DRN-3868317

The complaint

Mr V complains about his mortgage with Landmark Mortgages Limited. He says that Landmark has added disproportionate and excessive fees to his mortgage. And he says that Landmark has overcharged interest because the interest rate should have been set at a consistent margin over the Bank of England base rate. He also complains that Landmark hasn't applied the correct terms and conditions, and that he'd relied on it telling him he'd paid his mortgage off.

What happened

Mr V took out a mortgage with the former Northern Rock bank – after its collapse, his mortgage was transferred to the nationalised lender which took over Northern Rock's business, NRAM, and then on to Landmark in 2016. As the current lender, Landmark is responsible for answering this complaint, including in respect of matters pre-dating the transfer.

Mr V borrowed around £190,000 on an interest only basis over a term of 23 years, beginning in 2006. The mortgage was on an initial fixed rate of 5.49% for two years, reverting to Northern Rock's standard variable rate (SVR) for five years and thereafter to a discount rate of at least 0.25% below the SVR thereafter. The discount rate was conditional on the mortgage payments being up to date; the discount would be removed and the full SVR charged if not.

In taking out the mortgage, Mr V received advice from a mortgage broker. That broker is no longer trading, but Mr V has complained to the Financial Services Compensation Scheme (FSCS) about the mortgage advice, and was awarded compensation of around £30,000. The FSCS found that the mortgage was not suitable for Mr V and should not have been recommended.

Some years ago Mr V fell into arrears on the mortgage. Landmark has added various fees and charges to the mortgage. Mr V has complained about this for some time, and in 2017 he issued a court claim against Landmark. The court decided in Landmark's favour. In late 2017 or early 2018, Mr V issued another claim. Landmark didn't originally respond to the claim, and Mr V obtained default judgment. Landmark agreed to pay Mr V the sum set out in the default judgment pending an application to strike it out. Landmark then decided not to proceed with the strike out application but as Mr V insisted on a hearing, the court directed him to pay Landmark's costs of the unnecessary hearing in April 2018.

The arrears continued, and in 2019 Landmark took possession proceedings. Mr V contested the possession proceedings, but shortly before the hearing paid a lump sum to Landmark to clear the arrears. The court issued a suspended possession order on the condition that Mr V continued to pay the monthly payments.

As a result of all this, and for other reasons, Mr V has been in dispute with Landmark about the mortgage for a number of years. The present complaint began in 2019, after he had cleared the arrears, when Mr V complained that Landmark had added fees and charges – including legal costs – to his mortgage balance. Since then Mr V has carried out his own

researches into the mortgage, including making enquiries of the Land Registry, and his complaint has evolved as a result. Mr V now questions the validity of the mortgage and whether he should be liable for it – or liable to pay anything beyond the capital initially borrowed.

Mr V complains that:

- Landmark had added excessive and disproportionate fees and charges to the mortgage balance, including legal fees.

- At the possession hearing in May 2019, the court declined to make a money judgment and made a suspended possession order on the condition that Mr V pay £850 per month. Mr V says this means that there is no longer a mortgage debt, and he only owes the £850 per month set out in the court order. And the court did not order costs, so Landmark is not entitled to recover legal costs from Mr V.

- The term of the mortgage contract Landmark says allows it to add fees and charges is an unfair term.

- In any case, by adding fees and charges Landmark has acted in breach of court orders and the rules of mortgage regulation.

- The court rejected Landmark's application for a money judgment, and so Mr V only owes, and is only required to pay, what is set out in the suspended possession order.

- Northern Rock did not lodge the mortgage terms and conditions with the Land Registry appropriately. Landmark and its predecessors have sought to rely on various versions of the terms and conditions. But because they have never been able to produce a particular set of terms and conditions explicitly referencing his mortgage and mortgage account number, the mortgage deed is invalid and unenforceable.

- The mortgage was mis-sold because it was unaffordable for him and there was no assessment of his interest only repayment strategy. Northern Rock had failed to include required information in the mortgage offer. Mr V has already received compensation for the sale of the mortgage from the Financial Services Compensation Scheme, in respect of the actions of his mortgage broker. This shows the mortgage was unsuitable for him and should never have been granted.

- The mortgage offer implies that the standard variable interest rate (SVR) should always be 1.84% above the Bank of England base rate. But in practice it has been significantly in excess of this. As a result, interest had been overcharged throughout the time Mr V had been on the SVR.

- By changing the mortgage account number, Landmark changed the mortgage deed without his agreement and so the deed is not valid.

- Landmark sent Mr V a letter setting out that his mortgage had been repaid in full, though the letter wasn't addressed to him and didn't refer to his property. Landmark said that was an error and the letter actually related to a different customer and shouldn't have been sent to Mr V. Mr V says this amounts to a negligent misrepresentation, he relied on it to not make further payments, and it entitles him to have the mortgage rescinded. Mr V is no longer making payments, or willing to make payments, to a mortgage the lender has told him has been redeemed.

Mr V's complaint has previously been the subject of a jurisdiction decision by another

ombudsman. That decision – with which, for the avoidance of doubt, I agree – found that any part of Mr V's complaint that relates to matters before June 2013 (six years before he first complained to Landmark) is out of time. That means that in this decision I will not be considering the sale or lending decision at the start of the mortgage term, or any fees or charges added to the balance, or interest charged, before June 2013.

However, as the other ombudsman also pointed out, in considering the part of Mr V's complaint about the fairness of the interest rate, it will be necessary to consider the whole history of the interest rate, including before June 2013. That's because changes to the interest rate before that date may have influenced the interest rate charged from then on, and so form part of all the circumstances of the case that I am required to consider.

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.

Mr V has complained about a number of different things in relation to his mortgage, some of which the previous ombudsman said were out of time. I'll deal with each of his complaints in turn.

