

The complaint

Mr and Mrs D complain that the interest rate Mortgage Express has applied to their mortgage is excessive and unfair. They bring this complaint through a law firm.

What happened

Mr and Mrs D took out their mortgage with GMAC-RFC Limited in December 2002. They borrowed just under £160,000 over a 23-year term, on an interest-only payment basis. The interest rate was a variable rate, initially of 5.74%. The mortgage was subject to an early repayment charge if it was repaid in the first two years.

Mr and Mrs D's mortgage was transferred from GMAC to Mortgage Express soon afterwards. Mortgage Express says the transfer was in around July 2003, although the letter about the transfer is dated 2006. 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. In July 2019, Mr and Mrs D repaid the mortgage in full.

In September 2021, through their representative, Mr and Mrs D complained to Mortgage Express about the interest rate they had been paying on their mortgage. In summary, they 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 D.
- Mortgage Express stopped offering new interest rate products in 2009, and Mr and Mrs D were unable to remortgage elsewhere. They had a reasonable expectation that they would be able to take a new interest rate, but were unable to do so – and as a result they had to keep their 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 Mr and Mrs D 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 Mr and Mrs D compensation.

Mortgage Express said it had done nothing wrong and it had operated the interest rate on Mr and Mrs D'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 Mr and Mrs D's mortgage since 2004 and no other barrier to their remortgaging elsewhere if they wished.

Through their representative, Mr and Mrs D referred their complaint to us. Our Investigator said that time limits apply to this complaint, and these mean we can only consider the interest charged in the six years leading up to this complaint – so, since September 2015. They also said that in considering interest charged during that six-year period we could take account of earlier variations to Mr and Mrs D's mortgage interest rate, because they contributed to the rate applied during the period we could consider.

The Investigator went on to look into the complaint, and didn't recommend that it be upheld. Through their representative, Mr and Mrs D asked for a review. They didn't accept the Investigator's conclusions about time limits applying to their complaint, and said they didn't know they had cause to complain until public awareness of 'mortgage prisoners' increased in 2019 and they instructed their representative.

Mortgage Express accepted the outcome the Investigator had reached, although it provided clarification about some of its funding arrangements.

I issued a decision confirming the scope of the Financial Ombudsman Service's jurisdiction to consider this complaint. I said we can consider the interest applied in the six-year period leading up to the date Mr and Mrs D made this complaint on 7 September 2021. I also said that in doing so we would take account of earlier variations to Mr and Mrs D'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.

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.

Having done so, I'm not upholding this complaint. First of all, I don't think that Mortgage Express did anything wrong in not offering Mr and Mrs D 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 Mr and Mrs D a rate it wasn't treating them less favourably than other customers. And no early repayment charges applied to the mortgage after 2004, so Mortgage Express didn't stop Mr and Mrs D from applying for better rates with other lenders.

I've carefully considered the fairness of the interest rate Mortgage Express charged Mr and Mrs D. Their mortgage was subject to a variable rate from inception – not, as Mr and Mrs D's representative has said, a fixed rate. All the variations made to the SVR were made by Mortgage Express. Until January 2009, these changes were largely made soon after changes to Bank of England base rate and largely by the same amount – maintaining a margin of 1.99% until 1 June 2004 and then 2.00% thereafter.

However, by March 2009 the difference between the base rate and the SVR increased from 2.00% to 4.34%. 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.

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.

The 2002 mortgage offer said it incorporated the Standard Offer Conditions, Mortgage Conditions, and attached Special Conditions.

The Special Conditions said, at condition 7, that "The interest applicable to this offer of advance is our standard variable rate".

The relevant 2002 Standard Offer Conditions said, at condition 5:

"If you have a variable rate mortgage we may vary the interest rate by notice to you at any time for any of the following reasons:

- (a) to reflect changes in our funding costs (actual or expected); or
- (b) to maintain the competitiveness of our business, taking into account changes in market conditions (actual or expected); or
- (c) to ensure that our business is operated in a prudent way; or
- (d) to take account of any change in the law or regulatory practice relating to us or to mortgage lenders generally."

There's nothing in the mortgage offer or terms and conditions to say that the SVR must track Bank of England base rate. 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 – which is in line with how Mr and Mrs D's representative has said Mr and Mrs D expected the SVR to operate.

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 Mr and Mrs D 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 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 5 (a) – to reflect actual or anticipated changes in its funding costs. 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 5. I'm further satisfied that it was entitled to rely on condition 5 and, in particular, on condition 5 (a) 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 its cost of funding.

It's also important to note that condition 5 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 Mr and Mrs D's representative's argument that Mr and Mrs D 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 Mr and Mrs D's mortgage. Mr and Mrs D'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 Mr and Mrs D can't have relied on something Mortgage Express said when they took out their mortgage with GMAC, a different lender.

Mr and Mrs D'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 Mr and Mrs D'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 Mr and Mrs D'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 D and Mr D to accept or reject my decision before 4 January 2024.

Janet Millington
Ombudsman