Category

1 This is a case where the borrowers (Mr and Mrs S):
   - had a Halifax standard variable rate ('base rate') mortgage;
   - were not locked in by any early repayment charge;
   - asked for Halifax's HVR2 rate before it closed on 31 January 2002
   - were transferred to HVR2 from August 2001; and
   - claim compensation from HVR2's introduction on 1 March 2001.

Introduction of two variable mortgage rates

2 Until February 2001 Halifax had a single standard variable mortgage rate, which it called its 'base rate'. But then Halifax announced that, from 1 March 2001, it would have two variable mortgage rates. Halifax called these Halifax Variable Rate 1 (or HVR1) and Halifax Variable Rate 2 (or HVR2). HVR1 was 0.75% higher than HVR2.

3 Halifax did not transfer any existing variable-rate borrowers to HVR2 automatically. Borrowers could apply to transfer to HVR2. Halifax required them to sign first a deed of variation incorporating Halifax’s 2001 Mortgage Conditions – which provided for interest to be calculated daily, rather than yearly as had been the case before that.

Mr and Mrs S’s mortgage

4 Mr and Mrs S took out their mortgage in 1989. The mortgage was at Halifax’s (standard variable) ‘base rate’ and Mr and Mrs S were not locked in by any early repayment charge. Their circumstances need to be considered in the context of Financial Ombudsman Service decisions in previous Halifax cases.

Mr and Mrs A’s case

5 In January 2002 the Financial Ombudsman Service issued an ombudsman’s final decision in a lead case concerning Halifax mortgage borrowers (Mr and Mrs A) who:
   - had a capped-rate mortgage;
   - were locked in by an early repayment charge; and
   - asked to be linked to HVR2 before it closed on 31 January 2002.

6 Mr and Mrs A had taken out a capped-rate deal in 1998 when Halifax had a single (standard variable) base rate. Their deal provided:
   - Halifax agreed that Mr and Mrs A would pay Halifax’s base rate or a capped rate (whichever was lower) until a specified date.
   - In return, Mr and Mrs A agreed to pay an early repayment charge if they repaid their mortgage before a specified date.

7 Mr and Mrs A were still on the capped rate, and were still subject to the early repayment charge, when HVR2 was introduced. They had applied to be linked to HVR2 days after
that rate was announced, but Halifax refused – unless they paid the early repayment charge.

8 Schedule 1, attached to this decision, sets out the main reasons for the ombudsman’s final decision in Mr and Mrs A’s case. In summary, the ombudsman decided:

- Mr and Mrs A were entitled to have available to them, subject to the cap, the ‘no-frills’ variable rate available to ordinary variable-rate borrowers who were not subject to any early repayment charge.
- The ‘no-frills’ variable rate available to such borrowers was HVR2. So Halifax should have made that rate available to Mr and Mrs A when they asked, without requiring them to pay the early repayment charge.
- It would have been reasonable for Halifax to expect them, like other existing borrowers, to sign first a deed of variation incorporating Halifax’s 2001 Mortgage Conditions. That could have been done by 9 March 2001.
- Subject to Mr and Mrs A accepting that the 2001 Mortgage Conditions should apply to their mortgage, Halifax should: recalculate Mr and Mrs A’s mortgage from 9 March 2001 on HVR2 (with daily interest); refund any overpayments; and pay Mr and Mrs A £150 for the inconvenience they had suffered.

What Halifax did then

9 The decision in that case was about the rate Mr and Mrs A were entitled to apply for. It was not about whether or not Halifax should have more than one variable mortgage rate. Nevertheless, Halifax closed HVR2 from 1 February 2002. Borrowers already linked to HVR2 remained linked to it. But it ceased to be available to anyone else, whether they were new or existing borrowers.

10 Following the ombudsman’s final decision in Mr and Mrs A’s case, Halifax announced that it would compensate a number of other existing variable-rate borrowers who had complained to it - provided they had asked for their mortgages to be linked to HVR2 before 1 February 2002, when that rate was no longer available.

11 Halifax’s announcement applied to such complainants who were locked in by an early repayment charge to a capped rate (like Mr and Mrs A) or a discount rate. They would be:
- linked to HVR2 for the future;
- compensated for the extra interest paid since they asked to be linked to HVR2; and
- paid £150 extra compensation for inconvenience.