The sale of the mortgage

Mr V's complaint here is in two parts – that the mortgage should never have been lent to him; and that, as a result, it isn't fair and reasonable for Landmark to seek to recover it from him (or recover anything other than the capital he borrowed) now.

I note that the FSCS upheld a complaint about the mortgage adviser and awarded Mr V compensation. I haven't seen the FSCS's file or the detailed reasons for its decision. But I accept that this means that it's more likely than not that the mortgage adviser mis-sold this mortgage. But it's important to note that the advice he received from a mortgage broker is separate from the lender's lending decision.

A mortgage broker acts as the representative and agent of the borrower – in this case Mr V – not of the lender. At the time, the rules of mortgage regulation set out that the responsibility of the mortgage broker was to advise on Mr V's requirements and recommend a mortgage that was suitable and affordable. Separately to that, it was for the mortgage lender to consider – based on the information provided by the broker, unless there were common sense grounds for doubting it – whether it was responsible to lend, taking into account the borrower's ability to repay the mortgage.

Mr V has referred to mortgage rule MCOB 11.6.2 – which requires a lender to consider affordability in detail as part of the responsible lending assessment. But this rule did not exist at the time; it was introduced in 2014. At the time of the lending decision, the relevant rule was MCOB 11.3.

While MCOB 11.6.3 also includes a requirement to assess affordability where there is a variation to or replacement of the mortgage – such as porting, changing repayment type, or extending the term – it doesn't apply to matters such as adding fees and charges to the loan balance. MCOB 11.6.3 therefore isn't relevant to this complaint.

Under the rules as they were at the time, the duties of a mortgage adviser and a mortgage lender are different. It doesn't automatically follow that because the mortgage was mis-sold by the mortgage adviser (as the FSCS found), it was also irresponsibly lent by Northern Rock on the basis of the information it had at the time.

The mortgage was lent in 2006, and therefore any complaint about the lending decision would be out of time, as the previous ombudsman concluded. So that isn't something I can consider here. That means I can't find that it was irresponsible for Northern Rock to lend.

And in the absence of such a finding about the conduct of Northern Rock, I can't safely find that it isn't fair and reasonable for Landmark to continue to hold Mr V liable for the mortgage merely because the FSCS upheld a separate complaint about the actions of a third party.

Mr V has also suggested that because it was recorded that he was relying on investment vehicles to repay the mortgage when that was not in fact the case, that invalidates the mortgage and makes the mortgage deed unenforceable. But I don't agree about that.

The sale was in 2006, and Mr V has known since at least 2015 that Northern Rock relied on information from the broker about the repayment vehicle he now says was not in fact in place. And he knew long before that that this was an interest only mortgage that he would be expected to repay, and that if in fact he wouldn't be able to do so, that was enough to tell him that something might have gone wrong with the lending decision. That means that the complaint about the lending decision is out of time, and not one I can consider, as my fellow ombudsman decided. I can't therefore make a finding that it wouldn't be fair for Landmark to expect Mr V to repay the mortgage because of this part of his complaint either.

I can't consider what the lender took into account in making the lending decision, as that is out of time. But even if the mortgage was lent on the basis of investment vehicles Mr V didn't in fact have, I don't think that would make the mortgage unenforceable now, or mean that it is unfair for Landmark to expect him to repay it.

Whether a mortgage is enforceable as a matter of law is a question for the courts. But I don't think it's fair and reasonable to ask Landmark to write the mortgage off because Mr V doesn't have a repayment strategy in place. That's because it's for the borrower to repay the mortgage, and make sure they have a strategy for doing so in place. That was made clear in the mortgage offer at the time Mr V took the mortgage out. The lender relied on information it was given to suggest Mr V had a repayment strategy in the form of investments in deciding whether it was responsible to lend. But whether or not it was correct to do so, and if not whether that is the fault of the lender the broker or Mr V, the fact remains that Mr V borrowed this mortgage and has an obligation to repay it.

Mr V has referred to a decision of the Court of Appeal[1], but I don't think that decision is relevant to this case – since it related to a complaint about a mortgage broker, which advised its customer to take an interest only mortgage relying on an unsuitable repayment strategy which later failed. Northern Rock did not give Mr V advice, the broker did. And Mr V has already been compensated for the broker's failings.

In summary, therefore, I cannot consider Mr V's complaint that this mortgage was irresponsibly lent. But even if it was, I don't think it follows that it's not fair and reasonable for Landmark to expect Mr V to repay it now.

What are the terms and conditions applicable to this mortgage?

Mr V disputes which terms and conditions apply to this mortgage, and says that because there are handwritten notes on the version filed with the Land Registry – which therefore differs from the version given to him by Landmark – the incorporation of those terms and conditions into the mortgage contract is not valid. He also says that Landmark has not been able to provide him with the actual terms and conditions applicable to his mortgage,

[1] *Emptage v Financial Services Compensation Scheme* [2013] EWCA Civ 729

including the right reference numbers, and has misled the court about the applicable terms.

Landmark sent Mr V a copy of Northern Rock's 2005 mortgage conditions, saying they were the applicable terms. It also said the same thing to the courts. That was an error, as in fact this mortgage is not subject to the 2005 conditions.

It's unfortunate Landmark made this mistake, as it has fuelled some of Mr V's later concerns and complaints. But I don't think this mistake invalidates the mortgage or means that Landmark can't rely on the terms and conditions which actually do apply.

The mortgage offer letter sent to Mr V on 26 September 2006 sets out that Northern Rock was willing to offer him a mortgage. It said that the following documents were enclosed with the letter, and were all applicable to the mortgage agreement:

- The mortgage offer
- The tariff of charges
- The Mortgage Conditions 2001
- The Mortgage Offer – General Conditions

I've reviewed all these documents.

