DRN-4019850

The complaint

Ms and Mr C are unhappy with the amount of interest charged by NRAM after the initial fixed rate period had expired. They believe the SVR should have moved in line with Bank of England base rate (BoEBR). They also consider the rate charged by NRAM was unfairly high in comparison to other lenders to generate excess profits to fund unrelated costs.

What happened

In 2007, Ms and Mr C took out a repayment mortgage with Northern Rock Plc (now trading as NRAM Limited) over 35 years. At the same time, Ms and Mr C took out an unsecured loan which was linked with the mortgage.

Northern Rock issued a mortgage offer which Ms and Mr C accepted. The offer confirmed that an initial rate of 7.79% would apply to the loan of £108,775 until October 2012, after which, a variable rate guaranteed to be below the standard variable rate (SVR) would apply – the Guaranteed Rate. The terms governing the unsecured loan remained the same.

During the 2008 financial crisis, Northern Rock was nationalised to avoid collapse of the bank. NRAM was later formed to manage most of the remaining Northern Rock mortgages, which included Ms and Mr C's mortgage, where it remained until it and the unsecured loan were redeemed in April 2018. For ease, I shall refer to NRAM for the remainder of this decision.

Since Ms and Mr C's mortgage was taken out, the BoEBR, SVR and the Guaranteed Rate have operated as follows:

Effective Date	BoEBR	SVR	Difference between BoEBR and SVR	Rate charged on Ms and Mr C's mortgage (the 'Guaranteed rate')	Difference between BoEBR and the rate charged on Ms and Mr C's mortgage
06/12/2007	5.5%			7.79%	n/a
01/01/2008		7.69%	2.19%	7.79%	n/a
07/02/2008	5.25%			7.79%	n/a
01/03/2008		7.59%	2.34%	7.79%	n/a

Effective Date	BoEBR	SVR	Difference between BoEBR and SVR	Rate charged on Ms and Mr C's mortgage (the 'Guaranteed rate')	Difference between BoEBR and the rate charged on Ms and Mr C's mortgage
10/04/2008	5%			7.79%	n/a
01/05/2008		7.49%	2.49%	7.79%	n/a
08/10/2008	4.5%			7.79%	n/a
01/11/2008		7.34%	2.84%	7.79%	n/a
06/11/2008	3%			7.79%	n/a
01/12/2008		5.84%	2.84%	7.79%	n/a
04/12/2008	2%			7.79%	n/a
01/01/2009		5.34%	3.34%	7.79%	n/a
08/01/2009	1.5%			7.79%	n/a
01/02/2009		5.09%	3.59%	7.79%	n/a
05/02/2009	1%			7.79%	n/a
01/03/2009		4.79%	3.79%	7.79%	n/a
05/03/2009	0.5%			7.79%	n/a
01/04/2009		4.79%	4.29%	7.79%	n/a
01/08/2010				7.79%	n/a
30/09/2012				Fixed rate ends	
01/10/2012				4.78%	4.28%
04/08/2016	0.25%				
01/10/2016		4.54%	4.29%	4.53%	4.28%
02/11/2017	0.5%				
01/01/2018		4.79%	4.29%	4.78%	4.28%

Ms and Mr C complained to NRAM with the help of a professional representative (HJ). The Letter of Complaint in September 2021 raised the following issues (in summary):

- Term 7.1 of the mortgage terms and conditions that allowed NRAM to reduce the interest payable by Ms and Mr C on the mortgage outside of any fixed rate period, is an unfair contract term, according to the Unfair Terms in Consumer Contracts Regulations (UTTCR) and guidance from the financial services regulator. It is not true to say that the term only operates in the consumer's favour, because it can result in the margin between the BoEBR and SVR increasing.

- NRAM's approach to setting the SVR had breached a number of the Financial Conduct Authority (FCA) Principles and MCOB rules. In relation to changes to the interest rate, NRAM hadn't communicated clearly, properly managed a conflict of interest between itself and Ms and Mr C and ultimately hadn't treated them fairly.

- Ms and Mr C had trusted that NRAM would vary the SVR in line with changes to the BoEBR.

- There was a *Braganza* duty implied in the mortgage contract meaning that NRAM had to exercise its contractual discretion in good faith and not arbitrarily or capriciously. NRAM hadn't evidenced this to be the case.

