DRN-3824806

Financial Ombudsman Service

The complaint

Mrs D complains about the interest rate on her mortgage with Kensington Mortgage Company Limited. She complains that Kensington won't allow her to take a new fixed interest rate, which would reduce her payments.

Mrs D is now represented by her granddaughter, who's dealt with this complaint on her behalf. But for ease I'll refer to Mrs D throughout, including when dealing with things her granddaughter has said on her behalf.

What happened

Mrs D and her late husband took out their mortgage with another lender in 2005. The mortgage was later transferred to Kensington. They took a three year fixed interest rate, which expired in 2008. Since then, the mortgage has been on a variable rate. The mortgage offer and terms and conditions say that the interest rate is made up of an underlying variable rate which will never be more than 2% above the LIBOR rate, plus a fixed margin of 2%. In other words, the mortgage is on a variable rate subject to a cap of 4% above LIBOR.

Mrs D first brought this complaint, explaining that Mr D was very unwell, she was acting as his carer and was herself unwell. They were finding the mortgage payments a struggle and had realised that their monthly payments had gone up. Sadly Mr D has since passed away, and the mortgage continues in Mrs D's sole name.

Mrs D said that the interest rate Kensington was charging was unfairly high. She hadn't understood what had happened when the interest rate ended in 2008, as initially the monthly payments went down. It was only later that she realised she was on a variable rate and her payments were increasing. She was concerned about keeping up with the payments. She said Kensington ought to have put her on a new fixed rate. But when she discussed this with Kensington, she was told there were no interest rates available to her.

Mrs D also said that she understood that the mortgage was to be switched over to repayment terms when the rate expired in 2008. But that hadn't happened, and she was worried about being able to repay the capital at the end of the term.

Kensington said that the mortgage was actually taken out on repayment terms, but in 2007 Mr and Mrs D asked for it to be switched to interest only as they were struggling with the repayments. It said there was no agreement that it would be switched back, or that there would be a new interest rate, when the initial fixed rate expired in 2008. Kensington said that if Mrs D was concerned about her payments, or about repaying the capital, it would be willing to discuss things with her. But her mortgage was not eligible for a new interest rate.

Kensington objected to us considering part of this complaint. I've previously issued a decision setting out my conclusions that we can only consider the fairness of the interest rate since 9 January 2014 – including whether or not Kensington should have offered Mr and Mrs D a new fixed rate after that date. I said that anything before that date was out of time and could not be considered.

Our investigator went on to consider the merits of that part of Mrs D's complaint. She said there was no evidence Mr and Mrs D had asked for a new fixed rate before January 2020. But then they had been told none was available to them.

Our investigator noted that Kensington did offer new fixed rates to other existing customers at that time, and didn't think it was fair that Mr and Mrs D – who had similar characteristics to those other customers – had been told they weren't eligible. She said that Kensington should re-work their mortgage as if it had offered them the best interest rate it had available for existing customers over a five year fixed term at that time.

As Kensington did not reply to the investigator's assessment, the case came to me for a decision to be made.

My provisional decision

I issued a provisional decision, in which I said:

> *I'm satisfied that there's no evidence Mr and Mrs D asked Kensington to consider a new interest rate on their mortgage before 2020. This case is about whether or not it's fair that Kensington didn't make a new interest rate available to Mr and Mrs D when they requested one in January 2020.*
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> *Under the terms and conditions of their mortgage offer, there is no obligation to offer a new rate. Mr and Mrs D's fixed rate expired in 2008, and since then the mortgage has been on a variable rate – just as the offer said it would be.*
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> *There's also nothing in the rules of mortgage regulation, or the regulator's guidance, which says that a lender has to make new interest rates available to its customers. I'm aware that it's a common feature of the mortgage market that borrowers take new interest rates (whether through a switch with their existing lender, or through moving to a new lender) and to that extent it may be a general expectation that rates might be available. But there's nothing that requires a new lender to offer new rates to existing customers.*
>
> *Until 2017, Kensington didn't offer new rates to any existing customers. Any customer who wanted to take a new rate after the expiry of their initial rate would either have to move to a new lender, or apply to Kensington as a new customer for a new mortgage to replace the old one.*
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> *As a result, therefore, there was nothing unfair in Kensington keeping Mr and Mrs D on their variable rate before 2017. There was no obligation to give them a new rate, and they were being treated the same as all other existing customers.*
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> *From 2017, Kensington did start to make new rates available to existing customers. But there was no requirement for it to pro-actively contact Mr and Mrs D – or any other borrower – to tell them that a rate might be available and to invite them to apply.*
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> *However, had Mr and Mrs D asked for a rate at any point, given that there were now rates available to existing customers, Kensington would have needed to give any application fair consideration, acting fairly and reasonably in all the circumstances in deciding whether or not to offer a new rate to Mr and Mrs D. But there's no evidence Mr and Mrs D made such an application before 2020.*
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> *That brings me to January 2020. That was when Mr and Mrs D did ask Kensington*

about their mortgage interest rate, whether it was fixed or variable and whether they could take a new interest rate. By this time their granddaughter was assisting them and was concerned that they had no means of repaying the capital, and appeared to be paying a relatively high variable interest rate.

