

The complaint

Mr and Mrs M, through their representative, complain that The Mortgage Business Plc ("TMB") has treated them unfairly by overcharging them on their mortgage, during a period when it was no longer offering new mortgages. Mr and Mrs M say that because of their circumstances and the tighter lending rules around affordability checks, introduced as part of the Financial Authority's ("FCA") review in 2014, they've been unable to re-mortgage elsewhere and as such, are considered 'mortgage prisoners'.

What happened

In around June 2007 Mr and Mrs M took a mortgage with TMB. The mortgage was taken out on interest only terms over 25 years. Mr and Mrs M agreed the mortgage on a fixed interest rate of 5.14% until 31 August 2009. At which point the mortgage reverted to TMB's Standard Variable Rate ("SVR").

TMB withdrew from the mortgage market in 2008, which meant that after Mr and Mrs M's fixed interest rate product ended, they were charged the SVR, and were unable to apply for a new fixed rate product with TMB.

There were occasions during the period of Mr and Mrs M's mortgage where TMB customers could explore re-mortgage options through other lenders within the Lloyds Banking Group.

In December 2009 Mr and Mrs M appear to have enquired about obtaining a lower interest rate, but TMB said it couldn't offer them a new rate at that time. Mr and Mrs M remained on the SVR until they redeemed their mortgage in January 2021. It is understood this was through re-mortgage service within Lloyds Banking Group.

Whilst on the SVR, Mr and Mrs M made large capital repayments towards their mortgage of £141,000 in July 2011 and £202,500 in January 2013.

Over the years spanning the period of the mortgage, 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 are as follows:

- From the mortgage start date in 2007 until January 2009, the variations TMB made to its SVR were largely made soon after the changes to the base rate and largely by the same amount – maintaining a margin of 2.44% during this time.
- By March 2009 the difference between the base rate and the SVR increased from 2.44% to 4.34%.
- In 2011, TMB increased its SVR by 0.11% outside of any changes to base rate. It has told us this was due to an increase in the costs.
- Following the change in 2011, TMB's SVR remained static at 4.95% until September 2018.

- For the remainder of the mortgage, the changes TMB made to the SVR were largely made soon after changes were made to the base rate, and by the same amount.

On 7 September 2021 Mr and Mrs M's representative raised this complaint with TMB on their behalf. The complaint letter set out in summary:

- TMB withdrew from the mortgage market in 2008 and stopped offering new interest rate products. Because of the tighter rules around affordability checks introduced as part of the Financial Conduct Authority's (FCA) review in 2014, Mr and Mrs M became 'mortgage prisoners' and were unable to move their mortgage to another lender, with no choice but to remain on TMB's SVR.
- The SVR charged by TMB since Mr and Mrs M's mortgage reverted was unfairly high, especially in these circumstances where Mr and Mrs M and other customers were unable to re-mortgage with another lender.
- The way TMB's margin between the SVR and the base rate increased over the years is unfair.
- TMB'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.
- TMB's actions constitute a breach of Principle 6 of the FCA 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.
- Mr and Mrs M 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.

TMB responded to the complaint on 2 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 mortgage terms and conditions set out when the SVR may be varied. When TMB exercised its right to vary the SVR, it did so in accordance with the terms and conditions.
- TMB was entitled to make a commercial decision in 2008 to stop accepting any new business applications. Its customers were made aware of such decision by letter in or around August 2008. As was the case in October 2011, when Mr and Mrs M were notified of an increase to the SVR due to changes in regulation regarding capital reserves.
- If Mr and Mrs M were unhappy with the interest rate being charged on their mortgage

by TMB they were free to re-mortgage elsewhere. Over the years TMB has, in several ways informed Mr and Mrs M of the options available to them if they wished to explore re-mortgaging with a different lender including another company within the Lloyds Banking Group. It's not clear what steps, if any, Mr and Mrs M took at the end of the fixed rate period to review any options to re-mortgage.

Mr and Mrs M's representative referred this complaint to our service on 6 April 2022. Our investigator issued his opinion on the limitations to our jurisdiction and what this meant for Mr and Mrs M. In summary, he said:

- The complaint was raised in November 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 November 2015 onward. So, he was satisfied that he could consider whether the sums charged from November 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 Mr and Mrs M 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 November 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. He would also need to consider whether the variation clause is itself an unfair term as a matter of law. 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 November 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 – November 2015 onward.

Mr and Mrs M accepted our investigator's findings on our jurisdiction. TMB also hasn't objected to our service continuing with our investigation of the complaint on this basis. As such our investigator subsequently issued his opinion on the merits of Mr and Mrs M's complaint. Our investigator didn't recommend that the complaint should be upheld. In summary he said:

- He doesn't agree that Mr and Mrs M can be defined as being 'mortgage prisoners'. TMB has largely been an inactive lender since 2008. As an inactive lender TMB didn't offer any products to any of its customers. He explained why, in his opinion, TMB had not breached the relevant MCOB rules and why Mr and Mrs M haven't been treated any less favourably than other TMB customers.
- He accepts that TMB could've done more to let its customers know sooner about the alternative specialist inter-group re-mortgage process in 2014. That said, in Mr and Mrs M's case, he's not persuaded that even if they'd known about this route sooner, they would have acted any differently in the circumstances. So, he can't safely say that Mr and Mrs M had lost out due to TMB's actions.

