

## The complaint

Mr M complains that the interest rate Mortgage Agency Services Number Five Limited have charged on his mortgage has been unfairly high. He also complains he's not been able to take out a new interest rate product.

## What happened

Mr M took out an interest only mortgage in August 2007 with a term of 25 years. The mortgage offer stated that a fixed interest rate of 5.99% would be applied to the mortgage until 30 September 2009, at which time the mortgage would revert to the standard variable rate (SVR) for the remaining term, which was 7.74% at the time of the offer.

Later in 2007, Mr M's mortgage was transferred to MAS5.

Since Mr M's mortgage reverted to the SVR in 2009, the interest rate MAS5 charged was as follows:

Date	SVR
01/10/2009	4.50%
01/03/2011	5.25%
01/05/2012	5.75%
01/09/2016	5.50%
01/12/2017	5.75%
01/09/2018	6.00%
01/04/2020	5.50%
01/05/2020	5.35%
01/02/2022	5.50%
01/03/2022	5.75%
01/05/2022	6.00%
01/06/2022	6.25%
01/08/2022	6.50%
01/12/2022	6.88%
01/02/2023	7.38%
01/03/2023	7.88%
01/05/2023	8.13%
01/07/2023	8.38%

On 27 June 2023 Mr M complained to MAS5 about the interest rate they'd charged on his mortgage. MAS5 issued their final response letter on 28 July 2023. They said that Mr M's complaint about the interest rate charged on his mortgage more than six years ago had been made outside of the time limits. They said the changes MAS5 made to the interest rate in 2009, 2011 and 2012 were made to reflect a change which had occurred, or which MAS5 reasonably expected to occur, in the cost of funds used in their mortgage lending business, in accordance with condition 3.1(b) of Mr M's mortgage terms and conditions. They said all of the other changes to the rate had followed changes to the Bank of England base rate in accordance with condition 3.1(a) of Mr M's mortgage terms and conditions. They said Mr M's mortgage offer explained that after 30 September 2009, he was free to redeem the mortgage without incurring any early repayment charges.

MAS5 also explained that as they were no longer an active lender, they were not accepting new customers, nor were they able to offer existing customers alternative interest rate products. However, since November 2019 they have been able to offer customers the opportunity to apply for an 'internal re-mortgage' with a different lender within the banking group. This is undertaken through a different and more proportionate affordability assessment, although is still subject to meeting the bank's current lending criteria.

They said they'd written to Mr M in December 2019 and March 2020 to invite him to discuss an internal re-mortgage. They discussed this option with Mr M on 27 June 2023, but as a new mortgage would include early repayment charges, it was found not to be a suitable option for him as he planned to sell the property in the short term. An application was not declined on affordability grounds. They said if Mr M would like to discuss an internal re-mortgage further, he could contact them again.

Mr M brought his complaint to our service on 15 August 2023. MAS5 said that any of Mr M's complaint relating to events and decisions about the interest rate applied to the mortgage before 27 June 2017 had been made out of time, and they didn't give our service consent to consider it. They said our service could only consider interest rate variations that took place before 27 June 2017 as background or context to the part of Mr M's complaint that had been made in time.

Our Investigator looked into things and explained that as Mr M's complaint was about the interest rate MAS5 had charged each month, he could consider the fairness of the interest charged each month for the six year period leading up to Mr M's complaint on 27 June 2023. He said that Mr M's complaint about the interest charged earlier than that (before 27 June 2017) was out of time under the time limits our service must apply. That was because Mr M would have been aware of the rate MAS5 were charging, and the amount he was paying, from the mortgage statements and interest rate letters he received over the years. He received that information more than three years before he complained in 2023. The Investigator wasn't persuaded the reason the complaint was made outside of the time limits was a result of exceptional circumstances.

The Investigator stated that when considering Mr M's complaint about the fairness of the interest rate charged from 27 June 2017 onwards, he would consider the whole history of the mortgage as relevant background to the complaint, as any decisions MAS5 made to vary the interest rate before 27 June 2017 would have impacted the fairness of the rate charged after that date. He was satisfied that approach was in line with our rules and a recent decision of the High Court on our service's jurisdiction in cases like this one.