12 Halifax later clarified that, in practice, it calculated the compensation for the extra interest paid in such cases from the earliest date (before 1 February 2002) when the capped-rate and discount-rate borrowers concerned:
- actually asked to be linked to HVR2, or complained that they had not been linked to HVR2; or
- demonstrably read something that reasonably led them to believe there was no point in applying because they would be refused; or
- took part in a mortgage review meeting with Halifax after the date on which HVR2 was first announced.
Mr and Mrs B’s case

13 In August 2002 the Financial Ombudsman Service issued an ombudsman’s final decision in a lead case concerning Halifax mortgage borrowers (Mr and Mrs B) who:
- had a capped-rate mortgage;
- were locked in by an early repayment charge;
- asked to be linked to HVR2 before it closed on 31 January 2002; and
- claimed compensation from 1 March 2001 when HVR2 was introduced.

14 Like Mr and Mrs A, in 1998 Mr and Mrs B took out a capped-rate deal with an early repayment charge. Unlike Mr and Mrs A, Mr and Mrs B did not ask to be linked to HVR2 until September 2001. At that time Halifax refused to do so unless Mr and Mrs B paid the early repayment charge, which Mr and Mrs B were not prepared to do.

15 Following the final decision in Mr and Mrs A’s case, Halifax offered to:
- link Mr and Mrs B’s mortgage to HVR2 for the future;
- compensate them for extra interest paid from September 2001; and
- pay them £150 for inconvenience.

16 Mr and Mrs B said that they were entitled to additional compensation. As they knew nothing about HVR2 until September 2001, compensation should be backdated to 1 March 2001 (when HVR2 was first introduced).

17 Schedule 2, attached to this decision, sets out an extract from the provisions of Halifax’s 1997 Mortgage Conditions and details of some of the ways in which Halifax actually did communicate the availability of HVR2.

18 Schedule 3, attached to this decision, sets out the main reasons for the ombudsman’s final decision in Mr and Mrs B’s case. In summary, the ombudsman decided:
- Like Mr and Mrs A, Mr and Mrs B were entitled to the same access (no better and no worse) to HVR2 as an ordinary variable-rate borrower who was not subject to an early repayment charge. Such borrowers were not transferred to HVR2 automatically. They had to apply, and to sign a form accepting Halifax’s 2001 Mortgage Conditions.
- Like ordinary variable-rate borrowers who were not subject to an early repayment charge, Mr and Mrs B should have been entitled to apply for HVR2. So Halifax first breached their mortgage contract in September 2001, when it refused to let them apply for HVR2 unless they paid the early repayment charge. Their compensation should run from September 2001, not March 2001.

Mr and Mrs S’s complaint

19 Mr and Mrs S’s mortgage was at Halifax’s (standard variable) base rate without any early repayment charge. They said:
- As long-standing borrowers, they were aggrieved that Halifax had treated them less favourably than new borrowers.
- They had not spotted Halifax’s advertisement in their newspaper. They heard about the new rate as a result of a subsequent campaign by that newspaper.
- If Halifax had really wanted them to know about the availability of the new rate, it should have written to them.
20 Halifax said:

– Borrowers had to apply for HVR2 because it involved a swap from yearly to daily interest. This meant borrowers had to sign a document to change to Halifax’s 2001 Mortgage Conditions.

– HVR2 was available to Mr and Mrs S. Halifax had taken reasonable steps to draw borrowers’ attention to the possibility of applying for HVR2. When Mr and Mrs S applied for HVR2, Halifax put them on that rate from August 2001.

**Legitimate commercial decisions**

21 I note that almost every business decision by a financial firm risks being criticised by one group of customers or another.

– The competitiveness of its products compared to others on the market, the speed (or lack of it) with which it responds to competition, its pricing strategy, its advertising tactics, the introduction of new products, the withdrawal of existing products – all are matters on which its customers, or indeed market commentators may make positive or negative comments.

– But the mere fact that a decision could be criticised or that its benefits for customers might be debated (or even debatable) does not necessarily render it unfair. A firm’s business strategy will ultimately be judged by success or failure in a competitive market.

22 There is a crucial distinction to be made:

– On the one hand, a firm makes many business decisions in the ordinary course of plying its trade, legitimately exercising its commercial judgment in the interests of carrying on the business. However much these legitimate commercial judgments might be criticised, an ombudsman should not ordinarily interfere with them.

– On the other hand, a firm may indulge in some unfair or unlawful practice that has the effect of causing a loss that a customer should not fairly be required to bear - or withholding a benefit that a customer had a reasonable and legitimate expectation of receiving. In such cases, an ombudsman’s role is to require the firm to remedy the matter.

23 Against that background, I have considered:

– (first) the availability of HVR2; and

– (second) how it was publicised.

**Availability of HVR2**

24 Unlike some other lenders that adopted dual variable mortgage rates, Halifax did not transfer any of its existing borrowers onto the new lower rate automatically. So borrowers like Mr and Mrs S only had access to HVR2 by applying for it, and signing a form to accept Halifax’s 2001 Mortgage Conditions – swapping from yearly to daily interest.