Kensington has confirmed that Mr and Mrs D were on a variable rate, had been since 2008, and that no new fixed rates were available to them.

While Mr and Mrs D did not formally apply for a new rate at this time, there would have been little point in them doing so since, under Kensington's criteria, they were not eligible for one.

But I think it's clear they were concerned about the state of their mortgage and what they were paying, and had they been able to do so I think it's likely they would have asked for a new, lower, fixed rate.

What I have to consider in this decision is whether it was fair that Kensington did not make a new rate available to them – or whether, acting fairly, Kensington ought to have made a rate available to them as it would have some other customers.

<u>Kensington's policy on rate switches</u>

Before 2017, Kensington did not offer new interest rates to existing customers. An existing customer whose introductory rate had expired and wanted a new rate would either have to move lender, or would have to re-apply to Kensington as a new customer for a new mortgage.

From 2017, however, Kensington began to offer new interest rates to some existing customers. It has explained to us that its criteria for offering new rates are that:

- *At the point at which the mortgage was taken out, the customer would have passed the affordability and regulatory requirements in place now;*
- *The customer's credit risk is in line with Kensington's current credit risk appetite;*
- *There is no history of arrears on the mortgage;*
- *The original mortgage lending was by Kensington – not another lender with the mortgage later moving to Kensington;*
- *The mortgage was taken out no earlier than 1 January 2010.*

Kensington has explained that its business model relies on securitisation. This is a relatively common model in the mortgage industry. In essence, once it has lent a mortgage and is entitled to receive the repayments, Kensington sells the beneficial interest (the benefit of the repayments) to a third party in order to fund further lending to other customers. Loans are not securitised individually, but packaged into groups called special purpose vehicles.

Under this model, Kensington remains the owner of the mortgage, remains the lender of record, and continues to be the firm that the borrower deals with. But once it has collected the payments, it passes the benefit of them on to the investor which bought the vehicle including that loan.

Kensington has explained that under the terms of its agreements with the investors which bought the securitisation vehicles, it cannot make changes to existing mortgages – such as offering new interest rates. It may be able to offer new rates when securitisations expire and are re-financed onto terms that do allow variations to the mortgages.

And it may be able to offer a new rate if a loan meets the current criteria that investors will accept as part of a securitisation vehicle – which explains the criteria around passing current requirements even on loans that were taken out some time before. It can offer a rate if it can extract a loan from a securitisation and then resecuritise it with a new interest rate – but only if the loan would be acceptable to a new securitisation vehicle. Loans taken out before 2010, and loans taken out which, at the time, did not meet regulatory requirements now in place do not meet that standard.

Such customers include those whose loans were underwritten based on the standards which applied before the financial crisis of 2007/8 – including customers who self-certified their income, who did not have to show that they had a repayment strategy for an interest only mortgage, and so on.

Because these customers cannot be re-securitised, they are not eligible for a new interest rate. And because Mrs D's mortgage was taken out before 2007 and is on interest only terms, her mortgage falls into this category.

Separately, and more recently, Kensington has introduced what it calls a "mortgage prisoners product" – an interest rate specifically aimed at customers who are not otherwise eligible for a rate switch, and who are likely to be unable to move their mortgage elsewhere.

During the course of this complaint, Kensington assessed whether to offer Mrs D this rate. But it did not do so because, at that time, the rate was higher than the variable rate she was paying.

I've set out Kensington's policy, and the rationale for it, at some length above because it's important context for the actions it took in this case. However, it's important to note that I'll be focussing on whether Kensington treated Mr and Mrs D fairly in their individual circumstances – not on whether its policies and procedures are fair more broadly.

<u>Regulatory considerations</u>

In deciding whether Kensington treated Mr and Mrs D fairly and reasonably in all the circumstances, I also need to take into account the regulator's rules and guidance, to be found in the MCOB section of the Financial Conduct Authority Handbook.

In my view, of particular importance in this case are the provisions to be found in section 11 of MCOB, especially MCOB 11.8.1 E. The suffix E denotes an evidential provision not a rule (suffixed R).