- In addition, there was a derived term from *Paragon v Nash* that the power to vary the interest rate needed to be exercised in a reasonable matter and this too hadn't been evidenced. According to an 'expert report' (which I'll call "Report A"), NRAM's setting of rates may have been for an 'improper purpose', because it had funded unexpected costs, including paying consumer redress.

- Report A also showed that the rate charged on Ms and Mr C's mortgage was unfairly high and this had increased profits in order for NRAM to meet unrelated costs and to meet its obligations with regards to the government assistance that it received.

NRAM didn't uphold the complaint. In summary, it said that:

- Under the relevant DISP rule (2.8.2R), any complaint about the interest charged more than six years prior would be time barred.

- Under the same rule, the concerns raised that Ms and Mr C were led to believe the SVR would track movements in the BoEBR was also time barred, because they would have been aware in 2012 that this wasn't in fact the case.

- UTCCR wasn't applicable to the interest variation term in question because it was a core term dealing with the price charged under the contract.

- It hadn't breached any of the FCA Principles or MCOB rules.

- The mortgage offer had clearly set out that a fixed rate would apply for a period of time followed by a variable rate less than the SVR. There was no suggestion the SVR would track movements in the BoEBR.

- *Braganza* was not applicable.

- Condition 7.1 didn't need to be supplemented with any further implied terms per *Paragon v Nash.* In any case, all of the interest variations were made for genuine commercial / business reasons.

- The ‘expert report’ provided in support of the complaint contained fundamental misunderstandings of the legal and factual position.

HJ on behalf of Ms and Mr C referred the matter to the Financial Ombudsman Service.

NRAM provided us with its file papers, including its own ‘expert report’ (which I’ll call “Report B”). It said that information it had previously provided to this Service on a confidential basis explaining the factors that had affected its setting of the SVR over time, was also relevant to our assessment of the complaint.

One or our investigators reviewed the complaint and issued an assessment setting out their thoughts on both this Service’s jurisdiction to consider the complaint issues raised and the merits of the issues that they considered were within our remit.

In terms of jurisdiction, the investigator said:

- They were satisfied we could consider a complaint about the interest charged since 17 September 2015 (the interest having been charged within six years of the Letter of Complaint).

- They didn’t think Ms and Mr C had raised a complaint about the interest charged before that point within three years of becoming aware (or from when they ought reasonably to have been aware) of cause for complaint. This was because Ms and Mr C had said they had trusted the SVR would track movements in the BoEBR and that they would or ought to have been aware that the margin had changed when their fixed rate ended (in 2012). Ms and Mr C had complained more than three years later, which was outside of the relevant time limit.

In terms of the merits of the complaint, the investigator said:

- They didn’t think the mortgage offer or any of the other documentation provided to Ms and Mr C suggested that the SVR would track movements in the BoEBR. So they didn’t think that NRAM had been obligated to have its SVR track the BoEBR.

- Ms and Mr C had been charged a fixed rate of interest for a period of time and then a rate guaranteed to be below the SVR until the mortgage was redeemed. This was in line with the information contained in the mortgage offer.

- The three interest rate variations (two reductions and one increase) that occurred after Ms and Mr C’s fixed rate ended were allowed for under the relevant interest variation terms contained in the mortgage General Conditions.

- They didn’t think condition 7.1 was a core term and therefore exempt from an assessment of fairness for that reason. However, they couldn’t see that a clause giving NRAM the widest possible discretion to reduce the rate payable could be considered to operate to the detriment of the consumer – and therefore couldn’t be considered to be an unfair term.

- They thought that a court may consider that some of the terms under condition 7.2 allowing for increases in the rate charged could be considered unfair, due to their breadth and a lack of transparency around when the terms would apply. But they thought the central issue was whether there had been any unfairness to Ms and Mr C from September 2015 onwards. They thought this came down to whether the way the terms had been used (including prior to September 2015) had resulted in Ms and Mr C being treated unfairly.

- They didn't think NRAM had varied the rate unfairly. The variations to the SVR between January 2008 and April 2009 were only downwards, although the margin between the BoEBR and SVR increased during that time. However, NRAM had provided us with information explaining why it had varied the SVR as it had during this period, referencing increasing costs and the impact of the government's assistance. The investigator considered there had been genuine commercial reasons behind each of the rate changes during this time. After 2010, the only changes to the SVR occurred in line with changes to the BoEBR. As such, the margin remained the same.

- They thought the interest rate applied to Ms and Mr C's mortgage had remained generally in line with the SVRs of similar lenders across the market. As such, the rate Ms and Mr C paid wasn't an obvious outlier or manifestly excessive.

