

The complaint

Mr and Mrs W complain that Mortgage Express overcharged them interest on their mortgage. They've also said they were mortgage prisoners and Mortgage Express hasn't taken steps to treat them fairly.

What happened

In 2006, Mr and Mrs W were offered a residential mortgage with GMAC-RFC (mortgage 1). The mortgage was taken out on interest only terms over 25 years with an initial fixed interest period lasting until 31 December 2007.

In April 2006, mortgage 1 was transferred to Mortgage Express – a wholly owned subsidiary of Bradford & Bingley (B&B) – the terms of the mortgage remained the same.

In late 2007, Mr and Mrs W underwent a mortgage review with Mortgage Express. They redeemed mortgage 1 and took out a new mortgage which went live on 1 January 2008 (mortgage 2). The mortgage was initially taken on a discounted variable interest rate of 1.21% below Mortgage Express' standard variable rate (SVR) until 30 November 2010. After which, the mortgage would revert to Mortgage Express' SVR for the remainder of the mortgage term.

Following the global financial crisis in 2008/2009, B&B was nationalised and, along with Mortgage Express as its subsidiary, stopped offering new mortgage products. This meant that when Mr and Mrs W's discounted rate came to an end in 2010, they were unable to apply for a rate with Mortgage Express. Mr and Mrs W say that due to their circumstances and tighter lending conditions, they've been unable to remortgage with a different lender. As such, they remained on Mortgage Express' SVR.

In September 2021, Mr and Mrs W's representative raised this complaint with Mortgage Express on their behalf. The complaint letter set out in summary:

- Mortgage Express withdrew from the mortgage market in 2009 and stopped offering new interest rate products. Because of tighter rules around affordability checks introduced as part of the Financial Conduct Authority's (FCA) review in 2014, Mr and Mrs W became 'mortgage prisoners' as they were unable to move their mortgage to another lender, with no choice but to remain on Mortgage Express' SVR.
- The SVR charged by Mortgage Express since Mr and Mrs W's mortgage reverted was unfairly high, especially in these circumstances where they were unable to re-mortgage to another lender.
- In 2007, Mortgage Express' website said the margin between its SVR and the base rate would be no more than 1.5-1.75%. The margin on Mr and Mrs W's mortgage has been much higher than this and the way it has increased over the years is unfair.
- Mortgage Express' 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.

- Mortgage Express' actions constitute a breach of Principle 6 of the FCA's Handbook whereby a firm must pay due regard to the interests of its customers and treat them fairly. And a breach of MCOB 11.8.1 which provides that in situations where a customer is either unable to enter into a new regulated mortgage contract with their existing lender or a new mortgage lender, the existing lender should not take advantage of the customer's situation or treat them differently to other customers with similar characteristics.
- GMAC-RFC actively targeted customers who were looking to remortgage on the expiry of their deal as documented by its marketing of the time. Switching at the end of a deal was also industry practice. So, Mr and Mrs W had a reasonable expectation that at the expiry of their fixed term deal, they would be able to switch.
- Mr and Mrs W 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.

Mortgage Express responded to the complaint on 1 November 2021. In summary it said it did not uphold the complaint for the following reasons:

- Part of the complaint about events that occurred more than six years before the complaint was made, had been brought too late.
- The SVR is not a base rate tracker. The mortgage offers state the SVR is variable.
- The applicable terms and conditions set out when the SVR may be varied. When Mortgage Express exercised its right to vary the SVR, it did so in accordance with the terms and conditions.
- The alleged implied term derived from case law does not apply here. The mortgage terms and conditions relevant to Mr and Mrs W's mortgages expressly set out the basis on which Mortgage Express can vary its SVR, it is therefore not necessary to imply any further terms into the mortgage agreements. Even if it is wrong about this, at all material times when it exercised its power to vary the SVR, it did so in accordance with the express terms and it had genuine and proper business reasons for doing so.
- There was no express guarantee in the mortgage offers that Mr and Mrs W would be provided with a new mortgage in the future. Neither was there any obligation on GMAC or Mortgage Express to provide a new mortgage.
- Mortgage Express provides details of a comparison tool on its website to make it easier for customers to compare deals and switch to another lender if they wish to do so.
- At all relevant times, Mortgage Express has acted as a responsible lender and complied with all of its regulatory obligations, whether under the principles set out in the FCA Handbook, MCOB or otherwise.
- MCOB 11.8.1E is not engaged here – Mortgage Express has treated all its customers in the same way.