MCOB 11.8.1 E says

> *Where a customer is unable to:*
>
> *(1) enter into a new regulated mortgage contract or home purchase plan or vary the terms of an existing regulated mortgage contract or home purchase*

plan with the existing mortgage lender or home purchase provider; or

(2) enter into a new regulated mortgage contract or home purchase plan with a new mortgage lender or home purchase provider;

the existing mortgage lender or home purchase provider should not (for example, by offering less favourable interest rates or other terms) take advantage of the customer's situation or treat the customer any less favourably than it would treat other customers with similar characteristics. To do so may be relied on as tending to show contravention of Principle 6 (customers' interests).

Principle 6 says:

A firm must pay due regard to the interests of its customers and treat them fairly.

As I've noted, MCOB 11.8.1 E is an evidential provision – not a rule – but it says that treatment of the kind set out in the provision may tend to show unfairness. In some situations, therefore, it also may not show unfairness – much will depend on the individual circumstances.

<u>Did Kensington treat Mr and Mrs D (and later Mrs D) fairly and reasonably in all the circumstances?</u>

I've already explained that Mr and Mrs D's mortgage was on a variable rate from 2008 (when their initial fixed rate expired) onwards. And I've said that there's no evidence that they asked Kensington about changing their interest rate, or formally applied for a new rate, until January 2020. At this time they didn't formally apply for a new rate – but they enquired about their interest rate, and I think they would have applied had a rate been available to them.

There's no obligation on lenders to offer customers new interest rates on their mortgages. Kensington did not offer new rates to any existing customers until 2017. Once it started to do so, it was under no obligation to notify Mr and Mrs D of this change in policy, and under no obligation to invite them to apply for a rate. If Mr and Mrs D asked for a rate, it would have needed to give fair consideration to that request. But it was not required to pro-actively invite them to do so.

Prior to 2017, there were no rates available to Mr and Mrs D – in common with all Kensington's customers. As there was no obligation to offer rates, and as Mr and Mrs D were being treated the same as all other customers whose initial rates had expired and were on reversion rates, I don't think Kensington treated them unfairly.

And between 2017 and the end of 2019, while new rates were available – to some existing customers, at least – because Mr and Mrs D did not apply for one, Kensington did not treat them unfairly in this period either.

In my view, the heart of this complaint is about what happened in January 2020, when Mr and Mrs D did ask Kensington about their interest rate – and whether Kensington gave fair consideration to their situation at this time. This was different to the situation prior to 2017, since by then Kensington did make interest rates available to some – but not all – existing customers. So the question I have to consider is whether, in offering rates to other customers but not to Mr and Mrs D, Kensington acted fairly and reasonably in all the circumstances.

Kensington has explained that Mr and Mrs D were not eligible for a rate, under its eligibility criteria, because their mortgage was taken out before 2010, when lending standards were very different to today. As a result, their mortgage no longer meets Kensington's current risk appetite – in part because of difficulties in re-securitising it based on current investor risk appetite.

Kensington hasn't explained what the specific risk factors it believes Mrs D's mortgage presents. I've not seen any evidence that it was taken out on a selfcertification basis or sub-prime basis, for example. It might have been – but if so, that has not been evidenced to me.

So while I accept that, in general, underwriting standards and the requirements of mortgage regulation were different when Mr and Mrs D took out their mortgage – and less stringent than they are today – I've not seen anything specific to the decision to lend this mortgage to Mr and Mrs D that is of particular concern given the change in regulation and lending standards in the years since.

In any case, even if there were evidence that Mr and Mrs D's mortgage presented a specific risk factor at the time it was taken out – such as being underwritten on a selfcertification or sub-prime basis, that wouldn't change my view of this complaint. In my view, what's relevant for the purposes of the comparison envisaged by MCOB 11.8.1 E are Mr and Mrs D's characteristics at the time of any application – not their characteristics as they were fifteen years earlier.

An assessment of the fairness of Mr and Mrs D's treatment in comparison to the treatment of other borrowers is to be based on their situation at the time of the assessment. I understand Kensington considers the circumstances in which the mortgage was taken out to be relevant to its business model of securitisation. That may well be the case – but, as I explain below, that's not relevant to the question of whether it treated Mr and Mrs D fairly in their particular circumstances.

I also note that there is no evidence from the transaction history provided by Kensington that this mortgage has ever been in significant arrears. Because no application was actually made in January 2020, there was no wider credit risk assessment – and so we don't know whether or not Mr and Mrs D would have passed it. Though I'm not aware of any specific issues that make it likely they wouldn't have done.