The mortgage offer is bespoke to Mr V. It sets out the terms on which Northern Rock was prepared to offer Mr V a mortgage, including the amount borrowed, the term and the interest rate.

The mortgage offer general conditions supplements the mortgage offer, defining the terms within it and setting out more detail on how the mortgage would operate – including how interest would be calculated and charged and how the interest rate could be varied. This is the document with the footer "ADV282".

The mortgage conditions 2001 are not directly related to the mortgage offer, or specific to Mr V or his own loan. These are the more general conditions applicable to all Northern Rock mortgages and cover matters such as each party's rights and obligations in respect of the property. This is the document registered with the Land Registry with the footer "LEG3" alongside the mortgage deed.

I don't think the fact that one of the copies the Land Registry gave Mr V had a stamp or some handwritten notes on the cover page and elsewhere invalidates the conditions or means they don't apply to his mortgage either. They are clearly Land Registry filing notes and record of receipt of the document, as well as minor typographical corrections, and have no impact on its content or substance. As the Land Registry explained to Mr V, this was a draft version superseded by the final version it also provided to Mr V.

I'm satisfied the mortgage offer, the mortgage offer general conditions, and the mortgage conditions 2021 are all part of the mortgage contract between Mr V and Northern Rock and its successors, including Landmark.

The mortgage offer sets out how much Mr V borrowed and how he must pay it back, and the mortgage offer general conditions interpret and expand on the offer. And the mortgage deed sets out the security Mr V gave for that borrowing, with the mortgage conditions 2001 setting out in more detail the rights and obligations of the parties in relation to that security. That's why it's that document which is included with the mortgage deed provided to the Land

Registry, not the mortgage offer general conditions. There was no obligation to lodge the mortgage offer or mortgage offer conditions with the Land Registry or file them with the deed.

I therefore don't think that there is a conflict or inconsistency here. It's not that either "LEG3" or "ADV282" apply – it's that both do. One set of conditions relate to and expand on the mortgage deed by which Mr V gave security to the lender and the rights and obligations of each party in respect of the property; the other set of conditions relate to and expand on the mortgage offer by which the lender lent money to Mr V in return for that security and the terms on which he was expected to repay it.

I also don't think it matters that various copies of the standard terms and conditions (that is, the documents other than the mortgage offer) have reference numbers that don't match each other, or don't match Mr V's mortgage account number.

There's no requirement for all documents to contain a single consistent reference number, or indeed any reference number at all. Nor is there a requirement for the mortgage terms and conditions to contain Mr V's offer reference number or mortgage account number. This does not render the documents invalid or mean they can't apply to Mr V or his mortgage. They are described within the offer covering letter of September 2006, which makes clear they formed part of the mortgage contract, and enclosed with that letter. That is enough to make them part of the mortgage contract, binding both parties.

There is no requirement to set out all the terms of a contract in one single document. It's often convenient to set out information specific to an individual customer – such as the security address, the amount borrowed and the mortgage term – in one document, with generic information applicable to all customers in another document.

Mr V has referred to MCOB 7.3.3 R. I've taken it into account. But I don't think it means he has been treated unfairly. This rule says

> *"The information required by this chapter, MCOB 7 [disclosure at the start of the contract and thereafter – such as the mortgage offer and terms and conditions], may be provided in more than one document, provided the use of several documents does not materially diminish the significance of any information the firm is required to give the customer, or the ease with which this can be understood."*

This rule allows a lender to use more than one document as part of the overall contract – as Northern Rock did here – provided doing so does not impact on the ability of the customer to understand the agreement.

I'm satisfied that Northern Rock explained the nature of the agreement and the documents that were part of it fairly and reasonably, such that a reasonable customer taking out this mortgage would have understood what they were agreeing to. So I don't think there was a breach of MCOB 7.3.3 R.

And I'm satisfied this was enough to comply with the regulator's Principle 7, which requires a firm to pay due regard to its customers' information needs, and communicate with them in a way that's clear fair and not misleading.

I've also considered the caselaw and statute Mr V has pointed to in this respect. But I'm not persuaded they are relevant to this complaint. And in any case, whether or not the mortgage debt or mortgage deed is technically enforceable as a matter of law is a matter for the courts.

But for the reasons I've given, taking into account the law, I've not seen anything which seems likely to invalidate the mortgage or the deed, or mean that it is unfair for Landmark to collect the resulting debt from Mr V. I think it's unlikely a court would conclude that, and for the purposes of this decision I proceed on the basis that it's fair and reasonable to conclude that both sets of conditions are part of Mr V's mortgage agreement, and that it's fair and reasonable to take them into account when thinking about whether or not to uphold Mr V's complaint.

I also think it's fair and reasonable to proceed on the basis that there is a valid mortgage agreement between Mr V and Landmark, and that – subject to the other matters I'll deal with below – Landmark entitled is to expect Mr V to repay it in line with the offer and the terms and conditions. That includes both the offer general conditions and the mortgage conditions 2001.

The relevance of the change of account number

Mr V complains that Landmark changed his mortgage account number without his consent, and that doing so is not permitted and invalidates the mortgage deed.

I don't think the change of account number makes any difference to the legal status or enforceability of the mortgage. The specific account number is not part of the mortgage contract itself – it's merely a reference number by which Landmark refers to the contract and which it uses to identify it. As such, it's a matter of administration rather than substance.

I don't agree that Landmark can't change the account number without Mr V's consent, or that by doing so it has invalidated the mortgage deed. I don't think changing the account number makes any difference to whether Landmark is entitled to expect Mr V to repay the mortgage.

Adding legal fees to the mortgage balance and the effect of the court not making a money judgment

Mr V has taken legal action against Landmark on two occasions, in 2017 and again in 2018. Landmark took legal action against Mr V in 2019.

I haven't seen a court order from 2017, though there's a note on Landmark's files that the court found against Mr V and ordered him to pay Landmark's costs.

