

The complaint

Ms H and Mr S through their representative, complain that Mortgage Express has treated them unfairly by overcharging them on their mortgage, during a period when they were no longer offering new mortgages. Ms H and Mr S say because of their circumstances and the tighter lending rules around affordability checks, introduced as part of the Financial Conduct Authority's review ("FCA") in 2014, they were unable to remortgage elsewhere and as such considered mortgage prisoners. They redeemed their mortgage in August 2018.

What happened

On the 10 August 2007, Ms H and Mr S were offered a residential mortgage with GMAC-RFC Limited ("GMAC"). The mortgage was taken out on a repayment basis over a term of 25 years. Ms H and Mr S agreed the mortgage on a fixed interest rate for two years at 5.80% until 30 September 2009. 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 7.74%.

Soon after the mortgage was taken, in early 2008, Ms H and Mr S' mortgage was transferred to Mortgage Express – a wholly-owned subsidiary of Bradford and Bingley ("B&B"). Following the global financial crisis in 2008/2009, B&B was nationalised in late 2008 and along with its subsidiaries, they stopped offering new mortgage products. So, from this point Ms H and Mr S were unable to apply for a new fixed rate product once their one had ended with Mortgage Express as they had no alternative interest rate products to offer them. Ms H and Mr S say that due to their circumstances and tighter lending conditions, they have been unable to re-mortgage with a different lender. As such, Ms H and Mr S remained on Mortgage Express' SVR until they redeemed the mortgage in August 2018.

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 Mortgage Express made to the SVR were soon after the changes to the base rate and largely by the same amount.
- 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, Ms H and Mr 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, Ms H and Mr S 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 Ms H and Mr S' mortgage reverted was unfairly high, especially in these circumstances where they have been 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 the 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 new mortgage lender, a lender should not take advantage of the customer's situation or treat them differently to other customers with similar characteristics.
- Ms H and Mr S have suffered additional financial problems due to the monthly costs which led to them having to take out additional borrowing which would have been unnecessary if they had been offered a better interest rate.
- Ms H and Mr S asked for a payment holiday when their business collapsed but they were told this wasn't an option which forced them into arrears.
- They accrued arrears which were capitalised and incurred late payment and arrears fees on top of this.
- Ms H and Mr S 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 they said they 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 given circumstances) under the mortgage terms.
- The transfer from GMAC to Mortgage Express did not affect any of the terms and conditions of Ms H and Mr S' mortgage. The terms and conditions set out when the SVR may be varied. When Mortgage Express exercised their right to vary the SVR, they 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 Ms H and Mr S' mortgage statement expressly sets 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 were no express guarantees in the mortgage offer that Ms H and Mr S would be provided with a new mortgage in the future. Neither as there any obligation on GMAC or subsequently Mortgage Express to provide a new mortgage.
- If Ms H and Mr S 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 October 2009. 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, the MCOB or otherwise.
- They have been unable to identify an occasion where a payment holiday had been rejected so Mortgage Express asked for further information to consider the matter further.

Ms H and Mr 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 Ms H and Mr S. 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 – until the mortgage was redeemed in August 2018. So, he was satisfied that he could consider whether the sums charged from 7 September 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, that they had cause for complaint. The investigator explained why he thought Ms H and Mr S 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.

Our investigator then went on to provide his opinion, not upholding the merits of Ms H and Mr S' complaint. He said:

- Ms H and Mr 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 Ms H and Mr S experienced because of the 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 the businesses and was reflected in changes to a number of lenders' interest rates.
- The investigator said that Mortgage Express was an inactive lender, so they didn't offer new lending or mortgage products to Ms H and Mr S. He said that Ms H and Mr S were not being treated any differently from any other Mortgage Express customers with similar characteristics when offering new interest rates – but Mortgage Express doesn't offer products to anyone because they can't. He also said that Mortgage Express didn't place any barriers to stop Ms H or Mr S approaching another lender.
- Overall, the investigator didn't think there was anything to suggest that Mortgage Express has acted unfairly or unreasonably.