Taking into account Kensington's rate switch criteria, then, I think Mr and Mrs D's mortgage met some of them in January 2020. The mortgage was not and had never been in arrears, and I've no current basis for concluding they would have failed a credit risk assessment.

Therefore, based on their circumstances and the circumstances of their mortgage at the time, I don't currently have any evidence for concluding that Mr and Mrs D failed Kensington's criteria in respect of their current circumstances. And so it follows that I think it's more likely than not that they met these criteria.

Rather, it seems that the reason Kensington told them no new rate was available to them was because they did not meet the rest of its criteria, relating to when their mortgage was taken out. In particular, that their mortgage was taken out before 2010 and that it was taken with another lender and later transferred to Kensington.

As to whether the mortgage, when taken out, would pass current lending standards – that's less clear. But given it was taken out on repayment terms (though later *switched to interest only) and I've seen no evidence that it was, for example, self-certification or sub-prime, I have no basis for concluding that this part of the criteria isn't met.*

In any case, I'm not persuaded that the circumstances in which Mr and Mrs D took out their mortgage, many years ago, are relevant to the fairness of how they were treated in January 2020.

I've referred above to MCOB 11.8.1 E, which I think is relevant in this situation. MCOB 11.8.1 E is an evidential provision – not a rule – but it says that treatment of the kind set out in the provision may tend to show unfairness. Though equally it may not, depending on the circumstances.

It says that where a borrower either can't vary their mortgage with an existing lender, or can't move their mortgage to another lender, it may be unfair for their existing lender to treat them less favourably (for example, by offering less favourable interest rates) than it would treat other customers with similar characteristics.

In my view, this provision is aimed at the unfairness that might result where a borrower is unable to move their mortgage and shop around for a better deal – having no choice but to remain with their existing lender, and being treated less favourably than other customers who are otherwise similar to them.

Mr and Mrs D's mortgage was transferred to interest only terms soon after it was taken out. Mrs D has explained that she has no means of repaying the capital at the end of the term, and is very concerned about this. Given that, and given their ages, I think it's very unlikely, at the time of their discussion with Kensington in January 2020, that they would have been able to move their mortgage to another lender. That brings them within the ambit of MCOB 11.8.1 E.

Kensington would offer rates to other customers in January 2020 – but not Mr and Mrs D. I've explained that I'm satisfied that Mr and Mrs D satisfied Kensington's criteria about the current position of their mortgage – but that the reasons for refusing them a new rate were because they failed the criteria about how their loan originated.

I'm not persuaded – taking into account MCOB 11.8.1 E – that this was fair. MCOB 11.8.1 E refers to the treatment of borrowers with similar characteristics. In my view, what's relevant to this exercise is Mr and Mrs D's characteristics at the time they made their application – not their characteristics as they might have been fifteen years earlier when the mortgage was taken out.

Mr and Mrs D were not in arrears. There's no reason to suppose they wouldn't have passed a credit check. A borrower who met those criteria would have been offered a rate – if their loan was taken out after 2010. But Mr and Mrs D, who also met those criteria were not – because their mortgage was taken out before 2010 with another lender.

I'm not persuaded this was relevant at the time they made their application. What was relevant were their circumstances at the time of their application. In my view, it is fair and reasonable to regard their current circumstances as the characteristics which are relevant for the purposes of the comparison in MCOB 11.8.1 E, and therefore fair and reasonable to consider whether Mr and Mrs D were treated less favourably than other customers to whom they were similar at that time.

I also don't think it's relevant that, in January 2020, they had an interest only *mortgage with no repayment strategy. This is because this is not part of Kensington's criteria for rate switches. And therefore this would not have been a barrier to a borrower who took their mortgage out after 2010 accessing a new interest rate.*

It follows that Mr and Mrs D were treated differently – less favourably, by being offered less favourable interest rates – than other customers with similar characteristics to them. They were unable to move their mortgage to a new lender or shop around for a better deal; they had no option but to remain with Kensington regardless of what decisions it made; and by refusing them a rate that it would offer to other, similar, customers Kensington didn't treat them fairly.

Kensington says that the reason for its rate switch criteria is that it has securitised its mortgages. Different groups of mortgages are in different securitisation vehicles. And the terms of its agreements with those vehicles limit what it can offer existing customers – it cannot vary the terms of a mortgage while securitised, and cannot re-securitise the mortgage of a customer who does not meet the risk appetite of its investigators.

I've taken that into account. I recognise the constraints under which Kensington operates. And I understand that securitisation is a recognised and relatively common business model within the mortgage market – and not inherently unfair.

