

The complaint

Mrs P, through her representative, complains that Mortgage Express has treated her unfairly by overcharging her on her mortgage – during a period when it was no longer offering new mortgages. Mrs P says that because of her circumstances and the tighter lending rules around affordability checks, introduced as part of the Financial Authority's ("FCA") review in 2014, she was unable to re-mortgage elsewhere and as such, she is considered a 'mortgage prisoner'.

What happened

In October 2007 Mrs P was offered a residential mortgage with GMAC-RFC. The mortgage was taken out on interest only terms over 25 years. Mrs P agreed the mortgage on a discounted variable interest rate of 1.25% below GMAC's SVR until 30 June 2009 – giving a rate of 6.49%. After which Mrs P's mortgage would revert to GMAC's Standard Variable Rate ("SVR") for the remainder of the term of the mortgage – which at the time was 7.74%.

Soon after the mortgage was taken, in early 2008, Mrs P's mortgage was transferred to Mortgage Express – a wholly-owned subsidiary of Bradford and Bingley ("B&B").

As a result of the global financial crisis in 2008/09, B&B was nationalised in late 2008 and along with Mortgage Express as its subsidiary, stopped offering new mortgage products. This meant that when Mrs P's fixed rate ended on 30 June 2009 and the mortgage reverted to the SVR, she was unable to apply for new fixed rate product with Mortgage Express as it had no alternative interest rate products to offer her. Mrs P says that due to her circumstances and tighter lending conditions, she's been unable to re-mortgage with a different lender. As such Mrs P has remained on Mortgage Express' SVR to date.

Over the years between the mortgage starting in 2007 and the complaint being raised with Mortgage Express on 7 September 2021 there have been a number of changes to both the Bank of England base rate ("base rate") and the SVR. The key things to note regarding the history of the changes is as follows

- From the mortgage start date in 2007 until 1 January 2009, all the variations made to the SVR were made by Mortgage Express. These changes were largely made soon after changes to the base rate and largely by the same amount – maintaining a margin of 1.99% until 1 May 2008 and then 2.00% thereafter.
- 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 September 2021 Mrs P's representative raised this complaint with Mortgage Express on her 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 the tighter rules around affordability checks introduced as part of the FCA's review in 2014, Mrs P became a 'mortgage prisoner' as she was unable to move her mortgage to another lender, with no choice but to remain on Mortgage Express' standard variable rate.
- The SVR charged by Mortgage Express since Mrs P's mortgage reverted was unfairly high, especially in these circumstances where Mrs P was unable to re-mortgage with another lender.
- The way Mortgage Express' margin between the SVR and the base rate 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, a lender should not take advantage of the customer's situation or treat them differently to other customers with similar characteristics.
- Mrs P seeks to claim the difference between the amount of interest she paid on her mortgage and the amount she would have paid had it been subject to what she deems 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 mortgage. The mortgage offer states the SVR is variable (in the given circumstances) under the mortgage terms.
- The transfer from GMAC-RFC to Mortgage Express did not affect any of the terms and conditions of Mrs P's Mortgage. The 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 said to derive from relevant case law does not apply here. As the mortgage conditions relevant to Mrs P's mortgage agreement 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 agreement.
- There was no express guarantee in the mortgage offer that Mrs P would be provided with a new mortgage in the future. Neither was there any obligation on GMAC-RFC or subsequently Mortgage Express to provide a new mortgage.
- If Mrs P was unhappy with the interest rate being charged on her mortgage

by Mortgage Express, she was free to re-mortgage elsewhere, without incurring an Early Repayment Charge (ERC) from 1 July 2009 onwards. 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.

- At all relevant times, Mortgage Express has acted as a reasonable lender and complied with all of its regulatory obligations, whether under the principles set out in the FCA Handbook, MCOB or otherwise.

Mrs P's representative referred this complaint to our service on 24 March 2022.

Our investigator issued his opinion on the limitations to our jurisdiction and what this meant for Mrs P. 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 this, 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 2.8.2(R) 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 from the date the consumer became aware, or ought reasonably to have become aware, that they had cause for complaint. The investigator explained why he thought Mrs P ought reasonably to have been aware of her cause for complaint more than three years before making her complaint. So, he didn't think this part of the rule gave her 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 in order 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 Mrs P's complaint. In summary he said:

- Mrs P's mortgage contract did not commit to track the base rate, she was made sufficiently aware of the relevant terms set out by GMAC-RFC and Mortgage Express has sought to charge interest in accordance with those terms.
- The investigator set out the need to consider what, if any, unfairness Mrs P experienced because of mortgage payments based on changes to the interest rate. And the need to consider whether Mortgage Express had exercised the terms fairly. He was not persuaded Mortgage Express varied the rate unfairly.

