

## The complaint

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

## What happened

In November 2003 Mr and Mrs C were offered a residential mortgage with GMAC-RFC. The mortgage was taken out on interest only terms over 17 years. Mr and Mrs C agreed the mortgage on a discounted variable interest rate of 1.00% below GMAC's standard variable rate ("SVR") until 1 January 2005 – giving a rate of 4.74%. After which the mortgage would revert to GMAC's Standard Variable Rate ("SVR") for the remainder of the term of the mortgage – which at the time was 5.74%.

Soon after the mortgage was taken, in early 2004, Mr and Mrs C'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. So, from this point, Mr and Mrs C were unable to apply for new fixed rate product with Mortgage Express as it had no alternative interest rate products to offer them. Mr and Mrs C say that due to their circumstances and tighter lending conditions, they've been unable to re-mortgage with a different lender. As such Mr and Mrs C remained on Mortgage Express' SVR until they redeemed their mortgage in September 2022.

Over the years between the mortgage starting in 2004 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 2004 until 1 January 2009, all the variations made to the SVR were made by Mortgage Express. These changes were largely made soon after the changes to the base rate and largely by the same amount – maintaining a margin of 1.99% until 1 June 2004 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 Mr and Mrs C's representative raised this complaint with Mortgage Express on their 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, Mr and Mrs C became 'mortgage prisoners' as they were unable to move their mortgage to another lender, with no choice but to remain on Mortgage Express' SVR.
- The SVR charged by Mortgage Express since Mr and Mrs C's mortgage reverted was unfairly high, especially in these circumstances where they were 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.
- Mr and Mrs C 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.

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 to Mortgage Express did not affect any of the terms and conditions of Mr and Mrs C'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 Mr and Mrs C'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 Mr and Mrs C would be provided with a new mortgage in the future. Neither was there any obligation on GMAC or subsequently Mortgage Express to provide a new mortgage.
- If Mr and Mrs C were unhappy with the interest rate being charged on their mortgage

by Mortgage Express, they were free to re-mortgage elsewhere, without incurring an Early Repayment Charge (ERC) from 1 January 2005 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.

Mr and Mrs C'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 Mr and Mrs C. 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 Mr and Mrs C 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 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 Mr and Mrs C's complaint. In summary he said:

- Mr and Mrs C's mortgage contract did not commit to track the base rate. They were made sufficiently aware of the relevant terms set out by GMAC 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 Mr and Mrs C 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 occurred between 2007 and 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.
- Overall, the investigator didn't think there was anything to suggest that Mortgage Express has acted unfairly or unreasonably.

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

- It didn't agree with the conclusion reached regarding the unfair terms and conditions. Mr and Mrs C's primary complaint is the breach of an implied term. The Investigator only considers the express terms of the mortgage and does not, in any event, deal with the compliance/non-compliance of these terms in sufficient detail for its client to understand the reasoning behind the decision.
- Mr and Mrs C are of pension age, which has impacted their ability to secure a new mortgage over the years. They were, as such, by definition, 'mortgage prisoners' for over a decade.
- It didn't agree with the investigator's view that we can only consider events occurring in the six-year period before the complaint was made. Mr and Mrs C do not agree that them being in receipt of mortgage statements that detail the applicable rate was grounds on which they ought to have been aware they had cause to complain that an implied term of the mortgage had been breached. It was not until around 2019 that they became aware of the concept of being a mortgage prisoner.

Our investigator addressed these points further, but Mr and Mrs C still didn't agree with the outcome and asked that the complaint be referred to an ombudsman.

In response, the investigator confirmed that he would pass the case to an ombudsman for a decision – inviting both parties to provide any further comments or information they would like the ombudsman to consider by 28 July 2023. Neither party made any further representations.

Mr and Mrs C did not accept the investigator's opinion relating to what part of the complaint we can and can't consider. As such, before proceeding to consider the merits of this complaint, I issued a decision setting out which parts of Mr and Mrs C's complaint our service has the power to consider.

