

The complaint

The estate of Mr M complains that UCB Home Loans Corporation Ltd (UCB) treated him unfairly by overcharging him on his mortgage.

What happened

Mr M took out a mortgage with UCB in 2006. The mortgage offer confirmed Mr M had taken out a five-year tracker mortgage – set to track the Bank of England base rate plus 0.5%¹. After the five-year interest rate product came to an end, Mr M's mortgage would revert to UCB's Flexible Variable Rate (FVR). The FVR at the time of application was 7.04%.

On 19 May 2020, Mr M complained to UCB via a representative. The letter set out that Mr M sought to claim damages in relation to being overcharged interest on his outstanding mortgage balance due to the "unlawful interest rates" and any variations in the interest rates charged by UCB.

The letter set out that Mr M considers that the mortgage offer issued on 25 October 2006, contained unfair contract terms pursuant to the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR). Elaborating on this point, Mr M's representative argued:

- Section four of the offer letter is unfair as the term within did not explain what was meant by the "Standard Variable Rate", and Mr M was misled into believing that this rate would vary in accordance with the Bank of England Base Rate, rather than at UCB's discretion.
- Mr M does not accept that the mortgage general terms and conditions, which defined the "Standard Variable Rate" were incorporated into the contract.
- It is unfair to expect a consumer, such as Mr M, to "pore over the small print" to understand the meaning of a key term like the interest rate.
- The meaning of the "Standard Variable Rate" and particularly the fact that UCB could vary it at its discretion, should have been set out in the mortgage offer. The failure to do so, renders the term within section four of the mortgage offer unfair for the purposes of UTCCR such that UCB is unable to rely on it.
- A term included within a contract allowing a lender to vary interest rates entirely at its own discretion without providing grounds to do so is unfair.
- The term lacks transparency and Mr M did not have an effective right to termination due to the presence of an Early Repayment Charge (ERC), as well as other costs associated with discharging his mortgage and switching to another lender.
- Section 15 of The Supply of Goods and Services Act should be deemed to apply in this case. This allows for the consideration of a 'reasonable rate' being applied to Mr M's mortgage balance rather than UCB's SVR.

¹ The mortgage offer also confirmed that if the Bank of England base rate fell to 2.75% or less, the mortgage would track at 0.54% for the remainder of the five-year interest product.

- UCB'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 11.5(1)(b) which requires a firm to treat customers fairly by assessing, before deciding to vary a regulated mortgage contract or home purchase plan; whether the consumer will be able to repay the sums borrowed and interest.
- Mr M seeks to claim the difference between the amount of interest he paid on his mortgage and the amount he would have paid had it been subject to what he deems to be a reasonable rate.

UCB responded to the letter of complaint on 1 July 2020, stating that the complaint had been made out of time and as such, it was not one it needed to investigate.

Unhappy with UCB's response, Mr M's representative referred the case to our service.

Before this service could provide an answer to this complaint Mr M's representative withdrew from this complaint and Mr M sadly passed away. His estate confirmed they wanted us to continue our investigation into the concerns originally raised in May 2020.

One of our investigators looked into the complaint and set out that part of the complaint had been brought too late under the rules that apply to this service. He went on to not uphold the merits of the part of the complaint that had been brought in time.

UCB replied to the investigator's assessment to let us know that it agreed with his findings and had nothing further to add.

The estate requested the complaint be passed to an ombudsman.

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

Why I can only consider part of this complaint

UCB previously raised an objection to our service considering Mr M's complaint, in short, it thought Mr M had brought his complaint too late under the DISP rules. In response to UCB's objection, the investigator issued a jurisdiction assessment setting out which parts of Mr M's complaint this service had the power to consider. In summary, he found the following:

- The Financial Ombudsman Service could not consider a complaint that Mr M was led to believe the interest rate would vary in accordance with the Bank of England Base Rate, as that complaint was made out of time;
- The Financial Ombudsman Service could consider a complaint about the amount and fairness of the interest Mr M was charged, but only from 19 May 2014 onwards – the complaint about charges before that date being out of time; and
- In order to consider the fairness of the interest charges that are in time, it is necessary for this service to take into account the historic changes to UCB's FVR, since the FVR charged during the period of time that is in time is the result not only of decisions UCB 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 UCB charges interest, it must have a fair and lawful basis for doing so.