- The difference between the SVR and the base rate largely increased 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.
- Mortgage Express has provided information to show that its cost of funds did not reduce in line with the base rate during this period. The interest rate on the Government loan Mortgage Express received through State Aid was LIBOR linked, rather than to the base rate. At the time of the global financial crisis, LIBOR increased when the base rate fell. So, he didn't think it was unreasonable that Mortgage Express didn't pass on all of the reductions to its SVR, in line with mortgage terms.
- For the remainder of the period (until the point this complaint was made), 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.
- Overall, the investigator didn't think there was anything to suggest that Mortgage Express has acted unfairly or unreasonably – including committing any breach of the suggested implied term, or that Mrs P has overpaid interest.
- The investigator went on to consider Mrs P's complaint about being a mortgage prisoner. He explained why, in his opinion, Mortgage Express had not breached the relevant MCOB rules and why Mrs P hasn't been treated any less favourably than other Mortgage Express customers. As an inactive lender Mortgage Express doesn't offer any products to any of its customers.
- Mortgage Express met its obligation by contacting Mrs P during the period where the FCA had relaxed affordability requirements – to let her know of the possible option of being able to re-mortgage with a different lender on possibly more favourable terms.

Mrs P's representative disagreed with the investigator's opinion. It said, and I quote:

"Our client does not have any further submissions in respect of the factual circumstances giving rise to the complaint but does not consider that the level of detail given in the Investigator decision is sufficient to enable our client to understand the apparent justifications for the rates charged. In particular, the decision contains a number of general statements with regard to LIBOR and rates generally in the market. Without more detail on these points for example, our client cannot accept the decision".

As the complaint could not be resolved informally, the case has been passed to me to decide.

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's Handbook to take into account the relevant law, regulations, and good industry practice, when reaching my decision.

I've given careful consideration to 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 – in keeping with the informal nature of our service.

Having done all that, I don't think this complaint should be upheld. I realise this will be disappointing for Mrs P. But I hope the reasons I have set out below will help her to understand why I have come to this conclusion.

I have explained the position relating to Mortgage Express' objection to our service considering Mrs P's complaint under the DISP rules relating to time limits for bringing complaints.

I've also set out our investigator's findings in relation to this. Neither Mortgage Express or Mrs P have sought to challenge the findings of the investigator on this point. But for completeness, I can confirm that I largely agree with the investigator's findings when considering our jurisdiction. The approach the investigator took reflects the decision of the High Court in an application for judicial review of another Ombudsman's decision in a similar case. As such I am satisfied:

- I do have the power to consider a complaint about the amount and fairness of the interest Mrs P has been charged, but only from 7 September 2015 onwards – the complaint about interest charges before that date are out of time.
- In order to consider the fairness of the interest charges that are in time, it is necessary for me to take into account the historic changes to Mortgage Express' SVR, since the SVR charged during the period that is in time, is the result not only of decisions Mortgage Express made during that period, but also the result of decisions it made prior to it. This includes considering whether the rate charged derived from earlier reliance on an unfair term or for reasons other than those allowed by the contract. That's because each time Mortgage Express charges interest, it must have a fair and lawful basis for doing so.
- For similar reasons, I'm satisfied our service only has the power to consider Mrs P's complaint about her ability to obtain access a new interest rate with Mortgage Express in the last six years leading up to her complaint being made – so from 7 September 2015 onwards. Mrs P says she's unhappy about being on the SVR and her inability to access a new interest rate with Mortgage Express, or switch to a different lender. This is something she would have known at the time over the years since 2009 and as such Mr P ought reasonably to have been aware of her cause for complaint more than three years before making her complaint. So, I didn't think this part of the rule gives her any more time to complain.

Access to interest rates

As explained, our service can only consider Mrs P's complaint about her access to interest rates from 7 September 2015 onwards. In the event I recommend any redress, I would only be able to award for the period that is in scope of this complaint. 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 what's known as 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 lower interest rates that would compete with other lenders. The same applies for Mortgage Express as a wholly owned subsidiary of B&B. 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 Mrs P a new interest rate. Having done so, I'm not persuaded it has. All of Mortgage Express' customers are in the same position, and Mrs P isn't 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 Mrs P.

As a closed book lender, Mortgage Express should not stand in the way of customers moving to another lender. And it was required to issue customers a "mortgage prisoner" letter, if they were eligible for one, to help them do so. It's unclear from the limited information available whether this happened in this case, but at the very least – in line with the good practice offered by other lenders dealing with closed and nationalised loan books – it's only fair that Mortgage Express should 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.

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

The fairness of the interest charged on Mrs P's mortgage.