- In setting the SVR as it had, they didn't think that NRAM had breached Principle 8 and thought that it had treated Ms and Mr C fairly, taking account of its financial situation and broader obligations.

- They thought that when NRAM communicated variations to the interest rate to Ms and Mr C, it had done so clearly. There had been no requirement for NRAM to give a reason why it was making a particular variation and if Ms and Mr C had wanted to know this, they could have asked.

- They didn't need to make a finding on whether implied terms from *Braganza* and *Paragon vs Nash* were relevant because, even if this was the case, they were satisfied that NRAM's decisions to vary the SVR as it did were reasonable and based on legitimate commercial judgments.

NRAM responded to say that it welcomed the conclusion that Ms and Mr C hadn't been charged an unfairly high rate of interest. It also said that there were certain aspects of the view it didn't agree with, but that as we hadn't reached a concluded view on those issues nor were they determinative in the analysis of the complaint, it didn't see the need to make any further representations. It said it would like the opportunity to see and comment on any further representations made by HJ.

HJ responded to say that it disagreed with the outcome and requested that the matter be considered by an Ombudsman. In summary, it said that:

- It disagreed with the finding in relation to jurisdiction. It said the fairness of all of the interest variations since inception should be considered, because Ms and Mr C had made their complaint within three years of becoming aware they had cause to complain.

- The Ombudsman should direct NRAM to provide evidence in relation to why it varied the SVR as it did, since this was the basis of the complaint. The only evidence provided is retrospective analysis by an economist. Without evidence of why the SVR had been varied as it had, there could not be a fair and proper resolution to the complaint. If relevant material is not provided, the Ombudsman could draw an adverse inference from this.

- Ms and Mr C acknowledge that DISP 3.5.9(c) entitles the Ombudsman to accept evidence in confidence. However, this only extends to 'confidential evidence about third parties and security information' (DISP 3.5.10). It does not entitle evidence to be accepted in confidence because it is commercially sensitive. To withhold such evidence would be acting outside of the Ombudsman's rules. If Ms and Mr C can't see such evidence, they are irreparably prejudiced, being unable to meaningfully respond to NRAM's response or the contents of the initial assessment. Ms and Mr C would be willing to enter into a confidentiality agreement to address NRAM's concerns if that assists.

- Ms and Mr C are in broad agreement with the investigator's statement that they trusted the SVR would be varied in line with changes to the BoEBR, because that is what they understood to be the only relevant factor concerning how funding impacted NRAM.

- Ms and Mr C agree with the investigator that the terms and conditions covering how and why the SVR is reduced is unfair. They also agree that the main issue to be determined is whether there is any unfairness in the way the SVR margin increased.

- Report B doesn't contain any evidence to show cost of funding increased for NRAM during the GFC, or of the disconnect between wholesale funding and the BoEBR. That aside, the alleged increase in cost of funding and disconnect between it and BoEBR must become irrelevant after 2010 when NRAM had stopped lending to new customers and was reliant on the government for funding.

- The conclusion in Report B that NRAM's SVR was comparable with the market is flawed, because NRAM was in a very different position to other lenders in terms of its funding, facing little to no risk and not offering new mortgages.

- Even if NRAM's lending book was at higher risk of default, this would not have affected its cost of funds, because funding was not provided via wholesale markets following the government bailout.

- The suggestion that NRAM couldn't reduce its SVR so as not to distort the market cannot be correct, because it wasn't offering new mortgages. As such, irrespective of how it set its SVR, there would have been no distortion to competition in terms of rates offered by other lenders.

- Neither Report B nor the investigator's assessment address the issues of customer redress. The amounts are substantial in the context of NRAM's finances and it seems likely that this had an impact on when interest rates were varied by NRAM. Per what is set out in Report A, this would render the SVR charged to Ms and Mr C unfair, because it would mean that the SVR was maintained at a level to ensure profits could be used to discharge separate and distinct liabilities. This was not a 'cost of borrowing' consideration. There are also question marks about why NRAM was making a profit at all, given the government backing and that it was effectively in run-off.

- When entering into the mortgage contract, Ms and Mr C expected that they would have the opportunity after their initial rate expired, to switch onto a more favourable rate than the SVR, either with NRAM or another lender. After the Mortgage Market Review (MMR) changes came into force, it would've been more difficult for NRAM customers to effect such a rate switch. Such customers should be categorised as 'mortgage prisoners'.