In 2018, the court ordered Mr V to pay Landmark's costs in the sum of £1,200 including VAT. I've not seen anything to suggest that the court made any other decision in respect of legal costs at this time.

Later, Landmark took legal action against Mr V, resulting in a suspended possession order in May 2019. The court did not deal with Landmark's application for a money judgment, which was "adjourned generally", and made no order as to costs.

I've also reviewed the transaction history for Mr V's mortgage, up to when he complained in 2019. These are the transactions relating to legal costs:

LEGAL COSTS	£ 1354.20	26/06/2017

SOLICITORS COSTS REVERSAL	- £ 1354.20	26/06/2017
SOLS INSTRUCTION FEE	£ 40.00	29/03/2018
LEGAL COSTS	£ 1957.80	10/08/2018
LEGAL COSTS	£ 355.20	10/08/2018
LEGAL COSTS	£ 2860.80	10/08/2018
LEGAL COSTS	£ 1573.87	12/11/2018
LEGAL COSTS	£ 273.60	26/11/2018
SOLICITORS COSTS REVERSAL	£ 273.60	26/11/2018
SOLS INSTRUCTION FEE REV	- £ 40.00	29/03/2018
LEGAL COSTS	£ 2170.80	16/05/2019
LEGAL COSTS	£ 6118.20	02/10/2019

The costs in 2017 were added in respect of Mr V's unsuccessful claim against Landmark. But they were removed from the balance again, as Landmark recognised that costs had been paid direct following the court order and didn't need to be added to the mortgage balance as well. So there was no lasting impact in relation to this, and Landmark has not included those costs in the balance it is expecting Mr V to pay now.

In court proceedings, a court may require one party to pay the other's costs. Or it may make no order as to costs, which generally means that each party has to pay their own costs, rather than one paying the other's costs.

The court has not ordered Mr V to pay any of the costs Landmark has added to the mortgage balance (other than the 2017 costs, which have been removed again).

The 2018 costs relate to Landmark's costs in defending Mr V's claim (other than the £1,200 costs of the April 2018 hearing, as ordered by the court), and the 2019 costs relate to the possession proceedings. As the court made no order about these costs, Landmark has not added them to the mortgage pursuant to a court order.

However, separate to the court order and court process, there is a term in the mortgage terms and conditions which says:

> *"Costs" means all Costs and expenses which we incur to any other person in connection with the Offer. Our Costs include (but are not limited to) all costs and expenses which we incur:*
>
> *(a) in recovering the Offer debt;*
>
> *(b) in any legal proceedings concerning the Offer (whether or not you are a party to the proceedings)*
>
> *…*
>
> *You agree to pay our reasonable Costs on demand.*
>
> *You agree to pay our reasonable Costs in full unless you can show that we acted unreasonably in incurring them.*
>
> *…*

We may charge you interest on Costs and Fees as follows:

(a) If you do not pay our Costs or Fees within fourteen days after we demand them, we may charge interest on those Costs from the date we incur them…

This is a contractual indemnity – under the terms of the contract between them, Mr V agreed to indemnify Northern Rock (and its successors, including Landmark) against any costs it incurred in relation to his mortgage. This indemnity is not limited to legal costs awarded by a court – it allows Landmark to recover *any* costs it has incurred from Mr V whether or not a court has ordered him to pay them, subject to reasonableness.

Mr V says this is an unfair term. But I don't agree about that. I've taken into account the Unfair Terms in Consumer Contracts Regulations (UTCCR), which is the relevant law applicable to this mortgage. The term is clear and clearly expressed. A term along these lines is a standard one in the mortgage industry. It doesn't create a significant imbalance between the parties contrary to the requirements of good faith – it's not unusual for a contract to require one party to indemnify the other against various costs incurred.

I don't think it's unusual or inherently unfair for a term such as this to be in a mortgage agreement. And the term doesn't allow the lender an unfettered discretion to add *any* costs – they have to be both reasonably incurred and reasonable in amount. I'm therefore satisfied that it's not unfair in principle for Landmark to rely on this term. So I'll go on to consider whether it was fair and reasonable for Landmark to rely on it on the specific occasions it did so in 2018 and 2019.

The courts in 2018 (other than the April 2018 hearing) and in 2019 did not make costs orders. But I don't think that means that Landmark can't add its costs to Mr V's mortgage balance. The absence of a costs order either means that the court didn't consider the question of costs at all, or that it didn't think it necessary to interfere with what would happen if no order was made.

Entirely separately to any court order, the terms of the contract allow Landmark to recover legal costs from Mr V, and it's not unfair for Landmark to do so where the court did not say that it should bear its own costs notwithstanding the indemnity. In other words, because the court made no order as to costs, Landmark is in my view entitled to rely on the contractual indemnity. If the court had expressly said that Landmark should pay its own costs and not charge them to Mr V I might think it unfair for Landmark to rely on the contractual indemnity – but the court did not say that.

In May 2019, Landmark wrote to Mr V to say that it had identified it had not given him the 14 day demand required in the terms and conditions I've quoted above. It recognised that meant it wasn't entitled to charge interest on the fees it had added until notice had been served, and so it refunded £99.23 of interest to Mr V's mortgage. As Landmark wasn't entitled to charge this interest until 14 days after giving notice, I'm satisfied this was fair and reasonable. But I don't think it means that Landmark wasn't entitled to add the fees at all, or that it can't charge interest on them now it has given notice.

Mr V says that as a result of this letter the court refused Landmark's application for a money judgment or costs because it found Landmark had been in breach of contract. I haven't seen a transcript of the hearing – but that is not what the court order says, and the court order records the decision of the court. The court order says the money judgment application was adjourned generally – which in my experience is not uncommon in repossession cases, since it's the fact of repossession as much as a money judgment which allows the lender to enforce the debt – and is silent as to costs. The court therefore did not make an order that Landmark wasn't entitled to recover its costs via the contractual indemnity – and it follows

that, subject to the requirement of reasonableness, it can do so.