In summary I said that our service can only consider whether Mortgage Express has treated Mr and Mrs C unfairly by overcharging them on their mortgage, during a period when it was no longer offering new mortgages – from September 2015 onwards. Mr and Mrs C's complaint about events that occurred before this date had been brought too late. I'll now issue my decision on this part of the 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 of this case, I'm required by DISP 3.6.4R of the 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 C. But I hope the reasons I have set out below will help them to understand why I have come to this conclusion.

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

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

I will deal with each point in turn.

#### *Access to interest rates*

As explained, our service can only consider Mr and Mrs C's complaint about their 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 Mr and Mrs C a new interest rate. Having done so, I'm not persuaded it has. All of Mortgage Express' customers are in the same position, and Mr and Mrs C aren'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 Mr and Mrs C.

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.

In these circumstances I don't think Mortgage Express was required to send Mr and Mrs C a "mortgage prisoner" letter – which would enable a new lender to apply a modified affordability assessment to their application – because they were not eligible. This was because they had not been arrears free for the last twelve months – at the time the FCA set out this requirement.

That said, in these circumstances I think it would be fair – and in line with the good practice offered by other lenders dealing with closed and nationalised loan books – for Mortgage Express to 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 Mr and Mrs C's mortgage*

I must consider whether from 7 September 2015 onwards, Mr and Mrs C have 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 Mr and Mrs C by GMAC in November 2003 set out that their two-year discounted interest rate would operate as follows:

#### ***"Mortgage Scheme***

<i>Product Name</i>	<i>DISC 1% 01-01-05</i>
<i>Type of Mortgage</i>	<i>Interest Only</i>
<i>Mortgage Term</i>	<i>17 years, 0 months</i>
<i>Interest Rate (per annum)</i>	<i>4.74%</i>
<i>(variable unless otherwise stated)"</i>	

Section 15 of the special conditions listed in the mortgage offer goes on to say:

*"The interest rate applicable to this offer of advance is our standard variable interest rate, which will be discounted by 1.0% until 01/01/2005. The interest rate detailed on the offer letter schedule has been calculated to include the 1.0% discount applicable to this offer of advance.*

*From and including 01/01/2005 your mortgage will revert to our standard variable rate applicable at the time. You will be advised when changes are due to your monthly payments"*

The relevant supplementary offer conditions dated October 2002 go on to say:

#### ***4. Interest***

*Details of how we charge interest to your account are set out in the Mortgage Conditions. Interest may be charged in advance or in arrears according to our policy from time to time...*

*If you have a variable rate mortgage, the interest rate shown in the offer letter is the rate which applies at the date of the offer, but this may change before the mortgage is completed.*

*After the mortgage is completed, we will notify you of any change in the rate in accordance with the Mortgage Conditions which also contain details of the way in which we will notify*

*you when we change the rate.*

## **5. Changes to the interest rate and other charges**

*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);*
- (b) to maintain the competitiveness of our business, taking into account changes in market conditions (actual or expected);*
- (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.”*

The mortgage terms and conditions set out that when the initial fixed rate expired in 2005, 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 Mr and Mrs C to a new interest rate. To that extent, the mortgage has operated as it should.

I've considered whether the terms in Mr and Mrs C'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 5(a) 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 Mr and Mrs C 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 Mr and Mrs C. 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 fairly and 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 Mr and Mrs C'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 Mr and Mrs C took their mortgage. Having done so, I am not persuaded that anything Mortgage Express has done in varying the rate has led to Mr and Mrs C 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 Mr and Mrs C. 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 2004, when Mr and Mrs C took their 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 Mr and Mrs C'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 Mr and Mrs C'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 it 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 England<sup>1</sup> and the FCA<sup>2</sup> since. Whilst the base rate did reduce

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

<sup>2</sup> 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



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 Mr and Mrs C'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 Mr and Mrs C's.

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

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 Mr and Mrs C 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 Mr and Mrs C's mortgage. I don't think there is any basis to say that it somehow contributed to Mr and Mrs C 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 were charged during that period was unfair for any other reason.

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.

Finally, I note that Mr and Mrs C'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 Mr and Mrs C to accept or reject my decision before 12 October 2023.

Arazu Eid  
**Ombudsman**