- It disagreed that it would've been reasonably foreseeable that the linked Together Loan would've made it more difficult for Ms and Mr C to switch to an alternative lender, because this was not made clear to them.

- Whilst it appreciated that Ms and Mr C hadn't tried to attempt to exit the mortgage arrangement, the fact it would have been difficult to do so should be considered.

- It invited the Ombudsman to consider whether it would be beneficial to hold a hearing

A copy of HJ's response to the investigator's view was provided to NRAM and it gave some additional comments. In summary, it said that:

- What HJ had said about NRAM not providing information was incorrect.

- It could not see why a hearing would be necessary.

- The position regarding jurisdiction is now well established and nothing HJ has said changed this.

- It noted HJ hadn't instructed the author of Report A to rebut the findings of Report B. Nothing it had said about Report B was compelling and some things it had said suggested a misunderstanding.

- The issues raised to do with Ms and Mr C's inability to re-mortgage had not previously been raised. Regardless, NRAM hasn't made any error in relation to this.

What I've decided about jurisdiction – and why

Jurisdiction

First, it is necessary for me to consider this Service's jurisdiction to consider this complaint. In its final response letter, NRAM said that it thought much of Ms and Mr C's complaint had been brought too late.

I'm satisfied I have the jurisdiction to consider the complaint about interest charged from 17 September 2015, because this interest was charged within six years of the Letter of Complaint. In terms of whether the interest charged before 17 September 2015 is within my jurisdiction, the relevant rule, is as follows:

"The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:

(2) more than:

(a) six years after the event complained of; or (if later)

(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint; unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received;

unless:

(3) in the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2 R or DISP 2.8.7 R was as a result of exceptional circumstances; or…

(5) the respondent has consented to the Ombudsman considering the complaint where the time limits in DISP 2.8.2 R…. have expired…."

The key question therefore is whether Ms and Mr C made their complaint within three years of when they were aware (or ought reasonably aware) they had cause for complaint.

HJ disagreed with the investigator's finding on this point, saying that the complaint was brought within three years of when Ms and Mr C became aware of cause for complaint. In its response to the investigator's assessment, it said that Ms and Mr C had absolutely no way of knowing that the variation of interest rate charges were potentially unfair or might somehow give them cause for complaint. HJ said that the fact the interest rate diverged from movements in the BoEBR was not unusual and appears to be consistent with what other lenders were doing at the relevant time and therefore did not give Ms and Mr C cause to think they might have a complaint.

They said that Ms and Mr C became aware of the possibility of a complaint when they instructed HJ, after they were alerted to there being a potential issue with the variation of interest rates.

I don't think Ms and Mr C did bring their complaint within three years of when they ought reasonably to have been aware they had cause for complaint. I say this because in the Letter of Complaint, HJ said that on the basis of the indication of NRAM's then current SVR and Ms and Mr C's knowledge of base rates generally, Ms and Mr C trusted that the SVR would be varied in approximate correspondence with changes in the BoEBR. In response to the investigator's assessment, HJ reiterated that Ms and Mr C had expected there to be a correlation between the SVR and BoEBR, because they had understood that the only relevant factor concerning how funding impacted NRAM, was the BoEBR.

When Ms and Mr C agreed to the mortgage initially in 2007, the SVR was 2.19% higher than base rate. When the fixed rate came to an end NRAM's SVR was 4.79%, with Ms and Mr C being charged 4.78%. At this point, the margin between BoEBR and NRAM's SVR had increased to 4.29% - nearly double the margin when the mortgage began.

Given that when making their complaint Ms and Mr C have said they expected the SVR to be varied in approximate correspondence with changes in the BoEBR (including by reference to their knowledge of base rates generally), I think this means they ought reasonably to have been aware at the point their fixed rate came to an end, that the margin between the rate they were being charged (which was closely linked to the SVR) and the BoEBR was significantly higher than when they first took the mortgage out. And I think this means they ought reasonably to have been aware of cause for complaint at that point.

Ms and Mr C didn't raise a complaint about this until much later – more than three years from that point. As a result, I'm satisfied the complaint about the interest rates charged before September 2015 has been made out of time. And for the same reasons, I'm satisfied any complaint about how the information provided to Ms C and Mr C at outset was misleading (in respect of how the mortgage would operate in terms of the movement of the SVR) would also be out of time.

I've not been provided with any information to suggest that the reason part of Ms C and Mr C's complaint was not brought in time was a result of exceptional circumstances.