So it's fair and reasonable in principle for Landmark to recover these costs from Mr V in 2018 and 2019 – subject to reasonableness. That being the case, I've gone on to think about whether the costs were reasonably incurred and reasonable in amount.

Given that the mortgage was in arrears until shortly before the possession hearing, it would be difficult for me to say that it was unreasonable for Landmark to take possession proceedings – or to be legally represented in doing so. And I'm satisfied that the costs incurred were actually incurred, and were not unreasonable or excessive compared to the level of costs I'd generally expect to see in possession cases such as this – particularly where, as here, Mr V disputed liability for the mortgage and raised other arguments which had to be dealt with, increasing the court time and costs incurred. Therefore I'm not persuaded that it was unreasonable for Landmark to incur these costs, or that they are unreasonable in amount.

Mr V also says that because the court did not make a money judgment, he no longer owes anything other than the instalments set out in the possession order. But I don't agree about that. Landmark's application for a money judgment was adjourned. The court didn't make a decision about the application one way or the other. The court did not make any decision about the total sum Mr V owed, only that Landmark would be entitled to repossess the property if he didn't make the regular monthly payments. The court order does not override the mortgage or mean that Mr V no longer owes the mortgage balance – he does.

Mr V has also pointed to a witness statement by Landmark's solicitor in the 2019 possession proceedings. The witness statement says that the mortgage is governed by Northern Rock's 2005 terms and conditions, and exhibits those terms to the statement. As I've said above, that's not in fact the case – Mr V's mortgage is subject to the 2001 edition of the terms and conditions, not the 2005 edition. Whether this is relevant to the validity of the possession order is a matter for the court, not for me. But I don't think a mistaken reference to the wrong set of terms and conditions means that Landmark is not entitled to rely on the correct terms and conditions when exercising the contractual indemnity to recover its costs, or in expecting Mr V to repay the mortgage more generally.

I therefore don't uphold this part of Mr V's complaint. I'm satisfied that it was fair and reasonable for Landmark to add its legal costs to the mortgage balance, and to charge interest on them and seek to recover them from Mr V. And I don't think the fact that the court didn't make a money judgment affects its ability to recover the mortgage balance from Mr V.

The interest rate applicable to the mortgage

The mortgage offer sets out that Mr V's mortgage was on a fixed rate for the first two years, reverting thereafter to the standard variable rate (SVR), then to a discount rate at least 0.25% below the SVR.

The SVR at the time the mortgage was taken out was 6.84%. At the time, the base rate was 4.75% - so the SVR was 1.84% above base rate. Between then and 2008, the SVR increased. From 2008 the SVR reduced – though not to the same extent as base rate.

Since Mr V took the mortgage out, the SVR and base rate have varied as follows:

Date	Base rate	SVR	Difference between base rate and SVR

09/11/2006	5.00%		
01/12/2006		7.09%	2.09%
11/01/2007	5.25%		
01/02/2007		7.34%	2.09%
10/05/2007	5.50%		
01/06/2007		7.59%	2.09%
05/07/2007	5.75%		
01/08/2007		7.84%	2.09%
06/12/2007	5.50%		
01/01/2008		7.69%	2.19%
07/02/2008	5.25%		
01/03/2008		7.59%	2.34%
10/04/2008	5.00%		
01/05/2008		7.49%	2.49%
08/10/2008	4.50%		
01/11/2008		7.34%	2.84%
06/11/2008	3.00%		
01/12/2008		5.84%	2.84%
04/12/2008	2.00%		
01/01/2009		5.34%	3.34%
08/01/2009	1.50%		
01/02/2009		5.09%	3.59%
05/02/2009	1.00%		
01/03/2009		4.79%	3.79%
05/03/2009	0.50%		
01/04/2009		4.79%	4.29%
04/08/2016	0.25%		
01/10/2016		4.64%	4.39%
02/11/2017	0.50%		
01/01/2018		4.79%	4.29%
02/08/2018	0.75%		
01/10/2018		5.04%	4.29%
11/03/2020	0.50%		
19/03/2020	0.10%		
01/04/2020		4.39%	4.29%

It can be seen that the SVR has varied around the same time as changes to base rate – though when base rate fell during the global financial crisis between 2007 and 2009, the SVR did not fall by as much. This meant that the difference between base rate and the SVR, which was 1.84% when Mr V took out the mortgage, increased shortly afterwards to 2.09% and then widened further. It was 4.29% by the time he reverted to the SVR (and later the discount rate) in 2012. It has stayed at that margin since then, other than a brief period in 2016 and 2017 when the margin widened to 4.39% before falling back to 4.29%.

The mortgage offer merely says that the SVR and then the SVR less discount will apply. There is no mention of the Bank of England base rate, and no suggestion that the SVR – or Mr V's mortgage more widely – was linked to base rate.

I don't therefore think that Mr V can have had any reasonable expectation that the SVR would be linked to base rate, or that the margin between base rate and the SVR would always be 1.84%. And I don't think there's any reasonable basis for implying into the mortgage contract a term that this would be the case.

I don't therefore think that it's inherently unfair that Mr V has been charged more than 1.84% above base rate since he's been on the SVR. I'll now go on to consider whether what he was actually charged was fair. The interest rate Mr V has been charged results from the variations to the SVR the various lenders have made since the mortgage was taken out – as set out in the table above.