25 That was a matter for Halifax’s commercial judgment. It ran the risk that it would be criticised by customers and market commentators who might compare its strategy with competitor lenders who automatically transferred borrowers to lower rates. Indeed there was some adverse comment at the time.
It also ran the risk that borrowers like Mr and Mrs S, who were free to move at any time, would prefer to take their mortgage business to one of Halifax’s competitors – including those who had transferred existing borrowers onto a lower rate automatically. These were legitimate business strategy assessments for Halifax to take.

In the cases of Mr and Mrs A and Mr and Mrs B the ombudsman did not decide that HVR2 automatically became Halifax’s (standard variable) base rate when it was introduced. The decision was that Mr and Mrs A and Mr and Mrs B were entitled to the same access to HVR2 as ordinary variable rate borrowers without an early repayment charge (like Mr and Mrs S).

**How HVR2 was publicised**

A lender introducing the availability of an attractive new product to hundreds of thousands of borrowers might well be unable to cope with the demand if a significant percentage of its borrowers were all spurred to contact its branches at the same time. Unless it made arrangements for contacts to be phased, it could create an unsatisfied demand that would itself be the subject of complaints.

It is not for me to lay down exactly how a lender should approach such a task. It depends on weighing a number of (sometimes conflicting) commercial and practical considerations, which it would be inappropriate and impracticable for me to judge. These include:

- the size of the audience the lender needed to address;
- the resources available to communicate with that audience;
- the potential demand that might result;
- the resources available to respond to that demand;
- matching resources to demand in order to provide an acceptable level of service; and
- the costs and benefits involved.

In my view the exact way in which Halifax chose to communicate the availability of HVR2 to borrowers was also a matter for Halifax’s commercial judgment. Some complainants have questioned Halifax’s motives. But its motives (whatever they were) would not necessarily make its decisions unfair. Financial firms, like anyone else, are to be judged primarily by what they do (which can be established) rather than by what they think (which is much more elusive).

I note the information set out in schedule 2, attached to this decision – in particular:

- Halifax’s 1997 Mortgage Conditions (like earlier editions applicable to Mr and Mrs S’s mortgage) contemplated giving notice to borrowers by putting the notice in at least three national newspapers and by displaying it in Halifax branches.

- Halifax publicised the introduction of HVR2 by prominent advertisements in, not three, but in twenty-one major newspapers. The advertisements included:

  “*Our new variable interest rate is just 6.75% 7.1% APR. And it’s available to all our customers. So if you’re on our current variable base rate, you could save 0.75%. If you transfer. (Simply contact any branch).*"

- The branch advertising campaign included a prominent invitation to - “*Ask about our great deals and new low variable base rate*”.

Against that background, I did not consider that it would be fair and reasonable for me to interfere with Halifax’s commercial judgement in deciding how to publicise the availability
of HVR2. And the introduction of that rate also received wide news coverage, a significant part of which made it clear that the rate was only available on application.

Conclusion

33 I am required to determine complaints by reference to what is, in my opinion, fair and reasonable in the circumstances. Halifax put Mr and Mrs S onto HVR2 in August 2001 in response to their application for it. In the circumstances I have described I do not think it would be fair to require Halifax to pay Mr and Mrs S compensation.

David Thomas
Principal Ombudsman
Schedule 1: Main reasons for the final decision in Mr And Mrs A’s Case

34 In Mr and Mrs A’s case, the ombudsman came to the following conclusions:

- Just because Halifax said that “our base rate” in the capped-rate deal meant Halifax’s standard variable rate and that meant HVR1 did not automatically make it so, especially if that was at odds with the facts.

- The legal principles for interpreting contracts were considered in the case of Investors Compensation Scheme Ltd v West Bromwich Building Society and others (reported in volume 1 of the Weekly Law Reports for 1998, starting at page 896).

- Mr and Mrs A’s case had to be considered on the basis of what “our base rate” in the capped-rate deal would have meant to a reasonable person who had all the background knowledge reasonably available to the parties at the time.

35 That background knowledge included the context in which variable-rate mortgages operate:

- Until 1 March 2001 Halifax (like other lenders) had a single variable mortgage rate. This was set and varied by Halifax against the background of, not only general interest rates, but also Halifax’s need to maintain a position in the competitive mortgage market.

- This single rate was generally paid by existing and new borrowers who had ‘no-frills’ mortgages – meaning mortgages that did not incorporate any special deal (such as a fixed rate, discounted rate, capped rate or cashback) and where the borrowers were not locked in by any early repayment charge.

- Such no-frills mortgages must be distinguished from the special deals that Halifax (like other lenders) would offer from time to time.