As a result, I'm satisfied that our service only has the power to consider Ms C and Mr C's complaint about the interest they've been charged on the mortgage since 17 September 2015.

Having concluded what I have about jurisdiction, in considering the fairness of interest charged from 17 September 2015 onwards, I need to have regard to the whole history of the interest rate, including before 17 September 2015.

That is because each time NRAM made a decision to change the SVR, the SVR remained at that revised level until it made a further decision to change it – from the starting point of the level resulting from the previous variation.

As such, the SVR charged from September 2015 is the "sum of the parts" of the history that went before. And if there were problems with any of those parts – for example, because the SVR was varied for a reason not allowed by the contract - that might mean that the SVR charged from September 2015 is itself unfair.

What I've decided about the merits of the complaint – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

When considering what is fair and reasonable in all the circumstances, I am required by DISP 3.6.4R of the Financial Conduct Authority's ("FCA") Handbook to take into account:

> '(1) relevant:
>
> (a) law and regulations;
>
> (b) regulators' rules, guidance and standards;
>
> (c) codes of practice; and
>
> (2) (where appropriate) what [I consider] to have been good industry practice at the relevant time.'

Having done all of that, I don't think this complaint should be upheld. I realise this will be disappointing for Ms and Mr C, But I hope my explanation will help them to understand why I have come to this conclusion.

Before I set this out, I want to set out my role as an ombudsman. It isn't to address every single point that's been made to date. Instead, it's to decide what's fair and reasonable given the circumstances of this complaint. And for that reason, I'm only going to refer to what I think are the most salient points when I set out my conclusions and my reasons for reaching them. But, having read all of the submissions from both sides in full, I will continue to keep in mind all of the points that have been made, insofar as they relate to this complaint, when doing that.

In its response to the investigator's assessment, HJ said that I should consider whether it would be beneficial to hold a hearing. It didn't give a reason why and it hasn't made a request as defined in the DISP rules. Regardless, I do not consider it necessary to hold a hearing in order to be able to fairly determine this complaint.

HJ has raised many individual complaint points both to NRAM directly and to this Service. However, I consider that Ms and Mr C's overall complaint breaks down into fundamentally three key things:

1. Ms and Mr C trusted that their mortgage interest rate would track or at least move broadly in line with movements in the BoEBR once it reverted to the variable rate. As it did not do so, NRAM has treated them unfairly.

2. The term allowing NRAM to reduce the SVR is unfair and there were implied terms in the contract that NRAM didn't adhere to. Alongside this, NRAM has not properly managed a conflict of interest between itself and its customers, resulting in its SVR being set at an unfairly high level for improper purposes, resulting in Ms and Mr C paying a higher rate of interest on their mortgage than they should have.

3. NRAM's communications in respect of interest rate variations were unclear and misleading.

I will deal with each point in turn.

<u>Did NRAM's actions cause Ms and Mr C to trust that their mortgage would track or closely follow the BoEBR?</u>

I consider that the mortgage documentation is clear in that Ms and Mr C's mortgage would revert to a rate guaranteed to be below the SVR once their fixed interest period expired and that the SVR could go up as well as down. And I haven't seen any evidence that persuades me that NRAM was obligated, contractually or otherwise, to have its SVR track or closely follow the BoEBR.

I'm also not aware of any evidence that can be properly said to show that NRAM acted in a way where it committed to keep the margin between the BoEBR and its SVR the same. Finally, I am not aware of any principle of law, that on the facts of this case, would obviously commit NRAM to doing so.

So, it follows that I do not uphold this part of Ms and Mr C's complaint.

Fairness of interest charged: the interest rate variation terms

I have to consider whether from 17 September 2015 onwards Ms and Mr C paid an unfairly high rate of interest. While I acknowledge that Ms and Mr C paid a rate guaranteed to be below the SVR set by NRAM and that there is no evidence (and no complaint) that NRAM made any calculation errors in charging interest, I also think that there are other questions that are potentially relevant to whether the interest itself was fairly charged.

One of those questions is whether the terms allowing NRAM to vary the SVR are the sort of terms the courts would consider to be unfair as a matter of law. The law on unfair terms is an important part of consumer protection measures and prevents businesses from taking advantage – whether consciously or otherwise – of their customers, who have limited bargaining power. If a variation made in reliance on an unfair term contributed to the rate charged from 17 September 2015 onwards, then that might be relevant to whether interest charged from that point was fair.