I've explained that I can only consider the fairness of interest charged to Mr V since June 2013 – which means variations before that are out of time for the purposes of this complaint. However, those decisions are important context for the period I can consider. That's because the level of the SVR during the period I can consider is the product not only of decisions to vary it during that period, but earlier decisions in the out of time period. To that extent, those earlier decisions are important context for the period I am considering, and form part of "all the circumstances of the case" that I am required by our rules to consider when determining the part of the complaint that is in time. I'm satisfied that this approach is required of me by our rules, and is compatible with a recent decision of the High Court[2] on this question.

It's clear that each time the successive lenders made a decision to vary the SVR, the SVR remained at that level until the next time they decided to vary the SVR. This means that the SVR as it was in June 2013, at the start of the period I can consider, was the "sum of the parts" of what went before. And therefore if any of those earlier decisions were made for reasons not permitted by the terms of the mortgage agreement, that *might* mean that it was unfair for them to be relied on as contributing to the level of the SVR (and therefore the interest charged to Mr V) during the period I can consider.

The fairness of the contractual term

When Northern Rock, and later NRAM and Landmark, varied the SVR they did so relying on the terms and conditions.

Section 7 of the Mortgage Offer General Conditions 2001 (the document Mr V has referred to as ADV282) says:

> ***7. Changing the Interest Rate***
>
> *7.1 We may reduce the Standard Variable Rate at any time.*
>
> *7.2 We may increase the Standard Variable Rate at any time if one of more of the following reasons applies:*
>
> *(a) there has been, or we reasonably expect there to be in the near future, a general trend to increase interest rates on mortgages generally or mortgages similar to yours;*
>
> *(b) for good commercial reasons, we need to fund an increase in the interest rates we pay to our own funders;*
>
> *(c) we wish to adjust our interest rate structure to maintain a prudent level of profitability;*
>
> *(d) there has been, or we reasonably expect there to be in the near future, a general increase in the risk of shortfalls on the accounts of mortgage borrowers (whether*

[2] *Mortgage Agency Services Number Five Limited, R (On the Application Of) v Financial Ombudsman Service Limited* [2022] EWHC 1979 (Admin)

generally or our mortgage borrowers only), or mortgage borrowers (whether generally or our mortgage borrowers only) whose accounts are similar to yours;

(e) our administrative costs have increased or are likely to do so in the near future.

"Standard Variable Rate" is defined in section 1 as

… such rate as we from time to time decide to set as the base from which to calculate Interest on our variable rate mortgage loans (disregarding the restrictions on what we can charge under condition 7 or the Offer). The current Standard Variable Rate which applies to your Loan is set out in the Offer. We may change this rate from time to time under condition 7 or the Offer. If we transfer or dispose of the Offer, the person to whom we make the transfer may change the rate to its own base rate which it applies to its variable rate mortgage loans. That rate will then be the Standard Variable Rate under the Offer and the person to whom we make the transfer may make further changes under condition 7 or the Offer.

I've already explained why I'm satisfied this term is applicable to Mr V's mortgage. Mr V says in addition that this is not a fair term.

I've taken into account the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR), which was the relevant law at this time and applicable to this contract.

Reversion rates – such as the SVR – serve a legitimate purpose in permitting lenders to provide for future changes that justify increases in the rate, and a lender's own costs of funds are by nature difficult to foresee. There may be other factors relevant to the price which vary over time – such as the risk of default or arrears. This is particularly true of a long term arrangement such as a mortgage contract.

So I'm satisfied that, if the agreement itself didn't include a rate variation clause, it's reasonable to assume that national law would provide for a mechanism allowing a lender to vary the rate for *legitimate* reasons. And I think the average customer could reasonably be assumed to accept this and agree to it in hypothetical negotiations.

I think the real issues regarding fairness are whether the terms in this agreement go further than reasonably necessary to protect the lender's legitimate interests, whether the SVR variation clauses are sufficiently transparent, and whether there were significant barriers to Mr V dissolving the contract.

Taking all that into account, I think there's a real possibility a court may conclude that the variation term does not meet the transparency requirement. While it's grammatically clear and easy to follow, the term is broad and gives the successive lenders significant scope for discretion about when the SVR can be varied and by how much.

Section 7.1 allows reductions to the SVR for any reason, and is therefore the broadest part of the term. But because this creates an unfettered ability to reduce the interest rate payable, I don't consider this clause creates a significant imbalance to the detriment of the consumer contrary to the requirements of good faith – because while there are no restrictions on the lender's power to reduce the interest rate, doing so is in the consumer's favour and the absence of restrictions increases the circumstances in which Mr V might benefit from a reduction in his interest rate. But I consider that the way in which the term is exercised could potentially lead to unfairness in individual cases.

Section 7.2 contains the following provisions, allowing the lender to increase the SVR:

- *"there has been, or we reasonably expect there to be in the near future, a general trend to increase interest rates on mortgages generally or mortgages similar to yours"*

- "*for good commercial reasons, we need to fund an increase in the interest rates we pay to our own funders"*

- *"we wish to adjust our interest rate structure to maintain a prudent level of profitability"*

- *"there has been, or we reasonably expect there to be in the near future, a general increase in the risk of shortfalls on the accounts of mortgage borrowers (whether generally or our mortgage borrowers only), or mortgage borrowers (whether generally or our mortgage borrowers only) whose accounts are similar to yours"*

I think there's a real possibility a court might find that these clauses are not sufficiently transparent such that an informed consumer would have agreed to them in a hypothetical individual negotiation. They give the lender a broad discretion, and may enable it to take into account possibly irrelevant factors – for example, a general increase in shortfall risk on mortgage accounts owned by other lenders in respect of borrowers not similar to this borrower.

I'm not persuaded such a consumer would necessarily be able to understand the mechanism for any decision taken in reliance on these clauses, or be able to understand the economic consequences of agreeing to them. Nor would such a customer be able easily to challenge an increase made in reliance on them.