The Investigator went on to look at the merits of Mr M's complaint that we had the power to consider. He didn't think MAS5 had acted unfairly by not offering Mr M a new interest rate product on expiry of his fixed rate that ended in 2009. He said there wasn't anything in the offer, or terms and conditions of Mr M's mortgage that said MAS5 would make a new rate available to him, and there's nothing in the rules of mortgage regulation that says they had to do that either. MAS5 didn't offer new interest rate products to any of their customers, so Mr M hasn't been treated less favourably than others.

The Investigator looked at the history of the interest rate Mr M had been charged on his mortgage in order to decide whether MAS5 had charged him fairly from 27 June 2017 onwards. He found that when the mortgage was transferred to MAS5 from the original lender, one of the terms of the transfer agreement was that the SVR charged on the mortgage would not be more than 2% above the Bank of England base rate. MAS5 had referred to this agreement as the restrictive covenant. That restrictive covenant came to an end in 2009.

He found that whilst MAS5 had said they'd increased their SVR in 2009, 2011 and 2012 as a result of an increase in their costs of funds, the evidence provided showed that MAS5's costs of funds weren't increasing at that time. Whilst he didn't have the power to consider Mr M's complaint about those specific increases as that was out of time, he did think those increases that MAS5 made were not made for reasons permitted under the terms and conditions, and they did impact the fairness of the SVR Mr M was charged from 27 June 2017 onwards, as the level of the SVR charged was the cumulative history of all changes that went before.

The Investigator thought it wasn't fair and reasonable for MAS5 to charge Mr M interest after 27 June 2017 that reflected the 1.25% increases in 2011 and 2012. But he didn't think it would be fair to reach the same conclusion about the 2009 increases, because that would have had the effect of continuing the benefit of the restrictive covenant after it ended, and put Mr M's mortgage on a lower interest rate than he could have expected from the operation of his mortgage terms and conditions alone. As a result, he said removing the effect of the 2009 increases would result in over-compensation. The Investigator didn't think any of the changes made to the SVR after 2017 were unfair.

To put things right the Investigator said that MAS5 should re-work Mr M's mortgage account as if the interest rate charged after 27 June 2017 was 1.25% lower than it was from time to time. They should also ensure the interest rate was reduced by 1.25% going forwards – though MAS5 could continue to vary the interest rate in the future if permitted to do so by the terms and conditions. He said that MAS5 should give Mr M the choice of either having the resulting overpayments he'd made each month treated as overpayments to reduce the mortgage balance, or having them refunded to him, adding simple annual interest of 8% running from the date of each overpayment to the date of refund.

MAS5 responded and disagreed that the 1.25% reduction should be applied beyond November 2022. They said their decisions not to pass on the Bank of England base rate increases between December 2021 and November 2022 balanced out the increases in 2011 and 2012 that the Investigator found were unfair. They said in December 2021, the base rate increases were not passed on immediately. And then in August and September 2022, base rate increased by 0.5% each time but MAS5 chose not to pass on those increases to their SVR customers. In November 2022 base rate increased by 0.75% and MAS5 took the decision to only pass on 0.38% to their SVR customers. That meant a total of 1.37% was not passed on to MAS5 customers in 2022 despite MAS5 having the right under condition 3.1(a) of the terms and conditions to pass all of those increases on. That 1.37% exceeds the 1.25% reduction the Investigator said they should make to the rate.

MAS5 also said the Investigator should consider the passage of time that had passed between the interest rate increases in 2011 and 2012, and the period of time that fell within our service's jurisdiction to consider (from 2017 to 2023). They said arguably, the increases that took place in 2011 and 2012 had little causative effect on the rate Mr M was paying from 2017 onwards, particularly in light of the decisions made in 2022 as mentioned above. MAS5 made an offer to settle Mr M's complaint on the basis that the 1.25% reduction in the rate would be made from 27 June 2017 to the end of November 2022.

