

The complaint

Mr and Mrs F complain about their mortgage with Kensington Mortgage Company Limited. They're concerned that the balance wasn't set correctly when they moved from one property to another, and they complain that Kensington's interest rate is too high and that it didn't treat Mrs F in particular fairly when she experienced financial difficulty.

What happened

Mr and Mrs F took their mortgage out with another lender, and it was later transferred to Kensington, which is therefore responsible for this complaint.

They took an initial three-year fixed rate of 6.54% in 2006, reverting to a rate which tracks the Barclays Bank Base Rate with a margin of 2.49% from 2009. Since, in practice, the Barclays Bank Base Rate has been set at the same level as the Bank of England base rate, Mr and Mrs F have been on a base rate tracker since the expiry of their fixed rate.

More recently, Mr and Mrs F separated and Mr F moved out of the property. Since then it has primarily been Mrs F that paid the mortgage.

The mortgage began to fall into arrears in late 2016. Although payments were made over the next few years, some monthly payments were missed and in other months the full payment wasn't made. So the arrears increased and by 2020 had reached over £7,000.

During this time, Mrs F was in regular contact with Kensington. She provided income and expenditure information and Kensington agreed a series of payment arrangements. But Mrs F wasn't able to bring the arrears down and get the mortgage back on track. In early 2019, Mrs F told Kensington that she was receiving medical treatment and her condition was affecting her income. Kensington agreed a further payment arrangement but when that wasn't kept to, it added an arrears fee to the account in April 2019.

There were further discussions between Mrs F and Kensington throughout 2019. Kensington asked Mrs F for medical evidence but she didn't provide any. She said she was still receiving treatment but was continuing to work. She said she had other financial difficulties and was struggling to meet her commitments.

In late 2019, Kensington decided to take repossession proceedings. It paid a trace agent to locate Mr F so that it could serve the proceedings on both parties, and added the costs to the mortgage balance.

Finally, the mortgage was paid off when a family member bought the property.

Mrs F complained to Kensington, and Mr F joined the complaint when it was brought to us. She said that their concerns were:

- The mortgage was lent beyond their retirement ages of 65 and 60 respectively;

- They were not advised about the appropriateness of using the mortgage to consolidate other debts when they took it out;
- Unreasonable fees were added to the mortgage balance when they took it out;
- The interest rate is unfair;
- In 2019, Kensington was unsympathetic and didn't treat her fairly when Mrs F had serious health concerns;
- Kensington has not acted fairly or sympathetically when they've struggled with the mortgage repayments. They understood that the mortgage includes life insurance and payment protection insurance, but no payments have been made;
- Kensington is hard to contact, with no response to contact via its website and excessive waiting times before telephone calls are answered – leading to higher call costs.

Our investigator said we couldn't consider anything from the time the mortgage was sold. She thought that overall Kensington had treated Mr and Mrs F fairly, but that the April 2019 arrears fee and the tracing agent fee should be refunded. As neither party agreed, the complaint comes to me for a final decision.

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.

As our investigator explained, there are time limits which apply to complaints. We can only consider a complaint made within six years of the event complained of, or – if later – within three years of when the complainant knew or ought reasonably to have known of cause for complaint. That's unless there's evidence of an earlier complaint having been made in time, unless the firm complained about consents to us looking at an older complaint, or unless there are exceptional circumstances which explain the delay.

Our investigator explained that, applying those rules, in this case we would only be able to consider things that happened in the six years before Mr and Mrs F complained. I agree about that. I'm satisfied that Mr and Mrs F would have known about the issues they've raised around the sale of the mortgage, fees added at the time, and the mortgage balance at or soon after the time of the sale. As that's more than six years ago, Kensington hasn't consented and there are no exceptional circumstances, we can't now consider those matters.

I've not seen any evidence that insurance was included as part of this mortgage. If Mr and Mrs F took out separate insurance around the same time as they took the mortgage, that's something to raise either with the broker who sold it or with the insurance providers.

I'll therefore focus in this decision on those matters which are in time – the interest rate charged in the six years before the complaint was made, and whether Kensington treated Mrs F in particular fairly when she experienced financial difficulties.

The interest rate

I've explained above that since the fixed rate ended in 2009, the mortgage has been on a variable rate which has effectively tracked base rate with a margin of 2.49%.

Mr and Mrs F have complained that the interest rate they've been asked to pay is too high, and that Kensington hasn't given them access to a new fixed rate.

Until 2017, Kensington did not make new fixed interest rates available to any existing customers. The terms and conditions of their mortgage make clear that when the old rate expired they would move onto the reversion tracker rate, and that's what in fact happened. Nothing in the mortgage terms and conditions says that Kensington has to offer them a new fixed rate. So the mortgage has operated as it should have done, in line with the terms and conditions.