I've said there's a legitimate purpose in variable reversion rates, such as an SVR, in allowing a lender to vary the price of the agreement to reflect changes in its costs. But these clauses seem to me to be wider than reasonably necessary to achieve that purpose. And they do not explain to the consumer the method for determining the new price. "Good commercial reasons" and "prudent level of profitability" are vague and unclear, and it is not immediately apparent why shortfalls on dissimilar mortgages owned by other lenders are relevant to this lender's risk position.

For those reasons, while a term enabling the lenders to increase the SVR to reflect increases in cost of funds or other legitimate factors would in principle be a fair term, I think section 7.2 specifically goes beyond what national law would imply into a contract such as this. I think there's a real possibility a court would find that this section causes a significant imbalance between the parties and that it's unlikely a hypothetical consumer would have agreed to a term that allowed the lender such a broad and undefined discretion to increase the SVR.

I have also considered whether – at the time the contract was taken out – there were likely to be such significant barriers to Mr V dissolving the contract that he could not effectively make use of the right to do so. That is something I need to consider both for the sake of deciding whether the term may be on the 'grey list' in Schedule 2 of the UTCCR that may be regarded as being unfair, as well as part of the wider analysis of whether the term creates a significant imbalance contrary to the requirement of good faith. If there were such barriers, that may mean that the variation terms are unfair.

I have reminded myself that – in assessing whether the term itself is unfair - the test is not whether there were significant practical barriers for Mr V at the point at which the SVR was varied, but rather whether it was foreseeable at the time the contract was entered into that there may have been such barriers.

There was no early repayment charge (ERC) applicable to Mr V's mortgage whilst he was on the SVR. So when NRAM and Whistletree exercised their rights to vary the SVR after reversion in 2012, if Mr V was unhappy with that decision, he was free under the contract to transfer the mortgage to another lender if he wished without having to pay a charge to end the existing contract with either lender. And similarly he was free to do so if he was unhappy with the level of the SVR at the point of reversion because of variations up to that point.

That may not in fact have been possible, because Mr V was sporadically in arrears from 2010 to 2017, and then more significantly in arrears until 2019. So it might not have been possible for him to move his mortgage to another lender. But that Mr V would later experience arrears is not something that would reasonably have been foreseeable at the time he took the mortgage out.

I don't therefore think that there were practical barriers to Mr V moving his mortgage to another lender which were foreseeable at the time the mortgage was taken out.

As I've said, there's a possibility a court might find that the SVR variation clause wasn't sufficiently transparent. But the presence of an arguably unfair term doesn't necessarily of itself mean that there has been actual unfairness such that I should uphold the complaint. It's important to think not just about what the term says, but also how it was used, in deciding what's fair and reasonable in all the circumstances.

So while I have taken account of the relevant law, I've also thought more broadly about whether the way the term has been used has resulted in Mr V being treated in a way that was not fair and reasonable in all the circumstances. It is that question I will focus on next.

Whether the lenders exercised the variation term fairly

Prior to the period I can consider, all the variations were made while Mr V was on a fixed rate, and so didn't directly impact the amount he had to pay at the time. But the sum total of those variations meant that on reversion in 2012 the SVR was lower – but at a higher margin over base rate – than it was when Mr V took the mortgage out in 2006.

While I've said that there is a possibility that a court might find the specific SVR variation term to be an unfair term as drafted, I don't think that a term allowing a mortgage lender to vary (including to reduce) its SVR is unfair in principle. I think the relevant question is therefore whether Northern Rock and then NRAM exercised their powers to reduce the SVR in line with the terms and conditions.

We have received evidence about how the SVR was reviewed over time, and the decisions Northern Rock and NRAM took from time to time to reduce it, as well as evidence about NRAM's broader circumstances and commercial strategy at the time which form the context in which it took those decisions. DISP 3.5.9 R (2) permits me to receive information in confidence where appropriate, such that only an edited version, summary or description is disclosed to the other party. In this case, I consider that to be appropriate and so we have not shared that evidence with Mr V. But I will summarise it in this part of my decision.

The relevant period is from late 2007 to early 2009, when the Bank of England base rate fell sharply, and to record lows, during the global financial crisis. At the same time, the UK mortgage market was going through a period of significant change and upheaval. The funding model of mortgage lenders changed at this time, as did the prudential and regulatory requirements imposed on them. During this period the SVR was reduced – but the margin above base rate increased.

At the time, Northern Rock's mortgage lending business was largely funded by wholesale funding, the cost of which was defined by reference to LIBOR rather than base rate. Before the financial crisis, LIBOR generally followed base rate – and so changes to LIBOR tended to take place broadly in line with changes to base rate, and so changes to base rate tended to be reflected in changes to cost of funding. And the same was largely true of Northern Rock's retail funding streams, which also contributed to funding its mortgage lending business.

However, during the financial crisis, there was an increasing disconnect between base rate and LIBOR – with the result that reductions in base rate were not matched by reductions to the same extent in LIBOR or cost of funding. Access to wholesale funding became harder and more expensive as wholesale funders became more concerned by risk of default – meaning that where funding was available, margins over LIBOR increased even as LIBOR itself decreased. At this time Northern Rock's credit rating was impaired, and it became increasingly difficult for it to raise and service its wholesale funding. At the same time, it saw a substantial reduction in the retail deposits it held as customers moved elsewhere.

Northern Rock received a government loan in September 2007 to try to avert its collapse. There were conditions attached to the loan which impacted Northern Rock's wider strategy and cost of funds. Then in February 2008, Northern Rock was nationalised and restructured. Following the nationalisation, as part of state aid rules, there were limits placed on the size and scope of the business. Assets – such as parts of its loan book – perceived to be higher quality (in risk and prudential terms) were transferred to the private sector and those perceived to be lower quality retained in the nationalised vehicle that became NRAM. This process increased the overall credit risk of the retained book – which also impacted cost of funding.