Unhappy with Mortgage Express' response, Mr and Mrs W's representative referred their

complaint to our service and provided further submissions.

Our investigator issued his opinion on the limitations to our jurisdiction and what this meant for Mr and Mrs W. In summary he said:

- The complaint was raised on 7 September 2021, so he concluded that the complaint about all of the interest charging events that took place within six years prior to that date, had been raised in time. Which would be from 7 September 2015 onward. So, he was satisfied that he could consider whether the sums charged from 7 September 2015 onward were fair and reasonable.
- That under DISP 2.8.2R where the consumer seeks to bring a complaint more than six years after the event complained of, such a complaint must be brought within three years of when they became aware, or ought reasonably to have become aware, of cause to complain. The investigator explained why he thought Mr and Mrs W ought reasonably to have been aware of their cause for complaint more than three years before making their complaint. So, he didn't think this part of the rule gave them any more time to complain.
- When considering the fairness of the interest rate charged from 7 September 2015 onward, he would need to take account of previous variations of the interest rate to determine whether the rate charged during the period he can look at is fair. In addition to considering the fairness of the express terms of the contract, he would also need to consider whether – as suggested – Mortgage Express has breached an implied term of the mortgage contract. He concluded both of these things were part of 'all the circumstances of the case' that he is required to consider under the DISP rules and are relevant to whether the interest charged from 7 September 2015 onward is fair and reasonable.
- In the event he recommends any redress, he would only be able to award for the period that is in scope of this complaint – 7 September 2015 onward.

Our investigator then went on to provide his opinion, not upholding the merits of the part of Mr and Mrs W's complaint that had been brought in time. In summary he said:

- Mr and Mrs W's mortgage contracts did not commit to maintain a fixed margin above base rate.
- The investigator was not persuaded Mortgage Express varied the rate unfairly.
- The difference between the SVR and the base rate largely occurred in 2009. The investigator set out that this was a time of significant change in the wider market as a result of the financial crisis. This impacted on the funding costs of businesses and was reflected in changes to a number of lenders' interest rates.
- Overall, the investigator didn't think there was anything to suggest that Mortgage Express has acted unfairly or unreasonably.

Mr and Mrs W's representative said it disagreed with the investigator's opinion. In summary it said it didn't agree with the investigator's view that we can only consider events occurring in the six-year period before the complaint was made. It disagrees that Mr and Mrs W being in receipt of mortgage statements detailing the applicable interest rate was grounds on which they ought to have been aware they had cause to complain.

In response, the investigator confirmed that he would pass the case to an ombudsman for a

decision – inviting both parties to provide any further comments or information they would like the ombudsman to consider. Neither party made any further representations.

Mr and Mrs W did not accept the investigator's opinion relating to what part of the complaint we can and can't consider. As such, before proceeding to consider the merits of this complaint, I issued a decision setting out which parts of Mr and Mrs W's complaint our service has the power to consider.

In summary I said that our service can only consider whether Mortgage Express has treated Mr and Mrs W unfairly by overcharging them on their mortgage, during a period when it was no longer offering new mortgages – from September 2015 onwards. Mr and Mrs W's complaint about events that occurred before this date had been brought too late. I'll now issue my decision on this part of the complaint.

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.

When considering what is fair and reasonable in all the circumstances of this case, I'm required by DISP 3.6.4R of the FCA Handbook to take into account the relevant law, regulations, and good industry practice, when reaching my decision.

I've considered all the submissions made by both parties, but I won't address each and every point that has been raised. I'll focus on the matters that I consider most relevant to how I've reached a fair outcome.

Having done all that, I don't think this complaint should be upheld. I realise this will be disappointing for Mr and Mrs W. 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 W's representative has raised many individual complaint points. However, I consider the overall complaint to break down into two key points:

- Mr and Mrs W's inability to access a new interest rate with Mortgage Express, which they say, by definition, made them 'mortgage prisoners'.
- Mr and Mrs W have paid an unfairly high rate of interest compared to what they should have paid. The way in which Mortgage Express has exercised its discretion to set and vary its SVR is in breach of an 'implied term'.

I will deal with each point in turn.