Our Investigator considered what MAS5 had said, and wrote to both parties setting out how he thought MAS5 should put things right having considered all the evidence. He said he thought that had the SVR been 1.25% lower than it was prior to August 2022, MAS5 would

have likely passed on the base rate increases as allowed under the terms and conditions of Mr M's mortgage. That would have resulted in the SVR ending up in much the same position as it actually was from November 2022 onwards. The Investigator was satisfied that as a result, from November 2022, the SVR was no longer higher than it should have been and said that to put things right, MAS5 should re-work Mr M's mortgage as if the interest rate charged after 27 June 2017 was 1.25% lower than it was from time to time until 30 November 2022.

Mr M said he could not understand why the 2009 increases were not being taken into account along with the increases in 2011 and 2012. The increases to the SVR in 2009 were affecting the amount of interest he's still paying today which was 9.12%. Mr M said that in 2009 the base rate was 0.5% and he should have been able to benefit from those low rates instead of being subject to corporate greed. He also said MAS5 had increased the SVR in August 2022 by 0.25%. He wanted MAS5 to re-work his mortgage account as if the interest rate charged after 27 June 2017 was 2.76% lower than it was up to November 2022. He said from that date and going forwards the rate should be reduced by 1.51%.

The Investigator still felt the offer MAS5 had made to reduce Mr M's interest rate by 1.25% from 27 June 2017 to 30 November 2022 was fair and reasonable.

Mr M asked for his complaint to be referred to an Ombudsman for 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.

#### Our jurisdiction to consider this complaint

Whilst neither party has disagreed with the Investigator's view about the parts of Mr M's complaint our service has the power to consider, I've nonetheless thought about this before turning to the merits of the complaint. Having done so, I agree with the Investigator that our service only has the power to consider Mr M's complaint about the interest rate MAS5 have charged him for the six year period leading up to his complaint in June 2023. A complaint about earlier interest charging events is out of time under the six year rule, and I also consider it to be out of time under the three year rule as well, as I'm satisfied Mr M ought reasonably to have been aware of his cause to complain more than three years before he did complain. He was sent annual mortgage statements which contained information about the interest rate MAS5 were charging on his mortgage, and MAS5 also wrote to him each time the interest rate changed. We haven't been made aware of any exceptional circumstances that caused the delay in the complaint being made.

However, as the Investigator explained, the interest rate charged from 27 June 2017 onwards is the result of the cumulative rate changes that took place beforehand. And so, it is therefore appropriate for our service to consider the interest rate history of Mr M's mortgage account dating back to when it was taken out in 2007, to determine whether the interest rate MAS5 have charged him from 27 June 2017 onwards was fair and reasonable.

#### Should MAS5 have offered Mr M a new interest rate product?

Mr M's mortgage offer said that on expiry of the fixed rate product, from 1 October 2009 the rate that would apply was the SVR for the remaining term of the mortgage. There was nothing in the rest of the offer document or the terms and conditions of the mortgage that stated Mr M would be entitled to a new fixed rate once his initial rate had ended.

Since Mr M's mortgage has been on the SVR, MAS5 have not offered any preferential interest rate products to any of their customers. There's nothing in the law, or the regulator's rules that requires lenders to offer new products or rates. Since Mr M's mortgage has been on the SVR, he wouldn't have incurred any early repayment charges if he'd decided to re-mortgage elsewhere to a lender that does offer rates.

Overall, MAS5 haven't treated Mr M any differently to any of their other mortgage customers by not offering him an interest rate product. They've contacted him in more recent years about applying for an internal re-mortgage to another lender within the banking group, but when Mr M enquired about that a new product wasn't suitable at the time.

Considering all the circumstances, I'm not satisfied MAS5 have treated Mr M unfairly by not offering him a new interest rate product.