However, I'm not persuaded that this explanation as to why Kensington made the decision it did changes my conclusion that Mr and Mrs D were not treated fairly when it refused to consider a rate.

MCOB 11.8.1 E refers to customers of a firm. In my view, this makes it clear that the comparison envisaged is to be done across all the customers of the firm – Kensington – not sub-sets of those customers (subject to them having similar characteristics). Whether or not their loan had been securitised, Kensington remained Mr and Mrs D's lender and it remained the firm which owed them obligations of fair treatment – including treatment of the sort envisaged in MCOB 11.8.1 E.

The mere fact of being a securitised customer, or a customer securitised in one vehicle rather than another, is not of itself a characteristic of difference that can in and of itself justify different treatment. If that were treated in and of itself as a different characteristic, it would prevent there being a comparison between customers of the firm merely because of the way the firm has dealt with them internally, since customers in different vehicles would be treated as not having similar characteristics simply because the lender has chosen to separate them. That would seem to me to defeat the purpose of 11.8.1 E.

I also think it's clear from the wording of MCOB 11.8.1 E that what matters is whether Mr and Mrs D, as individual mortgage customers, had similar characteristics to other individual customers of Kensington – taken as a whole. And if they have similar characteristics to those other customers, but are being treated less favourably than those other customers, that may tend to show a breach of Principle 6 and unfair treatment in their individual case.

I therefore do not think that the mere fact that the mortgage of one customer but not another has been securitised, or securitised in a different way or different vehicle, can of itself amount to a characteristic of either customer. Securitisation is a unilateral step taken in relation to an existing borrower's loan by a lender for the lender's prudential and commercial purposes, not a characteristic of the borrower *themselves (as loan to value or credit score might be).*

And in my view the existence of contractual terms agreed between Kensington and a third party by which Kensington has chosen to constrain its options for managing Mr and Mrs D's mortgage is also not a relevant consideration in deciding what are the characteristics of Mr and Mrs D and their mortgage. Nor is it relevant to considering whether Kensington's treatment of them was fair – if Kensington has obligations to treat them fairly, those obligations cannot be dis-applied because of an agreement Kensington has entered into with a third party.

In other words securitisation is something done to the borrower by the lender rather than a characteristic of the borrower. The lender's decision to securitise might be driven in part by its perception of the characteristics of the borrower, or at least the average characteristics of the part of the lender's business the borrower sits within. But if that is the case, it is those characteristics that may be relevant, not the securitisation itself. It is therefore necessary to identify what Mr and Mrs D's characteristics were, and the extent to which they have similar characteristics to other customers of Kensington. I've set out above my analysis of that, and why I consider that Mr and Mrs D had similar characteristics to other customers who would have been eligible for a rate switch in January 2020.

Acting fairly and reasonably, therefore, in my view what Kensington ought to have done in January 2020 was to have looked at Mr and Mrs D and their circumstances and considered whether the application of its rate switch criteria, resulting in the refusal of a new rate, would have brought them within the scope of MCOB 11.8.1 E. Acting fairly and reasonably, it would have concluded that it did – since they could not move to another lender, could not vary their mortgage with Kensington, and were potentially being offered less favourable rates than other customers with similar characteristics.

I've noted that MCOB 11.81 E is an evidential provision tending to show unfairness – which means that there may be situations in which treatment of the sort described in the provision may nevertheless not result in unfairness too. But in this case, where Mr and Mrs D were unable to move their mortgage, unable to shop around for a better deal, and left with no choice but to remain with Kensington whatever happened, it was not fair and reasonable in all the circumstances to refuse to consider their request for a new interest rate. In my view, in simply applying its policy without considering these broader issues and whether they resulted in unfairness in Mr and Mrs D's specific circumstances, Kensington did not act fairly and reasonably.

<u>Putting things right</u>

Had it acted fairly and reasonably at the time, in my view, Kensington ought to have gone on to consider whether to offer Mr and Mrs D a new interest rate. Our investigator has asked Kensington, on several occasions, to provide her with a list of the interest rates Kensington had available to existing customers at this time. It has refused to do so – though it has provided us with a list of rates available to new customers.

When it responds to this provisional decision, I direct Kensington to provide me with a list of the interest rates it had available for existing customers in January 2020. And if it has categories of rates for customers or mortgages of different types, it should explain which category it believes Mr and Mrs D fell into at the time and why – disregarding the matters around the circumstances in which their mortgage was taken out which I've said above are not relevant.

If Kensington does not provide this information, I shall assume that the list of rates for new customers is the same as would have been available to existing customers, and will work from the new customer rate list we already have.