I'm aware that it's a common feature of the mortgage market that once a fixed rate expires, a borrower will often shop around for another, either with their existing lender or with a new lender. But there's no rule or obligation that says a lender has to offer new rates to its existing customers. Prior to 2017, Kensington didn't offer rates to any customers, and therefore did not treat Mr and Mrs F any less favourably or less fairly than any of its other customers.

I don't know whether Mr and Mrs F tried to move to another lender or not. But if they didn't, or if they did and weren't able to, I don't think I can fairly hold Kensington responsible for that.

That means that I don't think I can fairly uphold a complaint that Kensington treated Mr and Mrs F unfairly by not giving them access to a new fixed rate prior to 2017 when it didn't have any rates available.

From 2017 onwards, Kensington did start to offer fixed rates to some existing customers, subject to eligibility criteria. One of the criteria was that the mortgage was not in arrears – but by 2017, Mr and Mrs F's mortgage was in arrears. This means that by the time Kensington started to make new rates available to existing customers, Mr and Mrs F were not eligible for one.

It's permissible for a lender to have eligibility criteria under which different rates are available to different customers – and under which some customers are not eligible for rates at all.

But nevertheless I've thought about whether it was fair, in Mr and Mrs F's particular circumstances, that Kensington didn't allow them access to a new interest rate.

I've said that Mr and Mrs F weren't eligible for a rate because of the arrears on their mortgage. A new fixed rate comes with an early repayment charge (ERC). Where a borrower is in arrears, it's more likely they will repay their mortgage early – perhaps because they decide it's no longer affordable and sell the property, or even because the lender repossesses. Ending the mortgage early in this way results in the ERC being paid – and an ERC can be substantial, often between 2% and 5% of the mortgage balance.

That means that if the mortgage has to be repaid early, it's more expensive to do so and leaves the borrower with less equity. Indeed, in this particular case the mortgage was ended early when a family member bought the property – so not having a fixed rate meant that Mr and Mrs F avoided having to pay an ERC when that happened.

The other factor to weigh in the balance is that a fixed rate can sometimes lower the interest

rate and therefore the monthly payments. And sometimes that's enough to make the mortgage affordable and take the borrower out of financial difficulty – which means that it might be fair to offer a rate as a form of forbearance, notwithstanding the ERC risk and despite the eligibility criteria.

However, I'm not persuaded that was the case here. I can see from the transaction history that between 2017 and 2021, when the mortgage was repaid, that in some months the full mortgage payments were made – and even overpayments to reduce the arrears. But in other months reduced payments or no payments at all were made. And overall, the arrears rose to over £7,000 over this period.

During this time, Mr and Mrs F's mortgage was on a rate which tracked base rate with a margin of 2.49%. This meant their interest rate was:

Date*	Base rate	Mr and Mrs F's mortgage rate
September 2016	0.25%	2.74%
December 2017	0.5%	2.99%
September 2018	0.75%	3.24%
April 2020	0.1%	2.59%

** This date is the date of changes to base rate – the mortgage rate changed shortly afterwards*

Therefore, throughout this period, Mr and Mrs F's interest rate was never more than 3.24%, and generally less than 3%.

While this is higher than the best fixed rates offered to their customers by high street banks, it's not an excessive rate that's unreasonable in and of itself, and is lower than many reversion rates. And it's important to note that the rates Mr and Mrs F were charged were generally lower than the fixed rates Kensington had available to offer to eligible existing customers.

And so even if Kensington had offered Mr and Mrs F a new fixed rate to replace their variable rate, I don't think it would have helped their situation. Rather, it's likely that doing so would have increased – not reduced – their monthly payments (as the fixed rates were generally higher than their variable rate) and also left them facing a substantial ERC when the property was sold.

In those circumstances, I don't think it was unfair that Kensington refused Mr and Mrs F a new fixed rate, keeping them on the variable rate set out in the terms of their mortgage agreement. They were not eligible for a fixed rate, and offering them one would likely have made their situation worse not better.

Fair treatment in financial difficulties

The arrears began to build up from 2016 onwards. Throughout this time, Mrs F was in regular contact with Kensington. She explained various difficulties she was experiencing with the separation from Mr F, her employment and her health, all of which impacted her ability to make the mortgage payments at various times. I appreciate it would have been difficult and

upsetting to have to discuss these matters with Kensington, but it was necessary to do so for it to understand her situation. At times – particularly around the pandemic – it would have taken longer to contact Kensington. But this is something that all firms struggled with, as increased demand from customers coincided with impacts on staff and resources. While that would no doubt have been frustrating for Mrs F I have to take account of the difficult wider circumstances.