Access to interest rates

As explained, our service can only consider Mr and Mrs W's complaint about their access to interest rates from 7 September 2015 onwards. That said, when considering this part of the complaint, I think it's necessary for me to set out the background to Mortgage Express' lending structure.

Mortgage Express is a closed book lender. Its parent company B&B collapsed and was nationalised in 2008. Because B&B is government owned, it can't offer new interest rates that would compete with other lenders. The same applies for its subsidiary, Mortgage Express. After this date and after any customers' fixed term products ended, all B&B and

Mortgage Express customers were charged the same SVR rate. It's part of the terms of the nationalisation that B&B (and Mortgage Express as its subsidiary) only offer a standard variable rate – which is comparable to the SVRs of other lenders.

I have considered the representative's point that Mortgage Express has breached Principle 6 of the FCA Handbook and MCOB 11.8.1 – by not offering Mr and Mrs W a new interest rate. Having done so, I'm not persuaded it has. All of Mortgage Express' customers are in the same position, and Mr and Mrs W are not being treated any differently to them.

It is generally expected that new interest rates are available when an old one expires – but there's no regulatory or contractual right to a new rate. So, in light of all of the above, I don't think Mortgage Express has done anything wrong in not offering a new rate to Mr and Mrs W.

That said, in these circumstances I think it would be fair – and in line with the good practice offered by other lenders dealing with closed and nationalised loan books – for Mortgage Express to direct its customers to seek independent mortgage advice so they can explore whether it's possible to switch their mortgage to a different lender with more preferential interest rates. Mortgage Express provides details of a comparison tool on its website to make it easy for customers to compare deals and switch to another lender if they wish to do so.

For the reasons given, I don't uphold this part of the complaint.

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

Mr and Mrs W took out two mortgages in close succession – as mortgage 1 was redeemed before it reverted to the SVR, I have focused this decision on the history of mortgage 2 given this was the only mortgage contract that was subject to Mortgage Express' SVR.

The mortgage terms and conditions set out that when the initial discounted rate expired in 2010, the mortgage would revert to the lender's SVR and that the SVR could be varied in line with terms of the mortgage¹. I haven't seen any evidence that persuades me that Mortgage Express was obligated, contractually or otherwise, to have its SVR track the base rate. There's also nothing in the terms and conditions that entitled Mr and Mrs W to a new interest rate. To that extent, the mortgage has operated as it should.

I've also considered whether the terms in Mr and Mrs W's agreement go further than reasonably necessary to protect Mortgage Express' legitimate interests and whether the variation clauses are sufficiently transparent.

Taking everything into account, I am not satisfied that the terms themselves necessarily meet the wider transparency requirements. While grammatically they are easy to follow, the terms allowing for the SVR to be varied are broad, and the circumstances in which changes might be made give Mortgage Express significant discretion about when it can make changes to the SVR and by how much.

That said, this alone is not determinative for the case. The central issue I need to decide is whether there has been any unfairness to Mr and Mrs W from September 2015 onwards. The fairness of the underlying variation clauses will not of itself properly answer that question.

¹ I have not set out the terms and conditions here as the terms are not in dispute and have been made available to both parties.

Our service is required to consider what is fair and reasonable in all the circumstances. That includes, thinking more broadly about whether the way, and the extent to which, the terms have been used has resulted in unfair treatment for Mr and Mrs W. I think that is the ultimate question I need to answer in deciding whether to uphold this case.

When considering everything I'm satisfied Mortgage Express has operated within the relevant terms and conditions, I'll explain why.

Has Mortgage Express 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 W's mortgage since 7 September 2015, why it's necessary for me to consider historic changes to Mortgage Express' SVR.

As previously explained, changes made to Mortgage Express' SVR were decided at B&B Group level. Throughout my decision, when referring to variations made to the SVR, for ease I will refer to Mortgage Express as setting the SVR.

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

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

Mr and Mrs W took out mortgage 2 with Mortgage Express in January 2008, by March 2009 the difference between the base rate and the SVR increased from 2.00% 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 W's mortgage was not a lifetime tracker mortgage, so Mortgage Express 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 W's mortgage had a 'cap' preventing Mortgage Express' SVR from increasing beyond a certain 'margin' above base rate. So, there was nothing in the contract that expressly prohibited Mortgage Express 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 Mortgage Express to vary the SVR itself has to be fair (to prevent businesses taking advantage of customers), and Mortgage Express had to ensure that in varying the SVR it only did so for one of the reasons set out in the contract.