I also direct Kensington to provide me with a history of the variable rate on Mr and Mrs D's mortgage from January 2020 until now.

I would also like Mrs D and her family to update me on her current situation. Mrs D's granddaughter recently told our investigator that, following the sad loss of Mr D, Mrs D no longer thought the mortgage to be sustainable and was considering selling the property. I would like to know what her current plans are and whether she does intend to sell the property.

I ask for this because while I have concluded that Kensington did not act fairly in considering whether to offer Mr and Mrs D a new rate in January 2020, I still need to consider whether, in the particular circumstances of this case, that resulted in detriment to Mr and Mrs D, and later to Mrs D.

I therefore need to confirm what rates Kensington could have offered to Mr and Mrs D – and whether the rates it had available would have resulted in a significant saving compared to their existing variable rate or not. I'm currently minded to say that if the available interest rates were significantly better than the variable rate, it would be fair to require Kensington to re-work Mrs D's mortgage as if it had offered them a rate at that time.

However, I also need to take into account the later change in circumstances surrounding the passing of Mr D and any changes in Mrs D's plans that may result. In particular, if Mrs D is now intending to sell the property, whether asking Kensington to treat her mortgage as if a new fixed rate had been applied from January 2020, and continues to apply from now on, might result in her having to pay an early repayment charge if she decides to sell the property.

The existing variable rate does not include an early repayment charge. And I think it would be fair to take into account whether – given what has happened in the years since January 2020 – applying redress in the form of a new rate would in fact leave Mrs D in a worse position now.

For all those reasons, I don't think I am yet in a position to decide what fair redress would be in this case. I will consider the responses from both parties and then reach a decision.

However, whether or not I end up directing Kensington to re-work the mortgage as if it had offered a rate, I do intend to require it to pay Mrs D compensation for her distress and inconvenience. If it ought fairly to have offered a rate – based on the factors I've set out above – the failure to do so has caused Mrs D distress. And if, based on those same factors offering a rate would not reduce her monthly payments or would otherwise not be the fair thing to do, the failure to explain why that was rather than simply refuse to consider her position also caused Mrs D distress. Either way, I'm minded to say that £500 represents fair compensation here.

The responses to my provisional decision

Mrs D confirmed that her financial situation hadn't changed. She had decided to remain in the property, and her current plan is to explore taking a lifetime mortgage to repay this one in due course.

Kensington responded to say that it didn't agree with my provisional decision. It said Mr and Mrs D's mortgage was taken out on a self-certified basis. It said that it funds its loans through securitisation – a common practice in the mortgage industry. During the securitisation period, it cannot make material changes to securitised mortgages, or remove them from securitisation to offer a different rate. Where it can offer a rate to a customer, it will let that customer know – and if not, recommend they take independent financial advice to explore moving to another lender. It said that the way it funds its mortgages is outside our jurisdiction and that my provisional decision was not fair and reasonable. It provided the list of rates I'd asked for, but said that since Mr and Mrs D were not eligible for them it didn't consider them relevant to this complaint.

Kensington also said that it had recently sold this mortgage on to another firm and therefore was no longer Mrs D's lender.

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.

I've also reconsidered what I said in my provisional decision, including in light of Kensington's response to it.

Kensington has not made any new arguments. It's said that its funding arrangements fall outside the jurisdiction of the Financial Ombudsman Service, and that my proposed outcome is not fair and reasonable in all the circumstances.

As I made clear in my provisional decision, and make clear again now, I am aware that securitisation is a common practice in the mortgage industry and is a feature of how many lenders fund their mortgage lending business. It is not unusual and not something that is inherently wrong or unfair. I made – and make – no findings about the fairness of Kensington having securitised Mr and Mrs D's mortgage. Its commercial funding arrangements are not a matter for me.

However, it is very much a matter for me whether Kensington has treated Mr and Mrs D fairly and reasonably in all the circumstances – and it's in that context that I referred to their mortgage having been securitised.

My key finding in this case is that, at the time of the discussion about a new rate in 2020, Mr and Mrs D shared similar characteristics with other customers who were eligible for a new rate on their existing mortgage – but Mr and Mrs D were not eligible.

I referred to MCOB 11.8.1 E, and noted its content and effect. I was satisfied that Mr and Mrs D were unable to move their mortgage to another lender, and that therefore MCOB 11.8.1 E was relevant to their situation.

I found that the reason Kensington did not offer them a new rate was because their mortgage was taken out before 2010, and because it had been securitised in a way that did not allow for changes to be made.