#### The interest rate MAS5 have charged on Mr M's mortgage

MAS5 have made an offer to settle Mr M's complaint by re-working his mortgage account as if the interest rate he was charged between 27 June 2017 and 30 November 2022 was 1.25% lower than what MAS5 did actually charge. They say that would put right the higher rate Mr M paid from June 2017 as a result of the increases they made to the SVR in 2011 and 2012. They don't think the redress should go beyond November 2022 as from that point, Mr M has been charged a rate that is 1.38% less than what it would have been had they decided to pass on the full increases to the base rate that year. Mr M disputes that redress is fair for two reasons:

- He wants the increases MAS5 made to the SVR in 2009 to be taken into account in the rate reduction, therefore asking for MAS5 to make a 2.76% reduction in the rate he's paid since 27 June 2017.
- Whilst the rate changes MAS5 made in 2022 may not have been as high as they could have been, it still doesn't undo the full effect of the unfair increases made from 2009 onwards, and so the adjustment to his interest rate should go beyond November 2022 and in the rate he's paying now.

#### The SVR increases in 2009

Mr M's mortgage was not taken out with MAS5 originally. In 2007 the mortgage was transferred to MAS5 by the originating lender. At the time of the transfer, there were certain terms that were agreed between the two businesses, one of which was an agreement that the SVR MAS5 charged on the mortgage would not be more than 2% above the Bank of England base rate. They've referred to this as the restrictive covenant. That term did not form part of the contract between Mr M and the lender, it was an agreement between the two businesses and did not alter the original terms and conditions that Mr M agreed to when he took out his mortgage.

The terms and conditions of Mr M's mortgage said that the lender could vary the standard variable rate for 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 M's mortgage offer stated that the interest rate that applied to Mr M's mortgage would be a fixed rate of 5.99% until 30 September 2009, after which the SVR would apply for the remaining term of the mortgage. There was nothing in the terms that stated the interest rate

would be linked to any particular reference rate, and it was not a tracker rate that would track movements in the base rate.

The Bank of England base rate fell significantly during 2008 and 2009, and as a result of the restrictive covenant, the SVR MAS5 charged to their mortgage customers reduced significantly too.

Mr M's mortgage was not actually on the SVR until 1 October 2009 as he had a fixed rate in place, and so the rate he was paying didn't reduce as it did for borrowers whose mortgages were on the SVR. So I appreciate why he feels he did not receive the benefit of the restrictive covenant. But when he took his mortgage out, he agreed that the interest rate he would pay would be fixed until 30 September 2009, and so MAS5 were charging him that rate (5.99%) in line with the terms.

The agreement MAS5 had in place to charge an SVR no higher than 2% above base rate ended in 2009, and that is when they started to increase the SVR. Those increases did impact Mr M's mortgage, as the increases resulted in the rate that Mr M's mortgage reverted to in October 2009, and the rate he's been charged on his mortgage since. MAS5 have said the increases made to the SVR in 2009 were because of an increase that had occurred in the cost of funds used in their mortgage lending business. They've sent us evidence to support their arguments about that, but I'm not satisfied the evidence provided does show that MAS5's cost of funds had increased at that time.

However, that isn't the end of the matter. I also have to consider what is fair and reasonable in all the circumstances. Having done so, I'm not satisfied it would be fair and reasonable for MAS5 to reduce Mr M's interest rate as if those increases in 2009 had not taken place.

Whilst interest rates fell generally during 2008 and 2009 as a result of the financial crisis, the SVRs charged to mortgage customers within the banking group MAS5 operated in, as well as the wider market, did not fall by the same proportions as the base rate. That is for a variety of reasons, but generally the costs to firms of funding their mortgage business did not reduce by as much as the base rate did, and their prudential requirements changed.

Having considered the information MAS5 have sent us, as well as my knowledge and understanding of how the mortgage market was operating at that time, I think it's likely that had the restrictive covenant not been in place during that period, the SVR MAS5 would have charged during 2008 and 2009 would not have reduced by as much as it did. As explained, there was nothing in the terms and conditions of Mr M's mortgage that linked the SVR to the base rate, and whilst the terms allowed MAS5 to vary the SVR following changes to base rate, they didn't say they must do so.