- Those special deals might include a special mortgage rate (fixed, discounted or capped) for a specified period. In return, the borrowers might be required to pay an early repayment charge if they redeemed the mortgage before a specified date. But, after the specified period, the rate would revert to the single variable mortgage rate payable on no-frills mortgages.

- Those special deals might include a cashback, either alone or in combination with a time-limited special mortgage rate. In return, the borrowers might be required to repay the cashback if they redeemed the mortgage before a specified date.

- Subject to the cap, the rate Halifax asked Mr and Mrs A to pay was the same as that for any other customer who had, or wanted, a no-frills mortgage. [Although it would not have been known at the time, this remained the position until 1 March 2001.]

- Unless a variable mortgage rate is linked directly to an external benchmark, the lender is in a much more powerful position than the borrower. It is the lender that has discretion to vary the interest rate from time to time. This could result in a very one-sided bargain.

- That one-sidedness is mitigated, to some extent, by the Unfair Terms in Consumer Contracts Regulations. But these focus on: the necessity for a valid reason for any change; whether notification has to be given to the borrower; and whether the
borrower has to be free to end the contract. The Regulations have little impact on the amount of any change.

- That one-sidedness is also mitigated, to some extent, by the Consumer Credit Act 1974. This allows a court to interfere where an interest rate is extortionate or a variable rate is altered irrationally. But these powers are limited to extreme cases, falling well outside what most borrowers would consider to be a reasonable variation.

- So why do borrowers enter into such an apparently one-sided arrangement? They do so (and a mortgage lender knows they do so) because borrowers have a legitimate expectation that the lender intends to retain its customer base in a competitive market, and that the lender will set the available going rate for no-frills mortgages accordingly.

- When Mr and Mrs A took out their capped-rate deal, they had a legitimate expectation that they would be treated like ordinary variable-rate borrowers with no-frills mortgages – except in two respects. First, their variable rate would not exceed the cap (until it expired). Second, and in return, they would pay an early repayment charge (until it expired) if they redeemed their mortgage.

- Mr and Mrs A did not have a no-frills mortgage themselves. They had a special deal – with the benefit of the cap and the burden of the early repayment charge. But they were not supposed to be locked to a higher rate than the no-frills rate available to borrowers who were not locked in by any early repayment charge and so were free to move their mortgage to another lender if dissatisfied with the rate.

36 So a reasonable person, with all the background knowledge reasonably available to the parties at the time, would have said that the capped-rate deal included a promise by Halifax that:

- the rate available to Mr and Mrs A would be no more than the going 'no-frills' variable rate available to borrowers with no-frills mortgages; and

- Halifax would set and vary that going rate so as to maintain its customer base in a competitive market.

37 In order to decide whether or not Halifax broke that promise after 1 March 2001, it was necessary to consider two questions. Did Halifax have a going rate that complied with this description? If so, was this rate available to Mr and Mrs A?

38 Did Halifax have a going rate that complied with this description? After 1 March 2001:

- New borrowers who wanted a 'no-frills' variable-rate mortgage would be offered one at, or linked to, HVR2.

- Existing variable-rate borrowers who were not locked in by an early repayment charge were, according to Halifax, "encouraged" to apply to transfer to HVR2.

- Existing variable-rate borrowers who were still subject to the overhanging part of an early repayment charge could transfer to a discounted rate that was exactly the same level as HVR2.
In those circumstances, the ombudsman considered that:

- Halifax did indeed have a going rate that complied with the description set out above. The rate that most nearly, indeed almost perfectly, complied with the description from 1 March 2001 was HVR2.

- HVR2 was the rate that a reasonable person would consider to be the equivalent of the (standard variable) base rate that was referred to in Mr and Mrs A's capped-rate deal.

Was this rate available to Mr and Mrs A?

- Halifax was not prepared to make HVR2 available to Mr and Mrs A, unless they paid the early repayment charge.

- But the early repayment charge was supposed to be the price of the cap, and not the price of paying no more than the going rate.

- Accordingly, the ombudsman considered that Halifax did break its promise to Mr and Mrs A after 1 March 2001, when it turned down Mr and Mrs A's request for HVR2.

In view of the switch to daily interest, Halifax required borrowers to sign a variation deed, just as Mr and Mrs A had done when they entered the capped-rate deal. That could have been done by 9 March 2001, and compensation should run from that date.