To assess the fairness of the interest rate terms, it is helpful to first set out the relevant terms themselves:

"*This secured mortgage is based on the following interest rate periods:*
• a fixed rate of 7.79% until 1 October 2012
followed by
• a variable rate which is guaranteed to be below Northern Rock Standard Variable Rate, which is currently 7.84%, for the remainder of the term of the mortgage.

Please note that the payments illustrated for this period of the mortgage in Section 6 of this document are based on Northern Rock's current Standard Variable Rate."

In section 6 ("What you will need to pay each month"), it says:

"*This Offer of Loan assumes that the mortgage will start on 1 March 2008. (The assumed start date and payments are for illustration purposes; your actual payments and start date, will be confirmed to you in writing, when your loan commences).*

• 1 initial payment at a fixed rate of 7.79%: £717.71 (monthly payment)
followed by
• 54 payments at a fixed rate of 7.79%: £753.73 (monthly payment)
followed by
• 366 payments at the Northern Rock standard variable rate, currently 7.84%: £757.32 (monthly payment)."

The correspondence accompanying the mortgage offer sent to Ms and Mr C in December 2007 said that a number of other documents were enclosed, including the "Mortgage Offer – General Conditions".

Within the "Mortgage Offer – General Conditions":

"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 or 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 or mortgage 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 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.

7.3 We will tell you of any change in the Standard Variable Rate and the Interest Rate in one of the following ways:

(a) by posting or delivering the notice to you in accordance with condition 24; or

(b) by publicising the change as follows:

> *(i) by displaying a notice of the change at our registered office and all our branch offices (if any); and or*
>
> *(ii) by advertising the notice in two or more national daily newspapers chosen by our board of directors (which will keep a list of the newspapers currently chosen by it for this purpose).*

If a Loan is a capped rate loan or a fixed rate loan (the Conditions will indicate if a Loan is a capped rate loan or a fixed rate loan, and if so what any capped rate period and fixed rate period is) we are not obligated to give you notice of any changes that occur in the Standard Variable Rate during any period when such changes do not affect the rate you are charged during that period, for example when the Standard Variable Rate is higher than the capped rate or during any fixed rate period.

7.4 Any notice we give under condition 7.3 will state the date on which the new rate is to come into effect, which we call the "Interest Change Date." The Interest Change Date must not be earlier than the date when the notice under condition 7.3 is given.

For this purpose:

(a) a notice displayed under condition 7.3(b)(i) is to be treated as given on the date on which we display it at our registered branch offices (if any) (ignoring any accidental failure to display it at a branch office); and
(b) a notice advertised under 7.3(b)(ii) is to be treated as given on the first date by which the notice has appeared in each of the newspapers chosen by our board of directors."

NRAM has told us it relied on Condition 7.1 for all reductions to the SVR. In 2018, the SVR did increase following increases to base rate. NRAM has said it relied on Conditions 7.2 (a), (b) & (c) to make this change. It has also said it wrote to Ms and Mr C each time it varied their interest rate as per Condition 7.3.

One of the considerations that I am required to take into account is relevant law. I consider that the application of the UTCCRs to the relevant terms in this case falls into that category of relevant law. I have therefore considered whether I think that a court could have a reasonable basis to conclude that the relevant terms may be unfair.

The relevant test as to whether a term is unfair is set out at Regulation 5(1), as follows:

> *'A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.'*

Regulation 6 says:

> *'(1)…the unfairness of the contractual term shall be assessed, taking into account the nature of the goods and services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract on which it is dependent.*
>
> *(2) In so far as it is in plain and intelligible language, the assessment of fairness of a term shall not relate:*
>
> *(a) to the definition of the main subject matter of the contract, or*
>
> *(b) to the adequacy of the price or remuneration, as against the goods or services supplied in exchange.'*

So, it is important to note, that I must consider whether the variation terms were unfair based on the situation when Ms and Mr C took the mortgage out. And whether the terms in question go to the main subject matter of the contract or the adequacy of the price/remuneration.

Schedule 2 to the UTCCRs sets out a grey list of indicatively unfair terms and various factors relevant to assessing the fairness of a term. The grey list includes:

'1. Terms which have the object and effect of –

> *(j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract…'*

The grey list of indicatively unfair terms is subject to the qualifications to be found in paragraph 2 of Schedule 2 of the UTCCRs. For example, paragraph 2(b) of Schedule 2 of the UTCCRs identifies that the indication of unfairness under paragraph 1(j) is '*without hindrance'* to terms under which a supplier of financial services reserves the right to:

- change a rate of interest payable without notice where there is a 'valid reason' (provided the supplier informs the consumer 'at the earliest opportunity' and the consumer is 'free to dissolve the contract immediately');

- alter unilaterally the conditions of a contract of indeterminate duration (provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract).

