7.74%.

In November 2007, the mortgage was transferred from GMAC to Mortgage Express. Mortgage Express was the specialist lending brand of Bradford & Bingley Plc. During the global financial crisis of 2007-2009, Bradford & Bingley collapsed and was nationalised. Mortgage Express remained a separate firm owned by the nationalised Bradford & Bingley, and it stopped offering new mortgage interest rate products. Mr and Mrs S's mortgage has remained with Mortgage Express ever since.

Mr S no longer lives in the mortgaged property. Mrs S says he hasn't done so for more than ten years, she has been paying the mortgage on her own, and she's no longer in contact with him. Mr S hasn't therefore joined this complaint.

In September 2021, through her representative, Mrs S complained to Mortgage Express about the interest rate she had been paying on her mortgage. In summary, she complained that:

- Mortgage Express's SVR has consistently been too high, and excessive when compared to other lenders' SVRs, particularly when Bank of England base rate was 0.5% or less.

- Mortgage Express's discretion to set and vary its SVR was subject to an implied term that it could not be exercised dishonestly, for an improper purpose, capriciously, arbitrarily, or in a way that no reasonable lender acting reasonably would do. In varying its SVR as it had, Mortgage Express had breached both this implied term and the express terms of its mortgage contract with Mr and Mrs S.

- Mortgage Express stopped offering new interest rate products in 2009, and Mrs S was unable to remortgage elsewhere. She had a reasonable expectation that she would be able to take a new interest rate when the initial fixed rate ended, but was unable to do so – and as a result she has had to keep her mortgage on Mortgage Express's SVR. Mortgage Express should have taken this into account in setting its SVR but did not do so.

- In setting its SVR at the level it had, Mortgage Express had treated Mrs S unfairly, in breach of Principle 6 in the Financial Conduct Authority's Handbook, and in breach of Mortgage Conduct of Business rules.

- Mortgage Express should refund interest charged above Bank of England base rate plus 1.5%, and pay Mrs S compensation.

Mortgage Express said it had done nothing wrong and it had operated the interest rate on Mrs S's mortgage fairly and in line with the mortgage terms. It said the SVR isn't a tracker rate and it had never described it as such. While it doesn't offer new interest rates, there had been no early repayment charge applicable to Mrs S's mortgage since 2009 and no other barrier to her remortgaging elsewhere if she wished.

Through her representative, Mrs S referred her complaint to us. Our Investigator said that time limits apply to this complaint, and didn't recommend that the complaint about the period which isn't time-barred be upheld. Mrs S didn't accept that and asked for an Ombudsman's review.

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.

As our Investigator explained, the scope of my power to consider this complaint is limited to the six-year period leading up to the date Mrs S made this complaint on 7 September 2021. This is because of the time limit rules I must apply. The relevant rules, which are set out in the Financial Conduct Authority's Handbook at DISP 2.8.2 R and are available online, say that complaints must be made within six years after the date of the event complained of, or, if it gives more time to complain, within three years of when the complainant knew or ought reasonably to have known that they had cause for complaint.

I can't consider a complaint made outside those timescales, unless there's a record of an earlier complaint, unless the business complained about consents, or unless there are exceptional circumstances to explain the complaint having been made late. Here, there's no record of an earlier complaint, Mortgage Express hasn't consented, and I don't find there are exceptional circumstances to explain the delay in complaining.

Mrs S complained to Mortgage Express about the interest rate on 7 September 2021. I think she should reasonably have known over the years what interest rate she was being charged, because Mortgage Express wrote to her regularly with details of the rate in letters and statements. So I think she ought reasonably to have known when she received rate change letters and statements that she had cause for complaint about paying the SVR and about the level of the SVR.

This means I can only consider this complaint from 7 September 2015, which is six years before Mrs S complained. In doing so, however, I will take account of earlier variations to Mrs S's mortgage interest rate because they form part of all the circumstances of this complaint leading up to the interest applied after 7 September 2015.

Turning now to the merits of this complaint, I don't think that Mortgage Express did anything wrong in not offering Mrs S a new interest rate after 7 September 2015. There was nothing to say that it had to do so, either in the mortgage offer and terms and conditions, or in law or the rules of mortgage regulation.