- In relation to the interest rate charged during the mortgage term, he was satisfied that Mr and Mrs M's mortgage contract did not commit to track the base rate, they were made sufficiently aware of the relevant terms and TMB has sought to charge interest in accordance with those terms. So, no unfairness has arisen for Mr and Mrs M.
- 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. TMB has provided some available information to show that its cost of funds did not reduce in line with the base rate during this period.
- For the remainder of the period until the mortgage was redeemed, the only changes TMB 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 TMB has acted unfairly or unreasonably, or that Mr and Mrs M have overpaid interest.
- The interest rate applied to this mortgage over the term has remained generally in line with the SVRs of other similar lenders across the market. The rate Mr and Mrs M paid was not an obvious outlier and was not manifestly excessive.

Mr and Mrs M's representative disagreed with the investigator's opinion. In summary it said:

- It didn't agree with the conclusion reached regarding the unfair terms of the mortgage. Mr and Mrs M's primary complaint about a breach of an implied term has not been addressed by the investigator; and
- It does not agree with the investigator's interpretation and response to whether TMB's actions as a 'closed book lender' constitute a breach of Principle 6 of the FCA handbook and a breach of MCOB 11.8.1.

As this 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 Financial Conduct Authority's ("FCA") 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 Mr and Mrs M. But I hope the reasons I have set out below will help them to understand why I have come to this conclusion.

I have explained the position relating to TMB's objection to our service considering Mr and Mrs M'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 TMB or Mr and Mrs M 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 Mr and Mrs M have been charged, but only from 7 September 2015 onwards – the complaint about charges before that date are out of time. I note the investigator gave a date of November 2015, but I have seen evidence that this complaint was in raised sooner on 7 September 2021; and
- 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 TMB's SVR, since the SVR charged during the period that is in time is the result not only of decisions TMB 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 TMB 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 Mr and Mrs M's complaint about their ability to obtain access a new interest rate with TMB in the last six years leading up to their complaint being made – so from 7 September 2015 onwards. Mr and Mrs M say they're unhappy about being on the SVR as opposed to a fixed rate over the years. This is something they would have known at the time over the years since 2008 and as such Mr and Mrs M ought reasonably to have been aware of their cause for complaint more than three years before making their complaint. So, I didn't think this part of the rule gives them any more time to complain.

Mr and Mrs M's representative has raised many individual complaint points. However, I consider the overall complaint to break down into two key points:

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

Our investigator has issued a lengthy view addressing Mr and Mrs M's complaint. The investigator's view echo's a previous Ombudsman's lead decision which is indicative of our service's approach to cases like this one about TMB. There are also many other published decisions of this nature against several other lenders that set out our service's approach on similar cases.

It's important to note that the complaints brought to our service by Mr and Mrs M's representative about TMB are identical to one and other. Notwithstanding that each

customers circumstances must be considered individually - the key facts and substance of these complaints remain the same.

It's for these reasons that I don't think it's necessary to repeat everything our service has already set out in previous final decisions. Rather I'll summarise the key findings, turning my attention specifically to the reasons why Mr and Mrs M's representative say they remain unhappy with the response given by our investigator.

Access to interest rates

Mr and Mrs M's mortgage was taken out in 2007. Under the terms of the mortgage offer, they had a fixed interest rate until 2009, after which the mortgage would revert to TMB's SVR – and this in fact happened. Neither the mortgage offer nor the mortgage terms and conditions say that TMB has to make another fixed rate available after the initial one ended, or that it has to offer Mr and Mrs Many rate other than the SVR.

This means that Mr and Mrs M's mortgage has operated as the contract said it would, on the terms they agreed to when they borrowed the funds in 2007. And there's nothing beyond the mortgage terms which say that TMB has to offer new rates either – there's no law, or rule of mortgage regulation which says that a lender has to offer new rates to existing customers.

From 2008, TMB was not offering new rates to any existing customers. Until 2011, there was an option of re-mortgaging directly to another lender within the same group (subject to application). In October 2011 the option of an inter-group re-mortgage was no longer possible. TMB did not start offering this option again until 2014. As I've said, it was not obliged to do so. Mr and Mrs M were not therefore being treated any differently to other TMB customers. Their mortgage was operating as it should have done according to its terms and conditions. And therefore, I don't think TMB treated them unfairly in respect of in the interest it charged them during this period.

In April 2014 TMB decided to offer their customers another specialist inter-group re-mortgage to Bank of Scotland, subject to eligibility. Our service isn't satisfied that TMB made this sufficiently clear to all its customers until it changed the wording in its annual statements from 2019 onwards – which made this option clearer. So, I'm satisfied that there was a period between 2014 and 2019 when customers could have potentially lost out on the option of securing a new fixed rate deal – had they wanted one.