As a strict matter of law, if the relevant clauses in this case are unfair under the UTCCRs, they would not be binding on Ms and Mr C (Regulation 8 UTCCR).

In considering these matters, it is relevant to note that the Court of Justice of the European Union ("CJEU"), having identified that ultimately the fairness of a term was a matter for the national court to decide, has indicated what national courts should take into account when making that decision:

- in *Invitel*, (C-472/10), the court concluded that a price variation clause in a contract is not a 'core term'. Identifying that a price variation clause was instead a *"term relating to a mechanism for amending the prices of the services provided to the consumer".*

- in *RWE*, (C/92/11), the court emphasised that, for unilateral price variation clauses (falling within paragraphs 1(j) or 1(l)) to be fair, they must specify the reasons and methodology for the price variation so that the consumer can foresee, on the basis of clear, intelligible criteria, the alterations that may be made to those charges. In addition, the CJEU was concerned that the customer is provided with meaningful criteria by which they can verify, and if necessary, challenge, any proposed variation to the rate. The CJEU also placed importance on whether the right to exit a contract in the event of a unilateral price variation can practically be exercised by the consumer at the time, having regard to the circumstances of the market as it exists at the time.

- In Kasler, (C-26/13), the CJEU identified that, when assessing the fairness of a unilateral variation clause – and the meaning of 'plain intelligible language', national courts ought to consider whether: a) the mechanism expressed in the reasons for the variation is transparent; such that b) it would enable a consumer to foresee and predict the economic consequences for him or her.

- In Matei (C-143/13) the CJEU referred to the loan agreement needing to set out 'transparently' the reasons for and the particularities of the mechanism for altering the interest rate and the relationship between that mechanism and the other terms relating to the lender's renumeration, so that the consumer can foresee, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it.

The leading UK judgement on the UTCCR is the 2015 Supreme Court case *ParkingEye v Beavis* [2015] UKSC 67. In this case the Court said that:

- The test for establishing a significant imbalance (Regulation 5(1)) includes, but is not limited to, asking whether the terms of agreement deprive the consumer of an advantage which they would enjoy under national law in the absence of the contractual provision;

- The question of whether a term is contrary to the requirements of good faith depends on an objective hypothetical negotiation, asking whether an informed consumer would have agreed to the term in question during individual contract negotiations. This should take into account a wider circumstantial review, such as the relationship with other relevant contractual terms; and

- Consideration should be given to the nature of the goods or services supplied, including the significance, purpose and effect of the term in question.

FCA guidance (FG18/07) on unfair terms in consumer contracts is also of relevance. This paper sets out that *"The fairness assessment is a holistic assessment and these two elements may overlap in the way they apply to any particular set of facts"* and that the applicable law *"recognises the importance of striking a fair balance between the legitimate interests of both the supplier and consumer"*. The guidance also provides an overview of factors relevant to determining whether a variation term is fair. At paragraphs 66 and 67 the guidance states that firms should consider the consumer's freedom to exit the contract if they do not accept the variation, and how they can actually do so. This should include the financial and practical barriers which may prevent them from doing so within any advance notice or reasonable timeframe.

Application to Ms and Mr C's complaint

Having considered the above, I am satisfied I need to address the following in deciding whether the variation clause was unfair:

- Whether the term is a core term
- Whether the term created a significant imbalance in the parties' rights and obligations to the consumer's detriment contrary to the requirements of good faith.

The decision whether the term is unfair should be made in the light of what sort of contract is in issue and what the contract is about, as well as what the other terms say and all the circumstances that existed when the term was agreed. Assessing whether a term is unfair involves winding the clock back to the date the term was agreed, and then standing back to consider the term in its full context, both within the contract and in all the surrounding circumstances.

- Is the relevant term a core term?

The terms in question relate to the mechanism for amending the price of the services provided, not the price itself. So, I am satisfied they are ancillary terms whose fairness can be assessed under the applicable fair terms legislation.

- Do the terms create a significant imbalance contrary to the requirements of good faith?

As set out above, one of the considerations when determining if the terms create a significant imbalance is whether the terms of the agreement deprive the consumer of an advantage which they would enjoy under national law if the term was not there.