Ms H and Mr S' representative said they disagreed with the investigator's opinion. In summary, they said the following:

- Despite Ms H and Mr S receiving interest rate statements, they did not have the knowledge or understanding to know they were mortgage prisoners and did not do so until 2019. Ms H and Mr S' primary complaint is the breach of an implied term. The term mortgage prisoner was not in public domain until around 2019, so Ms H and Mr

S did not know that they may be afforded special protections from unfair treatment as a result. These are not matters which Ms H and Mr S would have been aware of and it was not until the combination of all of those things, that they were in a position to make a formal complaint to Mortgage Express.

Our investigator addressed these points further, but Ms H and Mr S didn't agree with the outcome and asked for the complaint to be referred to an ombudsman, so it's been passed to me to decide.

I already issued a decision letting Ms H and Mr S know which parts of their complaint I can consider. In summary, I said that our service can only consider whether Mortgage Express has treated Ms H and Mr S unfairly by overcharging them on their mortgage, during a period when it was no longer offering new mortgages – from September 2015 onwards until August 2018 when the mortgage was redeemed. Ms H and Mr 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 that, I don't think this complaint should be upheld. I realise this will be disappointing for Ms H and Mr S. But I hope the reasons I have set out below will help them understand why I have come to this conclusion.

Ms H and Mr S' representative have raised multiple complaint points. However I will consider the overall complaint and will break it down into two key points:

- Ms H and Mr S' inability to access a new interest rate with Mortgage Express, which they say, by definition, made them mortgage prisoners.
- Ms H and Mr S have paid an unfairly high rate of interest compared to what they should have paid. They say the way in which Mortgage Express has exercised their discretion to set and vary the SVR is in breach of an 'implied term'.

I will deal with each point in turn.

Access to interest rates

As already explained, our service can only consider Ms H and Mr S' complaint about their access to interest rates from 7 September 2015 onwards. In the event I recommended 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. Their parent company B&B collapsed and was nationalised in 2008. Because B&B is government owned, they 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 customer's fixed rate 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 their subsidiary) only offered 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 Ms H and Mr S a new interest rate. Having done so, I'm not persuaded by this. All of Mortgage Express' customers are in the same position, and Ms H and Mr S are not being treated differently to them.

As a closed book lender, Mortgage Express should not stand in the way of customers moving to another lender. From what I can see, they haven't placed any barriers to Ms H and Mr S approaching another lender.

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 the above, I don't think Mortgage Express has done anything wrong in not offering a new rate to Ms H and Mr S.

The fairness of the interest charged on Ms H and Mr S' mortgage

I must consider whether from 7 September 2015 onwards Ms H and Mr S have paid an unfairly high rate of interest. To assess the fairness of the interest rate terms, it's helpful to first set out the relevant terms themselves.

The relevant section of the mortgage offer issued to Ms H and Mr S in August 2007 set out that their fixed interest rate would operate as follows:

- Repayment mortgage for a 25-year term
- *A fixed rate of 5.80% until 30 September 2009*
- *From 1 October 2009, the rate that will apply is GMAC-RFC Ltd standard variable rate, 7.74% for the remaining term of the mortgage*

The mortgage terms and conditions set out what powers Mortgage Express has to vary the SVR. They state the following:

"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 of 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 decision by a court; or*
- (e) to reflect a decision or recommendation by an ombudsman, regulator or similar body".*

Ms H and Mr S believe that following the mortgage being transferred to Mortgage Express, the SVR would from then on, act like the variable rates offered by Mortgage Express. But Ms H and Mr S' mortgage was taken out with GMAC, on the terms agreed with GMAC.

These terms, make no mention of the SVR needing to maintain a fixed margin above the Bank of England Base Rate (BoEBR) or any other benchmark. It is common when mortgages are transferred between lenders that the terms are agreed between the borrower and the original lender are maintained and I've not seen anything to suggest that this wasn't the case here.