Neither party objected to the investigator's findings on jurisdiction. And as the approach the investigator took in that assessment reflects the decision of the High Court in an application

for a judicial review of ombudsman's decision in a similar case. I am satisfied that, as a matter of jurisdiction, I have the power to consider this complaint.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

When considering what is fair and reasonable in all the circumstances, I am required by DISP 3.6.4R of the Financial Conduct Authority's ("FCA") Handbook to take into account:

'(1) relevant:

- (a) law and regulations;
- (b) regulators' rules, guidance and standards;
- (c) codes of practice; and

(2) (where appropriate) what [I consider] to have been good industry practice at the relevant time.'

I also focus on what I think is material and relevant to reach a fair and reasonable outcome. So, although I have read everything that has been supplied to me, I may not address every point that has been raised.

Having done all that, I don't think this complaint should be upheld. I have set out my reasons for this decision below.

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

- Mr M had a legitimate expectation that his mortgage would track the Bank of England Base Rate once it reverted to the variable rate. As it did not do so, UCB has treated him unfairly.
- Mr M has paid an unfairly high rate of interest than he should have done because in varying the FVR UCB (i) relied on an unfair term and/or (ii) did not vary the FVR for a reason allowed by the terms and conditions.

I will deal with each point in turn.

Did UCB's actions cause Mr M to have a legitimate expectation that his mortgage would track the Bank of England Base Rate?

Mr M's representative considered UCB's actions to have given Mr M a legitimate expectation that his mortgage would track base rate.

As I mentioned above, this part of Mr M's complaint is out of time.

To the extent that Mr M's representative is suggesting that this is also a basis to complain about the charges that are in time, I disagree with its conclusions.

The mortgage documentation is clear in that Mr M's mortgage would revert to the FVR once his tracker period expired and that the FVR could go up as well as down. And I haven't seen any evidence that persuades me that UCB was obligated, contractually or otherwise, to have its FVR track Base Rate.

I am aware Mr M's representative argued that, as the mortgage general terms and conditions were not included in the mortgage offer letter, they should not form part of the mortgage contract. I disagree with this conclusion.

UCB was not obligated to set out all the terms and conditions governing its mortgages in one document. And while I appreciate this means Mr M would have needed to read more than one document to understand and appreciate the terms that governed his mortgage, given this was a substantial liability, I think Mr M ought reasonably to be treated as if he had read all of the information provided. And I'm not aware of any evidence that can properly be said to show that UCB acted in a way where it committed to keep the margin between base rate and the FVR the same. Finally, I am not aware of any principle of law that, on the facts of this case, would obviously commit UCB to doing so.

So, it follows that I do not uphold this part of Mr M's complaint.

Fairness of interest charged: interest rate variation terms

I have to consider whether from 19 May 2014 onwards Mr M paid an unfairly high rate of interest. While I acknowledge that Mr M paid the FVR set by UCB, and that there is no evidence (and no complaint) that UCB made any calculation errors in charging interest, I also think that there are other questions that are potentially relevant to whether the interest itself was fairly charged.

One of those questions is whether the term allowing UCB to vary the FVR is the sort of term the courts would consider to be unfair as a matter of law.

Mr M's representative argued that his contract with UCB contained unfair contract terms pursuant to UTCCR. The law on unfair terms is an important part of consumer protection measures and prevents businesses from taking advantage – whether consciously or otherwise – of their customers, who have limited bargaining power.

As a strict matter of law, if the relevant clauses in this case are unfair under the UTCCRs, they would not be binding on Mr M (Regulation 8 UTCCR). And UCB would not have been permitted under the terms and conditions to vary the FVR in the way that it did.

In considering this point I've looked at whether the terms in the agreement between Mr M and UCB go further than reasonably necessary to protect UCB's legitimate interests, whether the variation clauses are sufficiently transparent and whether there was a significant barrier to exit.

In respect of the last point, the contract confirms that an early repayment charge would cease to apply once Mr M reverted to the FVR and I'm not aware of any other significant barrier to him being able to exit the contract at this stage. And while his representative referred to the costs associated with re-mortgaging, these would apply whenever Mr M chose to switch lender and I'm not persuaded they amount to a significant barrier to exit.

And in respect of the first two considerations, I accept there is a possibility that a court might conclude that parts of the clause are overly broad and could be more transparent. But I think it is important to be clear that whatever the answer to this question, the central issue I need to decide is whether there was any unfairness caused to Mr M from 19 May 2014 onwards. The fairness of the underlying variation clause 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, but is not limited to, relevant law. So, while I've taken account of the relevant law regarding unfair contract terms, I've also thought more broadly about whether, and the extent to which, the way in which the terms have been used has resulted in unfair treatment for Mr M. I think that is the ultimate question I need to answer in deciding whether to uphold this case.