Kensington has now confirmed that their mortgage was taken out on a self-certification basis. But I don't think that affects my broader conclusions. As I explained, in my view what's relevant is Mr and Mrs D's characteristics at the time they discussed a new rate – not the circumstances in which they'd taken their mortgage out around fifteen years earlier. Their circumstances may well have changed significantly since then. And other customers who were eligible for a rate may well also have faced changed circumstances since taking their loans out – which wouldn't affect their eligibility. In my view, the question to be asked is whether, in 2020, Mr and Mrs D's characteristics at that time were similar to the then current characteristics of customers who would be eligible for a rate. And if they were similar, it wouldn't be fair not to offer them a rate no less favourable than those other customers.

Therefore, in my view, the circumstances in which Mr and Mrs D took their mortgage out, or the fact that it was taken out prior to 2010, are not relevant to the question of whether in 2020 they had similar characteristics to, and were being treated less favourably than, customers who would be eligible for a rate.

And this is where the question of securitisation becomes relevant too. It's not clear to me whether Kensington is arguing that securitisation ought to be considered a characteristic of Mr and Mrs D. Or whether it is arguing that even if refusing them a rate might otherwise tend to show unfairness of the sort contemplated in MCOB 11.8.1 E, the fact that their mortgage has been securitised means such treatment is rendered fair and reasonable in all the circumstances. But I'm not persuaded by either of these arguments.

I think it's clear from the wording of MCOB 11.8.1 E that the comparison envisaged is between customers of a firm taken as a whole. What matters is whether Mr and Mrs D, as individual mortgage customers, have similar characteristics to other individual customers of Kensington. And if they have similar characteristics to those other customers, but are being treated less favourably than those other customers, that may tend to show a breach of Principle 6 and unfair treatment in the individual case.

I therefore do not think that the mere fact that the mortgage of one customer but not another has been securitised can of itself amount to a characteristic of either customer. Securitisation is a unilateral step taken in relation to an existing borrower's loan by a lender for the lender's prudential and commercial purposes, not a characteristic of the borrower themselves (as loan to value or credit score might be).

In other words securitisation is something done to the borrower by the lender rather than a characteristic of the borrower. The lender's decision to securitise might be driven in part by its perception of the characteristics of the borrower, or at least the average characteristics of the part of the lender's business the borrower sits within. But if that is the case, it is those characteristics that may be relevant, not the securitisation itself. It is therefore necessary to identify what Mr and Mrs D's characteristics are, and the extent to which they have similar characteristics to other customers of Kensington. I set out my conclusions on that in my provisional decision, reproduced above, and I haven't seen anything to change my mind about that.

And if the argument is that because it has securitised their mortgage, Kensington's treatment of them becomes fair and reasonable, I'm not persuaded by that either. I think the question of securitisation does not impact on whether or not Mr and Mrs D were treated fairly, or whether Kensington treated them less favourably than other customers whose current circumstances are the same or similar.

I understand that Kensington has decided to securitise the mortgage for commercial reasons. And it is entitled to make commercial decisions. But it also has obligations to treat its customers fairly. I have no role in Kensington's commercial decisions; my role is limited to considering whether it has treated Mr and Mrs D fairly and reasonably in all the circumstances. And if I consider that it hasn't, and something needs to be done to put matters right, it is for Kensington to find a way of doing so consistent with its other obligations. I don't think such considerations carry substantial weight in determining whether Mr and Mrs D have been treated fairly.

There may be occasions where a commercial decision a lender is entitled to take nevertheless results in unfair treatment in the particular circumstances of an individual customer. In my view this is one such case. Where a lender is entitled to take a commercial decision in the overall management of its business, it does not follow that doing so can never result in unfairness to an individual customer in an individual case. Nor does it follow that the lender cannot be held responsible for any such unfairness.

Mr and Mrs D have no relationship with the securitisation vehicle. It is not their lender and does not own the legal title to their mortgage. Kensington was at the relevant time Mr and Mrs D's lender. Its obligations to treat them fairly flow from the fact that it is their lender, regardless of any contractual arrangements it might separately have entered into with a third party. Those obligations do not in my view change its obligations to act fairly and reasonably to Mr and Mrs D. The question of securitisation is, it seems to me, more relevant as a question about the practicalities of putting matters right, not a question about the principle of whether Kensington has treated Mr and Mrs D fairly.

Having considered everything afresh, and for the reasons I've given in this and in my provisional decision, I remain of the view that it was not fair and reasonable in the particular circumstances of this case for Kensington to tell Mr and Mrs D that they were not eligible for a new rate. Acting fairly, it should have enquired into their circumstances and, given its obligations to treat customers fairly, understood that they were unable to move to another lender and that MCOB 11.8.1 E was therefore relevant their circumstances and should be taken into account. In my view the fair and reasonable thing would have been to recognise that they had similar characteristics to other borrowers who could access rates – and so it should have offered them no less favourable rates or terms than would have been offered to those other customers with similar characteristics.