I must consider whether from 7 September 2015 onwards, Mrs P has paid an unfairly high rate of interest. To assess the fairness of the interest rate terms, it is helpful to first set out the relevant terms themselves:

The relevant section of mortgage offer issued to Mrs P by GMAC in October 2007 set out that her two-year discounted interest rate would operate as follows:

"Description of this mortgage

This mortgage is provided by GMAC-RFC Ltd.

A standard variable rate of 7.74%, with a discount of 1.25% until 30 June 2009 giving a current rate payable of 6.49%.

From the 01 July 2009 the rate that will apply is GMAC-RFC Ltd standard variable rate, currently 7.74%, for the remaining term of the mortgage." The relevant supplementary mortgage conditions (2007) go on to say:

The term "standard variable rate" is defined in section 1 of the Mortgage Conditions as:

"our standard variable rate of interest which can be changed by us at any time before and after completion under condition 3 of section 3. If we enter into a transfer, the standard variable rate will be set by or on behalf of the transferee. The transferee can set the standard variable rate independently of any rate set by GMAC-RFC Limited or any other transferee."

Condition 3 of section 3 of the Mortgage Conditions entitled “Changes to the standard variable rate” provides in relevant part as follows:

“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.*

3.2 We will give you notice of any change in the standard variable rate in one of the ways set out in section 7. Any change will take effect on the date set out in the notice. This cannot be earlier than the date the notice is given. If we do not set out in the notice any date on which the change is to take effect, the change will take effect on the date the notice is given. Section 7 deals with when notices are given.”

The mortgage terms and conditions set out that when the initial fixed rate expired in 2009, the mortgage would revert to the lender’s SVR and that the SVR could be varied in line with terms of the mortgage. I haven’t seen any evidence that persuades me that GMAC or subsequently Mortgage Express were obligated, contractually or otherwise, to have their SVR track the base rate. There’s also nothing in the terms and conditions that entitled Mrs P to a new interest rate. To that extent, the mortgage has operated as it should.

I’ve considered whether the terms in Mrs P’s agreement go further than reasonably necessary to protect GMAC (and later Mortgage Express’) legitimate interests and whether the variation clauses are sufficiently transparent.

Mortgage Express’ funding was secured at “B&B Group” level. This consisted solely of an inter-company loan from B&B. Decisions as to the setting of the Mortgage Express SVR were made exclusively at B&B Group level. B&B has said that the primary factor in relation to the movement of the mortgage Express SVR during the period in question has been the cost of funding its mortgages. Therefore, largely relying on term 3.1(b) when it made variations to its SVR.

Taking everything into account, I am not satisfied that the terms 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 Mrs P from September 2015 onwards. The fairness of the underlying variation clauses will not of itself properly answer that question.

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 Mrs P. 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?

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.

In answering this question, I have explained that although I'm only able to consider the fairness of interest charged to Mrs P's mortgage since 7 September 2015, why it's necessary for me to consider historic changes to Mortgage Express' SVR.

I've considered all the available evidence and all of the changes Mortgage Express has made to the SVR since Mrs P took her mortgage. Having done so, I am not persuaded that anything Mortgage Express has done in varying the rate has led to Mrs P 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 Mrs P. 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.

In 2007, when Mrs P took her mortgage with GMAC, the margin between with the base rate and the SVR was 1.99%. Soon after, at the time of takeover, Mortgage Express increased the margin to 2.00%. From that point, until 1 January 2009, all the variations Mortgage Express made to the SVR were made soon after the changes to the base rate and by the same amount – maintaining a margin of 2.00% throughout this period.

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 Mrs P'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 Mrs P'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 Mortgage Express 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. The earlier increase of 0.01% at the time of takeover being so marginal and of less significance than the later variations.

At this time in 2009, the mortgage market was going through a period of significant change as a result of 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 England¹ and the FCA² 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 sourced 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 Mrs P'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.

Mortgage Express reduced the SVR on several occasions during this period, just not by the same proportion as the base rate. Given the documented increase in cost of funding across the industry, including the B&B Group specifically, and the obligations surrounding Government requirements and the Working Capital Facility loan, I am satisfied the Group balanced its own financial position and obligations at the time with the impact such changes would have on customers like Mrs P.

While I note and have considered the evidence relied on by Mrs P'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 Mrs P's representative.

¹ Quarterly Bulletin, Q4 2014, Bank of England – Bank funding costs: what are they, what determines them and why do they matter?

² 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

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 Mrs P 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.

So 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 Mrs P's mortgage. I don't think there is any basis to say that it somehow contributed to Mrs P being charged an unfairly high rate of interest on her mortgage during the period I can consider, and I've seen no evidence to say that the interest she was charged during that period was unfair for any other reason.

Finally, I note that Mrs P'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

My final decision is that I don't uphold this complaint as such I don't expect Mortgage Express to take any action in response to this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs P to accept or reject my decision before 12 October 2023.

Arazu Eid
Ombudsman