I've looked at the period of the arrears from 2016 onwards carefully, and I think Kensington acted fairly and reasonably. It took account of Mrs F's circumstances, as I'd expect, and looked at her income and expenditure to see what she could afford. It agreed a series of payment arrangements, some of which Mrs F was able to keep to and some of which she wasn't. In 2018, concerned at the increasing arrears, Kensington instructed solicitors to begin repossession proceedings – although no proceedings took place when a further payment arrangement was agreed.

Mrs F has particularly complained about what happened in 2019, at the time of her illness. I can understand this was a particularly difficult and upsetting time for her. And I appreciate that the worry of her mortgage contributed to that. Again, though, I don't think Kensington acted unreasonably. It wanted to understand more about her condition and how it might affect her, which I think was fair. And it looked at her income and expenditure and financial situation. Mrs F said that she was still working, other than time off for medical procedures, and also that she was planning to sell the property to a family member.

At the same time, Kensington was concerned that the arrears were continuing to grow, that previous arrangements hadn't been kept to, and there was no definite timescale for a property sale. By this point, the arrears had been growing for several years. I don't think it was unreasonable that Kensington began to explore whether it needed to take matters further and instructed solicitors. It was clear at this time that it wasn't seeking to repossess the property immediately, but that it wanted the court to grant a suspended possession order – which is a form of payment arrangement which gives the lender the right to go back to court and seek repossession if it isn't kept to.

So while this was a very difficult time for Mrs F, it's also the case that the mortgage arrears continued to increase – and, as Mrs F was continuing to work and still having difficulty with the mortgage, there didn't seem to be any prospect of her financial situation improving in the future. As things had been getting worse for some years, I don't think it was unreasonable that Kensington wanted to move things on to the next stage – but, by applying for a suspended rather than outright possession order – still give Mrs F a further chance to get things back on track or complete the sale of the property. In the event, though, it didn't take proceedings at all as a further arrangement was agreed in January 2020.

Finally, I've looked at the fees Kensington applied to the loan over this time. It added the following fees to the loan balance, up to the time of Mrs F's complaint:

- February 2017 - £50 arrears fee
- March 2017 - £50 arrears fee
- May 2018 - £30 arrears fee
- June 2018 - £30 arrears fee
- July 2018 - £30 arrears fee
- August 2018 - £645 legal fees

- April 2019 - £30 arrears fee
- September 2019 - £30 tracing fee
- December 2019 - £65 legal fees
- February 2020 - £87.60 legal fees

I've explained that I think it was reasonable that Kensington considered legal action when it did. And therefore it's fair that it added the costs incurred by its solicitors to the mortgage balance.

Arrears fees should only be charged where a payment has been missed and there's not an ongoing arrangement to accept reduced or nil payments. And even then, a fee should only be charged where it reflects extra administrative work carried out by Kensington because of the missed payment – for example, working with Mrs F to understand her situation and what she can afford to pay.

With that in mind, I'm satisfied that all the arrears fees were reasonable and fairly charged – with the exception of the fee charged at the start of April 2019 for the payment missed in March 2019. While the payment was missed, there's no evidence of contact between Mrs F and Kensington in that month, or of any other additional work Kensington carried out which would justify charging that fee.

I'm also not persuaded the tracing fee in September 2019 was fair and reasonable. This was a fee paid to a tracing agent for finding Mr F's address. At this time, Kensington was contemplating taking possession proceedings – which would need to be served on Mr F as well as Mrs F, as both were parties to the mortgage. To do that, Kensington would need Mr F's address. However, Kensington has not explained, and I've seen no evidence of a good reason, why it was necessary to pay a tracing agent to confirm Mr F's address. This wasn't necessary when proceedings were contemplated in 2018, and I've not seen evidence that anything had changed.

Our investigator said in her view that she'd not seen any evidence of why that fee was justified. Kensington sent her a copy of the invoice, but didn't explain why it considered it to be necessary.

Having seen the invoice, I'm satisfied Kensington incurred this fee. But for it to be fair to charge it to Mr and Mrs F, that's not enough – it also has to be reasonable to incur it. And I'm not persuaded of that.

Putting things right

To put things right, I think Kensington should refund the two fees I've identified above, plus interest.

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:

- Refund the £30 arrears fee added to the mortgage balance in April 2019; and
- Refund the £30 tracing fee added to the mortgage balance in September 2019.

In each case, Kensington should also refund any mortgage interest charged on those fees from the date they were added to the balance to the date the mortgage was redeemed. It should then add simple annual interest of 8% to the total of the fees plus mortgage interest, running from the date the mortgage was redeemed to date of refund. Kensington may deduct income tax from the 8% interest element of my award, as required by HMRC, but should tell Mr and Mrs F how much is has deducted so they can reclaim the tax from HMRC if they are entitled to do so.

As Mr and Mrs F are not together, they will need to decide between them how the refund is to be apportioned, and should confirm that when they accept my decision – if they do.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F and Mrs F to accept or reject my decision before 6 February 2023.

Simon Pugh
Ombudsman