The effect of the restrictive covenant therefore meant that the SVR MAS5 were charging their mortgage customers was lower than it would have been had the covenant not been in place. As a result, MAS5 customers received the benefit of paying a lower reversionary rate than they would have been charged by most other lenders at that time.

Whilst MAS5 may have increased the SVR when the covenant ended for reasons that weren't permitted under the terms and conditions of Mr M's mortgage, they were restoring the rate to what it would have been had the covenant not been in place. And whilst Mr M may not have benefitted from the existence of the covenant, as a result of the higher fixed rate he was on, I'm not persuaded that's a result of anything MAS5 did wrong.

It's important to remember that a complaint about the interest rate variations that took place in 2009 is actually out of time and our service doesn't have the power to consider it. I'm only taking account of what happened to the rate at that time as I think it's relevant to determine whether the rate Mr M has been charged since 27 June 2017 is fair and reasonable.

While MAS5 may not have had any contractual justification for increasing the SVR once the covenant came to an end, I have to take all the wider circumstances into account when thinking about what's fair and reasonable more broadly during the period I can consider. And

for the reasons I have given, I am satisfied that directing MAS5 to essentially deduct the 2009 increases from interest charged from June 2017 onwards would provide Mr M with a level of compensation that I think goes beyond what is fair and reasonable in view of how long ago the changes were made, and the fact that those increases would not have been necessary had MAS5 been able to vary the rate in line with the terms and conditions Mr M agreed to without the covenant in place. To do so would result in the interest rate after 27 June 2017 being lower than Mr M could have expected it to be by operation of the mortgage terms and conditions alone, and would result in over-compensation.

#### The SVR increases in 2011 and 2012

MAS5 increased the SVR charged on Mr M's mortgage in 2011 and 2012. The effect of both of those changes meant the rate went from 4.5% to 5.75%.

MAS5 said those increases were made as a result of the increases in the cost of funds used in their mortgage lending business. I am not satisfied that the evidence MAS5 have sent us shows that there was actually an increase in MAS5's own cost of funds at that time. They've now offered to re-work Mr M's mortgage account from 27 June 2017 (up until November 2022) as if those increases never took place. So I won't consider this point any further, as the offer puts Mr M back in the position he would have been in had the increases not been made (for the time period that is in scope of this complaint).

#### Should the redress go beyond November 2022?

MAS5 have offered to re-work Mr M's mortgage account as though the interest rate he's been charged since 27 June 2017 was 1.25% lower than it was to reverse the effect of the 2011 and 2012 increases – but only up until the end of November 2022. They've said this is because they made the decision in 2022 not to pass on the full Bank of England base rate rises to customers when they could have done. That resulted in the SVR being 1.38% lower than it would have been had they passed on the full extent of the increases. They've said if the SVR had in fact been 1.25% lower than it was before 2022, as we've said it should have been, they would have taken the decision to pass on all of the base rate rises when they took place in 2022. This would have ensured that the SVR was priced at an appropriate level for its risk profile and market position. Therefore, the rate would have ended up 0.12% higher than it actually was in December 2022.

MAS5 have provided our service with evidence to support their arguments, including the factors the wider banking group considered when they were deciding whether to pass on the base rate rises to customers in 2022. It's clear the priorities for the banking group were to balance increases to the SVR to reflect increases to cost of funds with keeping down increases to maintain their market position, and to minimise customer stress. While that wasn't the case specifically for Mr M's mortgage – since there's no evidence of a change in the costs of funding MAS5 itself at this time, the position of the MAS5 SVR comparative to the SVR charged to 'prime' customers in the group was also a key factor.

If the MAS5 SVR had been 1.25% lower than it actually was, it would have been lower than the SVR charged by other lenders within the group, as well as other lenders in the wider prime mortgage market.

Having considered the evidence MAS5 have provided, I'm satisfied that on balance, if the SVR had been 1.25% lower than it was at the start of 2022, MAS5 would have increased the SVR by more than they did during 2022, by passing on all of the base rate rises. That would have been permitted under the terms and conditions of Mr M's mortgage.