I consider the main variations to the SVR to have taken place in 2009. At that time, the mortgage market was going through a period of significant change due to the global financial crisis. This impacted the funding costs of businesses, including B&B 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 England² and

² Quarterly Bulletin, Q4 2014, Bank of England – Bank funding costs: what are they, what determines them and why do they matter?

the FCA³ 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 that are not directly linked to base rate. There was a substantial risk to all lenders during this period and they all had to find ways to mitigate that risk while balancing the need to treat customers fairly.

The B&B Group has told us that, like many lenders at the time, B&B was predominantly funded by wholesale funding. The cost of which was in the most part, contractually defined by reference to LIBOR and LIBOR generally followed base rate prior to the financial crisis. As a result, changes in base rate tended to result in changes to cost of funding. Before the financial crisis, changes in costs of its retail funding also tended to correspond to changes in base rate.

However, 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 B&B's 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 – B&B in particular has shown how its credit rating was impacted and the implications this had on its ability to raise funds and the cost of its funding – including how this impacted the cost of the inter-company loan it provided to Mortgage Express.

To avoid collapse, State Aid in the form of a Working Capital Facility loan was extended to B&B from September 2008. With the aid came several conditions on how B&B could operate and obligations on how and when it should look to repay the loan. Understandably, this significantly impacted its commercial strategy and with it, the cost of funding mortgages like Mr and Mrs W's. To add to this, B&B was nationalised in September 2008 and its entire share capital was transferred to HM treasury (such that B&B became a wholly owned subsidiary, and Mortgage Express an indirect subsidiary of HM Treasury).

So, whilst the State Aid extended to B&B also benefitted Mortgage Express, it came with certain obligation on B&B which also filtered through to the operation of Mortgage Express and as such are relevant factors when considering the impact this had on the setting of Mortgage Express' SVR.

Given the documented increase in cost of funding across the industry, including the B&B Group specifically, the obligations surrounding Government requirements and the Working Capital Facility loan, I am satisfied Mortgage Express' decision to only pass on partial reductions to its SVR was in line with its terms and conditions and a fair and reasonable response to the wider market conditions.

While I note and have considered the submissions of Mr and Mrs W's representative, I am not persuaded they outweigh the business specific evidence provided by the Group on the impact of the financial crisis on its own cost of funding. In addition, as I have said above, I have considered other sources such as the Bank of England that leads me to a different conclusion from Mr and Mrs W's representative.

I have not seen any evidence to suggest the changes Mortgage Express made to the SVR were arbitrary, excessive, or unfair. Rather, the evidence I've seen satisfies me that Mortgage Express acted to protect its legitimate interests while balancing its obligation to treat Mr and Mrs W fairly. And, as explained, I'm further satisfied that the evidence Mortgage Express has provided is corroborated by evidence of wider market conditions at the time.

³ May 2018 Guidance Consultation GC18/2 Fairness of Variation terms in financial services consumer contracts under the Consumer Rights Act paragraphs 2.8 to 2.10

To conclude, I am not persuaded that Mortgage Express operated the terms in an unfair manner when setting and varying the interest rate that applied to Mr and Mrs W's mortgage. Its decision to vary the SVR due to cost of funds was permitted within the terms and conditions of the mortgage and for the reasons set out above, I'm satisfied it exercised those terms fairly.

I don't think there is any basis to say that Mortgage Express somehow contributed to Mr and Mrs W 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.

From 2009 onwards, the only changes Mortgage Express made to the SVR were made soon after changes were made to the base rate and by the same amount.

Finally, I note that Mr and Mrs W's representative argues that Mortgage Express has breached what it says was an implied term, not to exercise its discretion to vary the SVR arbitrarily, capriciously, perversely or irrationally. For the reasons set out above, if there was such a duty in the present case, I'm satisfied that Mortgage Express did not breach it since it approached the question of varying the SVR fairly and in line with the terms of the contract.

My final decision

For the reasons set out above, I do not uphold this complaint and I make no award against Mortgage Express

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W and Mrs W to accept or reject my decision before 23 November 2023.

Lucy Wilson
Ombudsman