Mortgage Express didn't offer new rates to any other existing customers either, so in not offering Mrs S a rate it wasn't treating her less favourably than other customers. And no early repayment charges applied to the mortgage after the fixed rate ended in September 2009, so Mortgage Express didn't stop Mrs S from applying for better rates with other lenders.

I've carefully considered the fairness of the interest rate Mortgage Express charged Mrs S. Her mortgage was subject to Mortgage Express's SVR from 1 October 2009 onwards. The SVR had reduced between August 2007, when Mrs S took out the mortgage, and October 2009 – it had fallen from 7.74% to 4.84%. Bank of England base rate fell further during that period – from 5.75% to 0.5%.

The SVR remained at the same level until 2016. Between 2016 and September 2021, when Mrs S made this complaint, the SVR varied at the same time, and by the same amount, as Bank of England base rate.

In changing the interest rate from time to time, Mortgage Express was limited 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 in those terms and conditions which says that 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."

There's nothing in the mortgage offer or terms and conditions to say that the SVR must track Bank of England base rate, with or without a margin. That said, for the period I can consider, from 7 September 2015, the SVR did only vary to reflect changes to the Bank of England base rate. That's explicitly provided for in the terms and conditions, and so I don't think the variations to the SVR from 7 September 2015 onwards 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. In order to do so, I've taken account of historic variations to the SVR, which – from the starting point of when Mrs S took the mortgage out – cumulatively led up to the rate she was charged from 7 September 2015 onwards. That's because if one of those earlier changes wasn't 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 – 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. It has given us detailed information about these costs. 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, Bradford & Bingley, in the form of loan facilities. Bradford & Bingley, before its collapse and nationalisation, predominantly raised funding on the wholesale markets. These wholesale market funding costs were generally driven by or related to the London Interbank Offered rate (LIBOR), not the Bank of England base rate. Before the financial crisis, LIBOR and base rate were broadly comparable. But during the financial crisis there was a significant dislocation between LIBOR and base rate, such that reductions in base rate weren't matched by corresponding reductions in LIBOR – and, therefore, reductions in Bradford & Bingley's cost of wholesale funding.

This divergence meant that while Mortgage Express's SVR reduced (reflecting the reductions in LIBOR), it didn't reduce by as much as base rate. This was the case across the mortgage industry, not just for Mortgage Express's SVR.

Following Bradford & Bingley'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 2007 and 2008, it did so relying on condition 3.1. I'm further satisfied that it was entitled to rely on condition 3.1 and, in particular, 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 Mrs S's mortgage.

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 vary it. In other words, Mortgage Express has the power to change the SVR – but only if certain conditions are met. 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 change the SVR.

I don't accept Mrs S's representative's argument that Mrs S had a reasonable expectation that the SVR would always be at 1.5% or a similar margin above Bank of England base rate. That's not in the mortgage offer or terms and conditions, and I've seen no evidence of such a policy or, if there was one, that it applied to Mrs S's mortgage. Mrs S's representative has referred to an archived webpage, but that refers to Mortgage Express's variable interest rate products, not its SVR. It also pre-dates the financial crisis. I've seen nothing to indicate that GMAC made any such commitment, and Mrs S can't have relied on something Mortgage Express said when she took out her mortgage with GMAC, a different lender.

Mrs S's representative has also said there is an implied term that Mortgage Express shouldn't exercise its power to vary the interest rate dishonestly, for an improper purpose, capriciously, arbitrarily, or in a way that no reasonable lender acting reasonably would do. I've explained why I've found that Mortgage Express acted fairly in varying its SVR during the period I can consider, and in reaching my conclusions I've also kept in mind the Unfair Terms in Consumer Contracts Regulations, as well as the relevant rules about mortgage lending and Financial Conduct Authority requirements. I don't think Mrs S's representative's argument about an implied term adds anything substantive for me to consider.

In all the circumstances, I'm satisfied that Mortgage Express acted in line with the mortgage terms in varying the SVR as it did, and I don't consider that it applied interest to Mrs S's mortgage unfairly for the period I can consider.

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 S to accept or reject my decision before 3 January 2024.

Janet Millington
Ombudsman