Putting things right

In my view the fair and reasonable way to put things right is for Kensington to put Mr and Mrs D back in the position they would have been in had it fairly offered them an interest rate in 2020.

Had Kensington treated Mr and Mrs D no less favourably than it would have treated other customers at that time, Mr and Mrs D's, and then Mrs D's alone, mortgage payments would have been lower since then. This means there have been overpayments each month since then – but, because this is an interest only mortgage, the balance would still be the same. The difference is the higher interest rate they've paid, and the higher monthly payments that resulted.

Mrs D says she would have wanted a five year fixed rate. She's now explained that she doesn't plan to sell the property and is intending to use equity release to pay the capital in due course.

Kensington has now given me the list of rates it had available for existing customers at the time. It didn't have a five year rate, but it had a four year rate of 3.79%. Had it given what I consider to be fair and reasonable consideration to their application, and in particular to MCOB 11.8.1 E, it's likely it would have agreed to charge Mr and Mrs D interest at a rate no less favourable than that offered to other customers with similar characteristics such as loan to value seeking a similar rate.

The amount Mr and Mrs D, and then Mrs D, have overpaid since then is therefore the difference between their actual interest payments and the payments they would have made had that happened.

It seems to me that Kensington can refund the overpayments Mr and Mrs D, and then Mrs D, have made since 2020 without impacting on the securitisation. That is simply a question of financial compensation – refunding overpayments – which Kensington can pay. It should add simple annual interest of 8% to the amount refunded.

I accept it's more difficult to resolve the situation going forward – not only because of the securitisation, but also because Kensington is no longer the owner of this mortgage.

However, Kensington will need to find a way to ensure Mrs D is not out of pocket for the remainder of the period a rate should have been in place.

There are likely to be various ways Kensington could give effect to this. It may be that the transfer agreement allows Kensington to require the new lender to implement ombudsman decisions – in which case, it can notify the new lender of the outcome of this complaint so the new lender can adjust the interest rate going forwards.

Alternatively, if that's not possible and the new lender continues to charge Mrs D the existing variable rate, Kensington can compensate her by refunding the difference between the amount she pays the new lender and the amount she should have paid on a 3.79% fixed rate. This will require Kensington to pro-actively calculate and refund the overpayments each month for the remaining part of the four year period – it's not possible to calculate this compensation in advance since the mortgage is on a variable rate which might increase (increasing the payments Mrs D has to make to the new lender and therefore the compensation Kensington has to pay her) over that time. There may be other alternatives too – it is for Kensington to find a way to give effect to my decision.

Assuming a reasonable time to implement a fixed rate, the redress period should run for four years from 1 March 2020 to 29 February 2024. And so when we notify Kensington that Mrs D has accepted my decision – if she does – it will need to calculate and pay her the compensation for overpayments to date, and notify her how it intends to compensate her for the future part of the redress period.

As Mrs D's mortgage is now with a new lender, she will need to discuss with the new lender whether or not the new lender makes new interest rates available to existing customers. In the event that Mrs D agrees a new rate with the new lender to replace the fixed rate I am directing before February 2024, Kensington's liability to compensate her for overpayments will come to an end.

Finally, for the reasons I gave in my provisional decision. I'm satisfied it's fair and reasonable for Kensington to pay Mrs D £500 compensation for the distress and inconvenience caused by having to make higher payments than she would otherwise have had to make since 2020.

My final decision

For the reasons I've given, my final decision is that I uphold this complaint and direct Kensington Mortgage Company Limited to:

- Calculate the difference between the amount Mrs D has paid each month since March 2020 and the amount she would have paid had she been given a fixed rate of 3.79%;

- Refund each monthly overpayment to Mrs D, adding simple annual interest of 8%* to each refund running from date of payment to date of refund;

- Work with Mrs D and the new lender either so that the new lender reduces the interest rate from now until 29 February 2024 as if the fixed rate of 3.79% had been in place, or so that Kensington compensates Mrs D for the ongoing overpayments if the new lender does not do so.

- Pay Mrs D £500 compensation.

**Kensington may deduct income tax from the 8% interest element of my award as required by HMRC, but it should tell Mrs D what it has deducted so she can reclaim the tax if she's entitled to do so.*

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs D to accept or reject my decision before 22 December 2022.

Simon Pugh
Ombudsman