

The complaint

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

What happened

In September 2007, Mr I was offered a residential mortgage with GMAC-RFC Limited ("GMAC"). The mortgage was taken out on an interest only term over 25 years. Mr I agreed the mortgage on a fixed interest rate for two years at 6.19% until 30 June 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 7.24%.

Soon after the mortgage was taken, in June 2008, Mr I'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 their subsidiaries, they stopped offering new mortgage products. So, from this point Mr I was unable to apply for a new fixed rate product with Mortgage Express as they had no alternative interest rate products to offer him. Mr I says that due to his circumstances and tighter lending conditions, he has been unable to re-mortgage with a different lender. As such, Mr I remained on Mortgage Express' SVR.

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, Mr I's representative raised this complaint with Mortgage Express on his 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 I became a 'mortgage prisoner' as he was unable to move his mortgage to another lender, with no choice but to remain on Mortgage Express' SVR.
- The SVR charged by Mortgage Express since Mr I's mortgage reverted was unfairly high, especially in these circumstances where he was unable to re-mortgage with

another lender.

- The way Mortgage Express' margin between the SVR and the base rate increased over the years is unfair.
- Mortgage Express' discretion to set and vary 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.
- Mr I 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.

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 Mr I'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 Mr I'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 was no express guarantees in the mortgage offer that Mr I 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 Mr I was unhappy with the interest rate being charged on his mortgage by Mortgage Express, he was free to re-mortgage elsewhere, without incurring an Early Repayment Charge ("ERC") from 1 July 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.

Mr I'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 I. 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 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 Mr I ought reasonably to have been aware of his cause for complaint more than three years before making his complaint. So he didn't think this part of the rule gave him any more time to complain.

Our investigator then went on to provide his opinion, not upholding the merits of Mr I's complaint. He said:

- Mr I's mortgage contract did not commit to track the base rate. He was 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 I 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 Mr I. He said that Mr I wasn't being treated any differently from any other Mortgage Express customers with similar characteristics when offering new interest rates – but rather 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 Mr I approaching another lender.
- Overall, the investigator didn't think there was anything to suggest that Mortgage Express has acted unfairly or unreasonably.

Mr I's representative said they disagreed with the investigator's opinion. In summary they said the following:

- They didn't agree with the conclusion reached regarding the unfair terms and conditions. Mr I'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 their client to understand the reasoning behind the decision.
- Mr I's representative raised the concerns about Mortgage Express being a closed book lender which affected Mr I's ability to switch mortgage products and having the ability to remortgage elsewhere. He doesn't agree that we cannot comment on closed book lenders. He said that Mr I was trapped as a mortgage customer and is a relevant consideration. Failure to take this into account amounts to a breach of the implied term.
- They 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 I does not agree that him being in receipt of mortgage statements that detail the applicable rates was grounds on which he ought to have been aware that he had cause to complain that an implied term of the mortgage had been breached. He said it was not until around 2019 that he became aware of the concept of being a mortgage prisoner.

Our investigator addressed these points further, but Mr I didn't agree with the outcome and asked for the complaint to be referred to an ombudsman. He did not accept the investigator's opinion relating to which part of the complaint we can and can't consider.

I have already issued a decision letting Mr I know which parts of his complaint I am able to consider. In summary, I said that our service can only consider whether Mortgage Express has treated Mr I unfairly by overcharging him on his mortgage, during a period when it was no longer offering new mortgages – from September 2015 onwards. Mr I'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 Mr I. But I hope the reasons I have set out below will help him to understand why I have come to this conclusion.

Mr I's representative has raised multiple complaint points. However I will consider the overall complaint and will break it down into two key points:

- Mr I's inability to access a new interest rate with Mortgage Express, which he says, by definition, made him a mortgage prisoner.
- Mr I has paid an unfairly high rate of interest compared to what he should have paid. He says 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 Mr I's complaint about his 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 customers' 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 Mr I a new interest rate. Having

done so, I'm not persuaded by this. All of Mortgage Express' customers are in the same position, and Mr I is not being treated 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 the above, I don't think Mortgage Express has done anything wrong in not offering a new rate to Mr I.

As a closed book lender, Mortgage Express should not stand in the way of customers moving to another lender. They haven't placed any barriers to Mr I approaching another lender.

In October 2019, the FCA relaxed their affordability requirement when assessing a mortgage application, in the hope of allowing borrowers with an inactive lender, to move to an active lender. This didn't directly affect inactive lenders – who had no products for borrowers to apply for – but the FCA did require them to contact borrowers to inform them of this change.

This was so that borrowers could take steps in finding a new mortgage, hopefully on more favourable terms, with another lender.

Mortgage Express had until January 2021 to contact all eligible borrowers and would have sent Mr I a letter. This letter directed Mr I to where he could check the likelihood of being offered a lower rate with another lender. It's not entirely clear if Mr I took advantage of this, or if he did, what the outcome was, as he still has his mortgage with Mortgage Express. But in any event, it wouldn't have any bearing on the ability of Mortgage Express being able to offer a new mortgage product.

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

The fairness of the interest charged on Mr I's mortgage

I must consider whether from 7 September 2015 onwards Mr I has 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 Mr I in September 2007 set out that his fixed interest rate would operate as follows:

- Interest only mortgage for a 25-year term
- *A fixed rate of 6.19% until 30 June 2009*
- *From 1 July 2009, the rate that will apply is GMAC-RFC Ltd standard variable rate, 7.24% 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”.*

Mr I believes 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 Mr I'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 Mr I'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 Mr I's SVR track the base rate. There's also nothing in the terms and conditions that entitled Mr I to a new interest rate. So to that extent, the mortgage operated as it should.

I've considered whether the terms of Mr I'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(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 Mr I 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 Mr I. 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 Mr I'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 have made to the SVR since Mr I took his mortgage. Having done so, I'm not persuaded that anything

Mortgage Express have done in varying the rate has led to Mr I 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 Mr I. 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.

Mr I's fixed rate ended in June 2009 and it's at this point, the mortgage moved to the SVR. I've already set out that Mr I'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 Mr I'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 they 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 London Interbank Offer Rate (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 Mr I. 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 Mr I.

While I note and have considered the evidence relied on by Mr I'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 Mr I'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 Mr I 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 I's mortgage. I don't think there is any basis to say that they somehow contributed to Mr I 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 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 Mr I's representative argues that Mortgage Express has breached what they say was an implied term, not to exercise their discretion to vary the SVR arbitrary, 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 Mr I to accept or reject my decision before 27 December 2023.

Maria Drury
Ombudsman