In effect, the ombudsman decided that Mr and Mrs A had been promised that the rate available to them, subject to a cap, would be the 'no-frills' variable rate available to ordinary variable-rate borrowers who were not locked in by any early repayment charge. The 'no-frills' variable rate available to such ordinary variable rate borrowers was HVR2. So it was wrong for Halifax to refuse to put Mr and Mrs A onto HVR2 when they asked.
Schedule 2: Mortgage conditions and HVR2 publicity

Halifax’s 1997 Mortgage Conditions

43 Mr and Mrs B’s mortgage incorporated Halifax’s 1997 Mortgage Conditions. These (like earlier editions, such as applied to Mr and Mrs S’s mortgage) provided for interest to be calculated yearly. They also included:

“2 Notices and permissions

“a Any notice or permission is only valid if it is in writing.

“b We will give you notice:

– by writing to you at the property or the last address you give us; or

– by putting the notice in at least three national newspapers and by displaying it in our branches.”

Newspaper advertising

44 Halifax said it carried out a major national press advertising campaign in February 2001 to support the introduction of HVR2. It arranged for its advertising agency to place a full-page advertisement in all major national newspapers – populars, mid-markets and qualities.

45 Halifax supplied:

– a copy of the advertisement;
– a list of the newspapers and the dates the advertisement was to appear; and
– the actual newspapers.

46 The advert appeared (full page in the tabloids, and equivalent size in the broadsheets) in the front half of the following newspapers, within the main news section:

21 February 2001 Daily Express
21 February 2001 Daily Mail
21 February 2001 Daily Record
21 February 2001 Daily Star
21 February 2001 Daily Telegraph
21 February 2001 Evening Standard (London)
21 February 2001 Financial Times
21 February 2001 Metro (national)
21 February 2001 The Guardian
21 February 2001 The Herald
21 February 2001 The Independent
21 February 2001 The Mirror
21 February 2001 The Scotsman
21 February 2001 The Scottish Sun
21 February 2001 The Sun
21 February 2001 The Times
24 February 2001 The Times
25 February 2001 News of the World
25 February 2001 Sunday Mail
25 February 2001 Sunday Mirror
25 February 2001 Sunday People
The advertisement’s headline, in letters about 1.5 inches (about 4 centimetres) high, was “HALIFAX PUT MORE INTO MORTGAGES THAN ANYONE ELSE”. The text included the following (shown in approximately the size it appeared):

**NEW HALIFAX MORTGAGE PACKAGE**

- New Halifax variable base rate

  Our new variable interest rate is just 6.75% \(7.1\%\) APR. And it’s available to all our customers. So if you’re on our current variable base rate, you could save 0.75%. If you transfer. (Simply contact any branch)

- Daily Interest

  We calculate interest daily – rather than annually – on all new mortgages. So you could pay your mortgage off quicker.

- Competitive Introductory deals

  With rates starting from as low as 5.25% \(6.8\%\) APR, our range includes a comprehensive choice of fixed, capped and discount rate mortgages.

- Free Mortgage Review

  Every year, completely free of charge, we’ll review your current mortgage and see whether any of the other Halifax deals available to you would be more suitable.

- No extended tie-ins

  So there are no nasty surprises once your special mortgage deal comes to an end.

- Easy access

  With Halifax, it couldn’t be easier to find out more about our new mortgage package. You’re welcome to pop into any of our 784 branches for a chat, call us or visit our website.

“You’ll get a lot out of our new mortgages. Because we’ve put a lot in. At the heart of this outstanding package is our new variable interest rate: just 6.75% \(7.1\%\) APR. In fact, as a package, it lacks just one thing – competition. Interested? Call into any branch.

“www.halifax.co.uk 08456 00 10 00

8am to 8pm, 7 days a week”

**News coverage**

Halifax said:

- Public relations formed a significant part of its launch strategy for the launch of HVR2. It achieved a phenomenal amount of media coverage - the highest level it had ever achieved for any product launch - including articles in all major newspapers and lead reports on both BBC and ITN television news.
In the period 20 February 2001 to 31 March 2001 its public relations resulted in 456 articles appearing in national and regional media. Coverage appeared in: national newspapers, both broadsheet and tabloid; and in regional newspapers; all television channels and BBC radio stations; key media websites, including BBC and ITN; and major information provider websites, including AOL and Yahoo.

This coverage reached over 36 million UK adults - according to Metrica, an independent media analysis consultancy. Metrica is a full member of AMEC (the Association of Media Evaluation Companies) and governed by industry agreed standards and regulations.

Metrica survey a demographically and geographically representative sample of the UK population to establish reading, viewing and listening habits. Activity generated by a company is then compared to this in order to measure the number of people exposed to the coverage and the number of times they read, listened to or viewed the coverage.

Halifax supplied copies of press articles for the period 20 February to 31 March 2001. The ombudsman excluded those that were unlikely to have come to a borrower’s attention as information about changes in mortgage rates – because they focused primarily on share prices, saving rates or the national economy.