After considering all the evidence provided, I do conclude that TMB should have informed Mrs and Mr G in April 2014 of the possibility of applying for a new interest rate product using the internal re-mortgaging process, or at the very least invited them to call TMB to discuss the interest rate, as they did do as part of their 2019 statements.

Whilst it's not in dispute that TMB ought to have given clearer information to its customers sooner than it did, that doesn't automatically follow that our service will uphold every complaint of this nature. It's necessary to consider each consumers' circumstances individually to establish whether, on balance, they'd likely have acted differently had they known of their options sooner. That said, I've thought about the fairness of this in the context of Mr and Mrs M's case and I'm not persuaded that they would have acted differently in the circumstances of this case. I'll explain why.

At a general level, SVR's have a legitimate purpose and can benefit consumers through providing flexibility. There is no evidence to suggest Mr and Mrs M actively sought a new rate from TMB during the period of their mortgage term that's falls within our jurisdiction – that being from September 2015 onwards or that they tried to re-mortgage with a different lender without any success.

I appreciate there appears to be some evidence that Mr and Mrs M did enquire about a new interest rate in 2009. For reasons I've explained I'm not able to look into any complaint about their ability to access a new interest rate before September 2015. That said, it does appear that remaining on the SVR was in Mr and Mrs M's best interest as in the following years they made large capital repayments towards their mortgage totalling almost £343,500. Had they been on a fixed interest rate, it's most likely they would have incurred a large ERC when making those payments.

I also note that it wasn't until January 2021 that Mr and Mrs M chose to apply for a re-mortgage within Lloyds Banking Group, despite being told from July 2019 about the internal re-mortgaging process. There is also no evidence to suggest that they expressed any form of concern about their inability to access a new interest rate until their representative raised the complaint for them after the mortgage was redeemed.

So, on balance, the information presented to me suggests that at the time, remaining on TMB's SVR appears to have suited Mr and Mrs M's circumstances. I'm also not persuaded that they weren't able to re-mortgage with a different lender, had they tried. I say this because from the information available they were successfully able to re-mortgage with a different (mainstream) lender in 2021 without any known difficulty.

I've considered Mr and Mrs M's representatives arguments in relation to the FCA's rules and regulations that they say apply here.

The FCA has, in the MCOB handbook, set out an evidential provision for the fair treatment of customers who are unable to source deals with their existing lender or move their mortgage elsewhere. I'm satisfied MCOB 11.8.1 E applies here.

In summary, 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. To do so may be in contravention of Principle 6.

There was a period where Mr and Mrs M were unable to access a new product with TMB. As such they satisfy 11.8.1 (1). Whilst I'm not persuaded that they couldn't obtain a new mortgage with a new lender, the provision still applies as 11.8.1 does not require both (1) and (2) to be satisfied before it is relevant to considering whether they were fairly treated, it requires either to be satisfied.

11.8.1 E does not require all customers to be treated the same. But it does, in my view, show that there may be unfairness where a borrower is treated less favourably than a borrower who shares similar characteristics, "for example, by offering less favourable interest rates or other terms". Where the lender offers less favourable products to some customers, it may give rise to the possibility of unfair outcomes in some situations.

For reasons I've explained, Mr and Mrs M weren't being treated any differently to any other TMB customer and as such there has been no contravention of Principle 6. So, I'm unable to conclude that Mr and Mrs M were treated unfairly by TMB in relation to accessing a lower interest rate.

That leads me to consider whether TMB took advantage of Mr and Mrs M's circumstances by setting the SVR unfairly during this period.

The fairness of the interest rate charged

Our investigator already set out the relevant terms of the mortgage, specifically those set out in Mr and Mrs M's mortgage offer and those in relation to how the SVR operated. He's also explained in detail why he is satisfied that TMB has operated within the relevant terms and conditions and that the way the terms have been used hasn't resulted in Mrs Mr and Mrs M being treated unfairly. This is supported by extracts of information TMB has provided about the impact of its funding costs during the global financial crisis. Albeit limited due to the time that's passed - this information is corroborated by what we know about general market conditions at that time.

When considering everything I am not persuaded that TMB operated the express contract terms in an unfair manner when setting and varying the interest rate that applied to Mr and Mrs M's mortgage. I don't think there is any basis to say that TMB somehow contributed to Mr and Mrs M 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 charged during that period was unfair for any other reason.

The representative continues to argue that TMB has breached what it says was an implied term, not to exercise its discretion to vary the SVR arbitrarily, capriciously, perversely or irrationally. Our service has explained in several decisions thus far our position in relation to this point. For the reasons set out above, if there was such a duty in the present case, I'm satisfied that TMB did not breach it since it approached the question of varying the SVR in line with the express terms of the contract.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M and Mrs M to accept or reject my decision before 27 November 2023.

Arazu Eid
Ombudsman