However, whilst I'm persuaded that's what MAS5 would have done, I still have to consider whether that would have been fair and reasonable in order to determine whether the offer MAS5 have made is a fair resolution to this complaint. It's important to remember it is not the role of our service to decide what a fair interest rate should be. However, I can determine

whether I think MAS5 have acted fairly when considering how to vary the rate they've charged Mr M, and the impact that's had on him.

MAS5 have provided evidence of the risk profile of the mortgages they hold in comparison with the banking group's 'prime' mortgages. I'm satisfied that information shows that there is a greater cost to the group when a MAS5 mortgage defaults, and there is also a much higher risk of those mortgages defaulting. I don't think it's unreasonable that MAS5 considered that risk when deciding where their SVR should sit not only in relation to the 'prime' SVR charged by other lenders in the group, but also the wider mortgage market. I'm satisfied that had the SVR been 1.25% lower than it was, and MAS5 had not decided to pass on the base rate rises in 2022, the resulting SVR would have been significantly lower than not only the group's 'prime' SVR, but also the SVRs charged by mainstream lenders in the wider market.

Under the terms and conditions of Mr M's mortgage MAS5 were entitled to increase the SVR to reflect changes in base rate. It's more likely than not, in my view, that if the SVR had been 1.25% lower because the 2011 and 2012 increases had not happened, MAS5 would have passed on the base rate changes in 2022 to move the SVR to a level comparable with other lenders in the group. Therefore, from November 2022, the SVR ended up at broadly the same level it would have been even without the 2011 and 2012 increases.

When considering the SVR Mr M has been charged since 27 June 2017 in the round, and the impact of the previous unfair increases that resulted in that rate, I'm persuaded on balance that any previous unfairness was essentially 'put right' by the decisions MAS5 made when they varied the rate in the way that they did in 2022. And so, to instruct MAS5 to make an ongoing reduction to Mr M's interest rate when that rate would be much lower than the rate he would actually have been on had MAS5 not done anything wrong, would be putting him in a better position than he ought to have been. To continue the redress beyond November 2022 means that Mr M would benefit both from the SVR being lower because of the removal of the ongoing effect of the 2011 and 2012 increases, and also benefit from the SVR being lower because of the decision not to pass on base rate cuts. I don't think it's likely Mr M's mortgage would ever have been in a situation where both those things happened, and therefore to require MAS5 to reduce his interest rate as if both had happened would be over-compensation.

I appreciate Mr M feels that his rate is still too high currently, and he feels it would be fair for his rate to be reduced on an ongoing basis, but unfortunately, we are in an economic climate where interest rates are much higher than they've been in recent years, and the rate he's now paying is not significantly out of line with reversion rates being charged by other lenders of similar mortgages.

I know Mr M discussed re-mortgaging within the banking group in 2023, but he was planning to sell his property in the short term so it wouldn't have been suitable to fix him into a rate that would have resulted in early repayment charges. But if his circumstances have changed, and he's no longer planning to sell his house in the near future, I'd encourage him to discuss his options with MAS5 to see if there are lower rates he might be able to benefit from by re-mortgaging to another lender within the group – or to take independent financial advice about moving his mortgage elsewhere.

### **Putting things right**

For the reasons I've explained, I'm satisfied MAS5 should do the following to put things right for Mr M:

- Re-work Mr M's mortgage account as if the interest rate charged after 27 June 2017 was 1.25% lower than it was from time to time, up until 30 November 2022.
- Mr M has told our service that he'd like the resulting overpayments from the above calculation to be paid to him directly and not taken off his mortgage. As a result, MAS5 should refund the above amount to Mr M. They should also add 8% simple



annual interest running from the date of each overpayment to the date of settlement.

\*Interest is at the rate of 8% a year simple. If MAS5 considers that it's required by HM Revenue & Customs to take off income tax from that interest, it should tell Mr M how much it's taken off. It should also give him a certificate showing this if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

### **My final decision**

Considering everything, for the reasons I've explained, I uphold this complaint and direct Mortgage Agency Services Number Five Limited to put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 30 May 2024.

Kathryn Billings  
**Ombudsman**