The ombudsman disregarded, as largely irrelevant, entries in other media such as financial adviser magazines. The ombudsman also disregarded entries from news websites – save that the BBC and ITN website coverage suggested there had indeed been television coverage. The remaining items fell under the following broad headings.

Some reports were mainly about other lenders, but referred to Halifax needing to cut its mortgage rate in order to compete. Reports like this appeared as follows:

**National press:**

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Regional press:
20 February 2001 Aberdeen Press and Journal
20 February 2001 Birmingham Post
20 February 2001 Cheshire and Stoke-on-Trent Sentinel
20 February 2001 East Anglian Daily Times
20 February 2001 Evening Standard (London)
20 February 2001 Glasgow Herald
20 February 2001 Metro (London)
20 February 2001 Metro (Midlands)
25 February 2001 Sunday Sentinel
6 March 2001 Brighton Evening Argus
6 March 2001 The Scotsman

Some reports referred to Halifax having introduced a new mortgage rate. Reports like this appeared as follows:

National press:
20 February 2001 Daily Express
20 February 2001 Daily Mail
20 February 2001 The Guardian
21 February 2001 Daily Express
21 February 2001 Daily Sport
21 February 2001 Daily Star
21 February 2001 Daily Telegraph
21 February 2001 Financial Times
21 February 2001 The Independent
21 February 2001 The Mirror
21 February 2001 The Times
24 February 2001 The Guardian
24 February 2001 The Independent
26 February 2001 Daily Express
26 February 2001 The Guardian
26 February 2001 The Times
28 February 2001 Daily Express
28 February 2001 Daily Mail
1 March 2001 Financial Times
3 March 2001 Daily Telegraph
3 March 2001 The Independent
3 March 2001 The Times
4 March 2001 Sunday Times
4 March 2001 The Observer
11 March 2001 Sunday Express

Regional press:
19 February 2001 Manchester Evening News
20 February 2001 Basildon Evening Echo
20 February 2001 Belfast Telegraph
20 February 2001 Bolton Evening News
20 February 2001 Bristol Evening Post
20 February 2001 Burton Mail
20 February 2001 Coventry Evening Telegraph
20 February 2001 Cumbria News and Star
20 February 2001 Dundee Evening Telegraph and Post
53 Some reports referred to Halifax having introduced a new mortgage rate, and indicated that it was only available on application. Reports like this appeared as follows:

**National press:**

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25 February 2001 Sunday Express
25 February 2001 Sunday Mirror
25 February 2001 Sunday Telegraph
25 February 2001 Sunday Times
25 February 2001 The Observer
28 February 2001 The Mirror
7 March 2001 Daily Mail
10 March 2001 The Times

Regional press:
20 February 2001 Aberdeen Evening Express
20 February 2001 Bath Chronicle
20 February 2001 Birmingham Evening Post
20 February 2001 Blackpool Gazette
20 February 2001 Bradford Telegraph and Argus
20 February 2001 Brighton Evening Argus
20 February 2001 Burton Mail
20 February 2001 Cambridge Evening News
20 February 2001 Cannock Express and Star
20 February 2001 Cheshire Sentinel
20 February 2001 Colchester Evening Gazette
20 February 2001 Derby Evening Telegraph
20 February 2001 Dudley Express and Star
20 February 2001 Dundee Evening Telegraph and Post
20 February 2001 Glasgow Evening Times
20 February 2001 Halifax Courier
20 February 2001 Huddersfield Examiner
20 February 2001 Kidderminster Express and Star
20 February 2001 Lancashire Evening Telegraph
20 February 2001 Lichfield and Burntwood Express & Star
20 February 2001 Liverpool Echo
20 February 2001 Newcastle-upon-Tyne Evening Chronicle
20 February 2001 Oldham Evening Chronicle
20 February 2001 Sandwell Express and Star
20 February 2001 Shropshire Star
20 February 2001 South Wales Echo
20 February 2001 Stafford Express and Star
20 February 2001 Teesside Evening Gazette
20 February 2001 Telegraph and Argus
20 February 2001 Walsall Express and Star
20 February 2001 West Cumbria News and Star
20 February 2001 Wolverhampton Express and Star
20 February 2001 Worcester Evening News
20 February 2001 Yorkshire Evening Post
21 February 2001 Aberdeen Press and Journal
21 February 2001 Bournemouth Daily Echo
21 February 2001 Daily Record
21 February 2001 Dundee Courier and Advertiser
21 February 2001 East Anglian Daily Times
21 February 2001 Eastern Daily Press
21 February 2001 Glasgow Herald
21 February 2001 Liverpool Daily Post
21 February 2001 Metro (London)
21 February 2001 Metro (North East)
21 February 2001 Metro (North West)
21 February 2001 Northern Echo
21 February 2001 Northern Ireland Newsletter
21 February 2001 Sunderland Echo
21 February 2001 The Scotsman
21 February 2001 Wales Daily Post
21 February 2001 Western Daily Press
21 February 2001 Western Morning News
21 February 2001 Yorkshire Post
22 February 2001 Exeter Express and Echo
23 February 2001 Evening Standard (London)
24 February 2001 Birmingham Post
24 February 2001 East Anglian Daily Times
24 February 2001 Glasgow Herald
24 February 2001 Newcastle-upon-Tyne Journal
24 February 2001 The Scotsman
25 February 2001 Glasgow Sunday Herald
25 February 2001 Scotland on Sunday
25 February 2001 Sunday Herald
27 February 2001 Newcastle-upon-Tyne Journal
28 February 2001 Nottingham Evening Post
2 March 2001 Portsmouth News