As with any lender, NRAM was required to balance the needs of servicing its funding streams (notably the government loan) with the interests of its customers. During this period, it reduced its SVR on several occasions. Although it didn't reduce the SVR to the same extent that base rate reduced, I've explained that its costs were not directly linked to, and increasingly separate from, base rate at this time.

I've not seen any evidence that the reductions it made to the SVR were arbitrary or unfair, or led to an excessive SVR being charged. While NRAM's SVR was at the higher end of mortgage SVRs across the industry at this time, it was not an outlier. Many lenders charged lower SVRs – but many lenders charged higher SVRs, including mainstream lenders. While rates charged by other lenders did not directly impact NRAM's own cost of funding, that comparison does show that similar pressures were faced across the industry and led – in terms of overall SVR levels – to similar results. And that is a relevant factor for me to consider in thinking about whether NRAM acted fairly.

Taking all that into account, I am not persuaded that Northern Rock and then NRAM operated the SVR variation clause in an unfair way when setting and varying the interest rate applied to Mr V's mortgage. Even if a court were to find that the relevant terms were unfair pursuant to UTCCR, I'm not persuaded that the exercise of those terms by Northern Rock and then NRAM resulted in an unfair SVR payable (subject to the discount) by Mr V from June 2013.

After June 2013, there were no further changes to the SVR until changes to base rate in 2016. When base rate reduced in 2016, Landmark didn't pass on the reduction in full – although base rate reduced by 0.25%, the SVR (and so Mr V's discount rate) only reduced by 0.15%, increasing the margin over base rate to 4.39%. This was reversed in 2018, when base rate increased by 0.25% but Landmark increased the SVR by 0.15%.

So I've thought about whether it was fair that Landmark didn't pass on the base rate changes in full when reducing the rate in November 2016, and when increasing it in January 2018.

Landmark has explained to us how it made that decision, and the sorts of factors it took into account. The detailed information it has given us about that is also commercially sensitive, and so it's something that again I think is appropriate for the ombudsman service to receive in confidence.

But in summary, Landmark has explained that it considered in 2016 whether or not to pass on the base rate cut. It's explained that the interest rates it charges are not based on or directly linked to the Bank of England base rate; they're linked to the costs it has to pay itself in respect of the funds lent on its mortgages. It incurs those costs on an ongoing basis. It calculated that its own costs would only reduce enough to justify a 0.15% reduction, so it reduced its SVR by that amount rather than the full 0.25% base rate cut.

Based on the evidence I've seen, I think that was fair. Landmark recognised that base rate had fallen and that its customers might expect it to reduce the SVR, as other lenders had – even though it wasn't contractually required to do so, it reduced the SVR (and so Mr V's discount rate) by the amount it expected its own costs to fall, balancing the interests of its customers in reducing the interest charged to them and its own interests in not reducing its revenues by more than its costs reduced. And when base rate rose in late 2017, reversing the 2016 fall, Landmark didn't pass on the full base rate rise – rather, it reversed the 2016 cut it had made to its own SVR at the start of 2018.

Taking all that into account, I'm satisfied that Landmark and its predecessors charged Mr V a fair rate of interest. And so I don't uphold this part of the complaint either.

The letter telling Mr V his mortgage had been repaid

Landmark sent Mr V a letter about his mortgage. Enclosed with the letter was another letter, addressed to another customer. That letter did not include Mr V's name, address, mortgage account number or any other information about Mr V. It was clearly a letter intended for another customer entirely about that customer's mortgage.

The letter said that the mortgage had been fully redeemed. Mr V says that he relied on this letter to believe that his own mortgage had been redeemed. He says that Landmark should stick to that. Or, alternatively, that he is entitled to have his mortgage contract rescinded because of a negligent misrepresentation.

I don't agree about that. As I've said, questions of law are ultimately a matter for the courts. So it would be for a court to say whether this mistake renders Mr V's mortgage unenforceable.

But, taking into account the relevant law, I don't think it would be fair and reasonable to expect Landmark to rescind Mr V's mortgage, write it off or treat it as redeemed. And I don't think it would be fair and reasonable to say that Landmark is no longer entitled to expect Mr V to make mortgage payments in the belief that his mortgage has been redeemed.

There was clearly a mistake. This letter referred to another customer, and another property, entirely. It shouldn't have been sent to Mr V in an envelope alongside a letter about his own mortgage.

However, it should have been obvious to Mr V that this was a mistake in sending him a letter about another customer's mortgage. I don't think Mr V can have reasonably understood the letter to mean that his own mortgage had been paid off, or that he would no longer have to make payments. Mr V knew very well he hadn't paid it off, so he can't reasonably have been induced into believing he had when he received the letter.

I don't think it's fair and reasonable to expect Landmark to proceed as if Mr V's mortgage had been redeemed. I don't think Mr V can reasonably expected it to have done so. It follows that if Mr V has chosen to withhold payments on the basis that – following this letter – he no longer owes Landmark any money (when he can have no reasonable basis for that belief), Landmark is entitled to take any action it would ordinarily take in respect of a mortgage which has fallen into arrears because a customer has decided to withhold payments. I don't uphold this part of the complaint either.

Conclusion

I've carefully considered all the evidence, and taken into account everything Mr V's said. While I understand he feels strongly about the situation, and the arguments he's made, I'm afraid I'm unable to agree with him. I'm not persuaded that Landmark or its predecessors have charged Mr V unfair interest, or that Landmark has acted unfairly in adding legal fees to the loan balance. And I've not seen anything that would lead me to conclude that the balance it's seeking to recover is incorrect or unfair, or that it's unreasonable for Landmark to expect Mr V to repay his mortgage.

My final decision

For the reasons I've given, my final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr V to accept or reject my decision before 28 June 2023.

Simon Pugh
Ombudsman