While Mortgage Express now had the power to vary the SVR that applied to Ms H and Mr S' mortgage, those powers stemmed from the terms and conditions agreed initially with GMAC.

These didn't require GMAC to maintain a fixed margin above BoEBR, then neither would they required Mortgage Express to.

I haven't seen any evidence that persuades me that GMAC or subsequently Mortgage Express, were obligated, contractually or otherwise, to have Ms H and Mr S' SVR track the base rate. There's also nothing in the terms and conditions that entitled Ms H and Mr S to a new interest rate. So to that extent, the mortgage operated as it should.

I've considered whether the terms of Ms H and Mr 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 their mortgages. Therefore, largely relying on the terms of 3.1(b) when it made variations to their SVR.

Taking everything into account, I'm 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 in the circumstances in which changes might be made to give Mortgage Express significant discretion about when they can make changes to the SVR and by how much.

That said, this alone is not a determination for the case. The central issue I need to decide is whether there has been any unfairness to Ms H and Mr S from September 2015 onwards. The fairness of the underlying variation clauses will not 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 Ms H and Mr S. 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 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 Ms H and Mr 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 the changes Mortgage Express has made to the SVR since Ms H and Mr S took their mortgage. Having done so, I'm not persuaded that anything Mortgage Express has done in varying the rate has led to Ms H and Mr S being treated unfairly for the period I can consider. I have set out why below.

For reasons of commercially 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 Ms H and Mr S. 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 B&B Group has provided in confidence, subject to the summary of it I have set out in this decision.

Ms H and Mr S' fixed rate ended in September 2009 and it's at this point, the mortgage moved to the SVR. I've already set out that Ms H and Mr S' mortgage was not a lifetime mortgage, so Mortgage Express were not contractually obligated to set their SVR at a level

that tracked the base rate for the duration of the mortgage term. Nor is it the case that Ms H and Mr 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 the base rate would change. But that doesn't mean they 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 they 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. 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 subject of analysis by both the Bank of England and the FCA 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 their 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 their credit rating was impacted and the implications this had on their ability to raise funds and the cost of their funding – including how this impacted the cost of the inter-company loan they sourced to Mortgage Express.

To avoid collapse, State Aid in the form of Working Capital Facility loan was extended to B&B from September 2008. With the aid came several conditions on how B&B could operate their obligations on how and when they should look to repay the loan. Understandably, this significantly impacted their commercial strategy and with it, the cost of funding mortgages like that of Ms H and Mr S. To add to this, B&B was nationalised in September 2008 and their 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 benefited Mortgage Express, it came with certain obligations 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 to 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'm satisfied the Group balanced their own financial position and obligations at the time with the impact such changes would have on customers like Ms H and Mr S.

While I note and have considered the evidence relied on by Ms H and Mr S' representative, I am not persuaded they outweigh the business specific evidence provided by the Group on the impact of the financial crisis on their own cost of funding. In addition, as I have said above, I have then considered other sources such as the Bank of England that leads me to a different conclusion from that of Ms H and Mr S' representative.

I have not seen any evidence to suggest the changes to Mortgage Express to the SVR were arbitrary, excessive or unfair. Rather, the evidence I've seen satisfies me that Mortgage Express acted to protect their legitimate interests while balancing their obligation to treat Ms H and Mr S 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 Ms H and Mr S' mortgage. I don't think there is any basis to say that they somehow contributed to Ms H and Mr S 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 the interest they were charging 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 Ms H and Mr S' representative argues that Mortgage Express has breached what they say was an implied term, not to exercise their 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 they approached the question of varying the SVR fairly and in line with the terms of the contract.

My final decision

For the reasons given above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms H and Mr S to accept or reject my decision before 31 January 2024.

Maria Drury
Ombudsman