54 Six of these reports in the national press, and two of these reports in the regional press, indicated that some borrowers were not eligible to apply or would have to pay a penalty.

Branch advertising

55 Halifax provided a photograph of a standard branch window layout and a sample poster. It said:

- There was a promotional campaign in all its branches from 9 April to 21 May 2001. The branch displays were to a standard pattern laid down by Halifax head office.

- This incorporated a large poster that included, in letters more than 1.5 inches (about 4 centimetres) high – “Ask about our great deals and new low variable base rate”.

- This appeared in all 761 Halifax branches – in the window of 699 branches and, because of branch design or planning restrictions, inside the remaining 62.

- An adapted version of the campaign, taking into account size and space restrictions, also appeared in 783 agencies and estate agencies.
Schedule 3: Main reasons for the final decision in Mr and Mrs B’s case

Mr and Mrs B’s entitlement

56 The ombudsman’s decision in the case of Mr and Mrs A was not that HVR2 automatically became Halifax’s (standard variable) base rate when it was introduced on 1 March 2001. It was:

- Mr and Mrs A were entitled to have available to them, subject to the cap, the no-frills variable rate available to ordinary variable-rate borrowers who were not subject to any early repayment charge (whom the ombudsman called ‘unlocked borrowers’ for short).

- The no-frills variable rate available to unlocked borrowers was HVR2. So Halifax should have made that rate available to Mr and Mrs A, when they asked, without requiring them to pay the early repayment charge.

57 Effectively, Mr and Mrs A were entitled to the same access (no better and no worse) to HVR2 as an unlocked borrower. Following the same principles, Mr and Mrs B were entitled to the same access (no better and no worse) to HVR2 as an unlocked borrower.

Unlocked borrower’s entitlement

58 Almost every business decision by a financial firm risks being criticised by one group of customers or another.

- The competitiveness of its products compared to others on the market, the speed (or lack of it) with which it responds to competition, its pricing strategy, its advertising tactics – all are matters on which its customers, or indeed market commentators may make positive or negative comments.

- But the mere fact that a decision could be criticised or that its benefits for customers might be debated (or even debatable) does not necessarily render it unfair. A firm’s business strategy will ultimately be judged by success or failure in a competitive market.

59 The ombudsman made a crucial distinction:

- On the one hand, a firm makes many business decisions in the ordinary course of plying its trade, legitimately exercising its commercial judgment in the interests of carrying on the business. However much these legitimate commercial judgments might be criticised, the ombudsman should not ordinarily interfere with them.

- On the other hand, a firm may indulge in some unfair or unlawful practice that has the effect of causing a loss that a customer should not fairly be required to bear - or withholding a benefit that a customer had a reasonable and legitimate expectation of receiving. In such cases, the ombudsman’s role is to require the firm to remedy the matter.

60 Against that background, the ombudsman considered:

- (first) the availability of HVR2; and
- (second) how it was publicised.
Availability of HVR2

61 Unlike some other lenders that adopted dual variable mortgage rates, Halifax did not transfer any of its existing borrowers onto the new lower rate automatically. So unlocked borrowers only had access to HVR2 by applying for it, and signing a form to accept Halifax’s 2001 Mortgage Conditions.

62 That was a matter for Halifax’s commercial judgment. It ran the risk that it would be criticised by customers and market commentators who might compare its strategy with competitor lenders who automatically transferred borrowers to lower rates. Indeed there was some adverse comment at the time.

63 It also ran the risk that unlocked borrowers, who were free to move at any time, would prefer to take their mortgage business to one of Halifax’s competitors – including those who had transferred existing borrowers onto a lower rate automatically. These were legitimate business strategy assessments for Halifax to take.