Has UCB exercised the terms fairly?

In answering this question, I am doing so in the context that this complaint only concerns the fairness of interest charged to Mr M's mortgage since 19 May 2020. All interest charging events before that are out of time because Mr M did not refer his complaint in time.

However, in order to consider the fairness of the interest Mr M was charged during the period that is in time, it's necessary for me to consider historic changes to UCB's FVR, since the FVR charged during the period of time that is in time is the result not only of decisions UCB made during that period, but also the result of decisions it made prior to it.

I'm satisfied that each time UCB made a decision to change the FVR, the FVR remained at that revised level until it made a further decision to change it – from the starting point of the level resulting from the previous variation. Therefore, the FVR charged from 19 May 2020 is the "sum of the parts" of the history that went before. And issues impacting on the fairness or lawfulness of those parts *might* have an impact on the fairness of the FVR charged from 19 May 2020.

Having established that I need to look at the FVR both before and after 19 May 2020, and having considered all the available evidence, I am not persuaded that anything UCB has done in varying the rate has led to unfairness from 19 May 2020 onwards.

This service asked UCB to provide evidence to support its decision making in varying its FVR across the period Mr M held his mortgage. For reasons of commercial confidentiality, I haven't set out in detail the evidence UCB has been able to provide in full or provided copies of it to the estate. 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 UCB has provided in confidence, subject to the summary of it I have set out in this decision.

Mr M's account reverted to the FVR in March 2008 and ceased to operate as a tracker. Between 2008 and 2009 UCB reduced its FVR on several occasions (although by less than the reduction in base rate) before holding the rate steady in 2009.

In 2010, UCB increased its FVR outside of a change to base rate. And it held the rate steady following the reduction and subsequent increase to base rate across 2016 and 2017.

I've already set out that this was not a lifetime tracker mortgage, so UCB was not contractually obligated to track the base rate. Nor is it the case that Mr M's mortgage had a 'cap' preventing UCB's FVR from increasing beyond a certain 'margin' above base rate. So, there was nothing in the contract that expressly prohibited UCB from setting the FVR at a level whereby the margin between the FVR and base rate would change. But that doesn't mean that UCB could set the FVR at whatever level it chose. As discussed above, the term enabling UCB to vary the FVR itself has to be fair (to prevent businesses taking advantage of customers), and UCB had to ensure that in varying the FVR it only did so for one of the reasons set out in the contract.

Between 2007 and 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 UCB (and its parent company), and was reflected in changes to a number of lenders' interest rates charged across the market at the time. This was clear at the time and has been the subject of analysis by both the Bank of England² and the FCA³ since. Whilst the base rate did reduce significantly during this period, the cost to lenders of funding their businesses changed, as did their prudential requirements. These were made up of several factors and that are not directly linked to base rate. So, I think there are likely to be objectively justifiable reasons why UCB did not reduce its FVR at the same level as the reduction in the Bank of England Base Rate.

The impact of the financial crisis extended beyond 2009 for many lenders, including UCB who has been able to show that by 2011, the level of accounts in arrears was eight times higher than its parent company, impacting the cost of funding UCB and its risk profile. It has explained this was a significant factor in its inability to pass on the full base rate reductions across 2008-2009 and led to it increasing its SVR in 2010.

Having reviewed the terms and conditions, I'm satisfied UCB varied its FVR in line with its terms and conditions and did so fairly. I have not seen any evidence to suggest the changes UCB made were arbitrary, excessive, or unfair. Rather, the evidence I've seen satisfies me that UCB acted to protect its legitimate interests while balancing its obligation to treat Mr M fairly.

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

So even if I were to conclude that the relevant terms were unfair pursuant to UTCCR, I am not persuaded that UCB operated them in an unfair manner when setting and varying the interest rate that applied to Mr M's mortgage. That being the case, I don't think there is any basis to say that they somehow contributed to Mr M being charged an unfairly high rate of interest on his mortgage during the period I can consider, and I've seen no evidence to say that the interest he was charged during that period was unfair for any other reason.

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

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

I have also considered the representative's point that UCB has breached Principle 6 of the FCA Handbook and MCOB 11.5(1)(b). Having done so, and for much the same reasons set out above, I'm not persuaded it has.

My final decision

For the reasons set out above, I do not uphold this case and I make no award against UCB Home Corporation Ltd

Under the rules of the Financial Ombudsman Service, I'm required to ask the estate of Mr M to accept or reject my decision before 12 December 2023.

Lucy Wilson
Ombudsman