64 If unlocked borrowers were not entitled to be put onto HVR2 automatically from 1 March 2001, it follows that Mr and Mrs B (who were entitled to be treated no better and no worse than an unlocked borrower) were not entitled to be put onto HVR2 automatically from 1 March 2001.

65 Mr and Mrs B said that Halifax breached their mortgage contract on 1 March 2001, when it introduced HVR2. The ombudsman did not accept that.

- Their mortgage contract did not have the effect of preventing Halifax introducing HVR2. So Halifax did not breach their mortgage contract on 1 March 2001.

- Their mortgage contract did have the effect that, like unlocked borrowers, they should have been entitled to apply for HVR2.

- So Halifax first breached their mortgage contract in September 2001, when it refused to let them apply for the HVR2.

66 Other complainants, in a similar position to Mr and Mrs B, said that the dictionary definition of ‘base’ was ‘lowest’ – so HVR2 automatically became Halifax’s ‘base rate’ on 1 March 2000 because it was the lowest available rate. The ombudsman did not accept that.

- The Shorter Oxford Dictionary gives a number of definitions for ‘base’ – including ‘low’ (not ‘lowest’), ‘degraded’, ‘inferior’ and ‘counterfeit’. The appropriate definition has to be derived from the context in which a word is used.

- With interest rates, ‘base’ is a standard from which other rates can be derived. But it is equally possible to have a rate that is base rate minus 1% as it is to have a rate that is base rate plus 1%. And ‘base rate’ does not mean ‘lowest rate’.

How HVR2 was publicised

67 A lender introducing the availability of an attractive new product to hundreds of thousands of borrowers might well be unable to cope with the demand if a significant percentage of its borrowers were all spurred to contact its branches at the same time. Unless it made arrangements for contacts to be phased, it could create an unsatisfied demand that would itself be the subject of complaints.
It was not for the ombudsman to lay down exactly how a lender should approach such a task. It depended on weighing a number of (sometimes conflicting) commercial and practical considerations, which it would be inappropriate and impracticable for the ombudsman to judge. These included:

- the size of the audience the lender needed to address;
- the resources available to communicate with that audience;
- the potential demand that might result;
- the resources available to respond to that demand;
- matching resources to demand in order to provide an acceptable level of service; and
- the costs and benefits involved.

In the ombudsman’s view the exact way in which Halifax chose to communicate the availability of HVR2 to unlocked borrowers was also a matter for Halifax's commercial judgment. Some complainants had questioned Halifax’s motives. But its motives (whatever they were) would not necessarily make its decisions unfair. Financial firms, like anyone else, are to be judged primarily by what they do (which can be established) rather than by what they think (which is much more elusive).

The ombudsman noted:

- Halifax's 1997 Mortgage Conditions contemplated giving notice to borrowers by putting the notice in at least three national newspapers and by displaying it in Halifax branches.
- Halifax publicised the introduction of HVR2 by prominent advertisements in, not three, but in twenty-one major newspapers. The advertisements included:
  
  “Our new variable interest rate is just 6.75% 7.1% APR. And it’s available to all our customers. So if you’re on our current variable base rate, you could save 0.75%. If you transfer. (Simply contact any branch).”

- The branch advertising campaign included a prominent invitation to - “Ask about our great deals and new low variable base rate”.

Against that background, the ombudsman did not consider that it would be fair and reasonable to interfere with Halifax's commercial judgement in deciding how to publicise the availability of HVR2 to unlocked borrowers. And the introduction of that rate also received wide news coverage, a significant part of which made it clear that the rate was only available on application.

If unlocked borrowers were not entitled by their mortgage contracts to receive better notification of the availability of HVR2, it followed that Mr and Mrs B (who were entitled to be treated no better and no worse than an unlocked borrower) were not entitled to receive better notification of the availability of HVR2.

There might be some capped-rate or discount-rate borrowers who would have applied to be linked to HVR2 before 1 February 2002 but who did not do so because they reasonably concluded from the publicity (which they could readily specify) that the rate would not be made available to them. Halifax had indicated that it was prepared to compensate complainants who were in this position.

But Mr and Mrs B were not in this position. They applied to be linked to HVR2 once they became aware of it. Halifax was wrong to refuse their request. But, following the ombudsman’s final decision in the case of Mr and Mrs A, Halifax remedied this – by:
– linking Mr and Mrs B to HVR2 for the future;
– compensating them for the extra interest since they asked to be linked to HVR2, and
– paying them £150 extra compensation for inconvenience.

Conclusion

75 In the circumstances described the ombudsman did not think it would be fair to require Halifax to pay Mr and Mrs B any further compensation.