I am not persuaded that the interest rate variation clause applicable to Ms and Mr C's mortgage contract does this. At a general level, such clauses have a legitimate purpose and are common in financial services consumer contracts. Particularly those of long or indeterminate duration, such as mortgage agreements. A fair variation term can benefit both consumers and lenders. Providing flexibility and a wider choice to consumers and enabling firms to provide competitively priced products, knowing they can vary the interest rates they charge to reflect changes in circumstances, particularly in their own costs of funding.[1]

A reversion rate also permits lenders to provide for future changes that justify increases in the rate, and a lender's own costs of funds and things such as changing regulatory requirements are by nature difficult to foresee. 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 a mechanism for allowing a lender to vary the rate for legitimate reasons. And I think the average consumer could reasonably be assumed to accept this and agree to it in hypothetical negotiations.

In addition, when considering whether there was a significant barrier to exit, it is important to note that there was no Early Repayment Charge (ERC) applicable to Ms and Mr C's mortgage at the point it reverted to the SVR in October 2012. So, if NRAM had exercised its rights as set by the variation term, and Ms and Mr C were unhappy with that decision, they were free under the contract to transfer their mortgage to another lender should they have wished without having to pay this charge.

I've also considered whether the terms in Ms and Mr C's agreement go further than reasonably necessary to protect NRAM's legitimate interests and whether the variation clauses are sufficiently transparent. Having done so, I accept that there is a possibility that a court might conclude that parts of the clause are overly broad and that it could be more transparent.

HJ has focused its argument about unfair terms on 7.1 – the term allowing NRAM to *reduce* the interest rate. This is the broadest part of the interest variation terms, as this doesn't require NRAM to rely on any particular circumstances to make the change. I can't see that a term which gives the lender the unfettered ability to reduce the rate payable, could be considered to create a significant imbalance between the lender and consumer to the detriment of the consumer, contrary to the requirements of good faith.

The lack of restrictions on reducing the interest rate increases the situations in which the interest rate might fall, and so is in the consumer's favour. But I consider that the way in which the term is exercised could potentially lead to unfairness in individual cases.

Before moving on, I note that in response to the investigator's assessment, HJ said "Our client agrees with the (investigator's assessment) that the terms and conditions covering how and why the SVR is reduced are unfair…" This is incorrect, the investigator said they thought the terms allowing for *increases* may be considered unfair by a court.

[1] FCA Guidance (FG18/07 Paragraph 34)

In considering Condition 7.2, I too think it's possible a court may find the following clauses are not sufficiently transparent such that an informed consumer would have agreed to them in individual negotiations:

"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…"

I am not persuaded a consumer would necessarily be able to understand the basis and the mechanics for any decisions taken that relied on these terms or to be able to understand the economic consequences of entering into the agreement and, if necessary, to challenge a variation made in reliance on them. I consider these terms potentially to be wider than are reasonably necessary to achieve a legitimate purpose and they do not explain to the consumer the method for determining the new price – 'good commercial reasons' and 'a prudent level of profitability' are vague terms.

While I do think that a term enabling NRAM to increase the SVR proportionately to reflect increases in its cost of funds in specific circumstances would be fair, I think Condition 7.2 (b) and (c) go beyond what national law would likely imply. I think it's possible a court could find that – without further qualification - they cause a significant imbalance between the parties and I think it's unlikely a hypothetical consumer would have agreed to a term that enabled the lender to increase the SVR payable on their mortgage for such vague reasons.

Having reached this conclusion, I also need to consider whether – at the time the contract was taken out – there were likely to be such significant barriers to Ms and Mr C dissolving the contract that they could not effectively make use of the right to do so. If there were such barriers, that may mean that the variation terms are unfair.

In assessing whether the term itself is unfair – the test is not whether there were significant practical barriers for Ms and Mr C at the point at which their interest rate was varied, but rather whether it was foreseeable at the time the contract was entered into that there may have been such barriers.

As set out above, there was no ERC applicable to Ms and Mr C's mortgage at the point they reverted to the Guaranteed Rate on 1 October 2012. So if NRAM had exercised its rights as set by the variation term, and Ms and Mr C were unhappy with that decision, they were free under the contract to transfer their mortgage to another lender should they have wished without having to pay this charge.

Having said that, if Ms and Mr C had wanted to transfer to another lender, they may have faced certain costs, including a discharge fee and other associated switching costs. However, the discharge fee would've always been due when the mortgage was redeemed, whether that was before the end of the intended term or not and is set out clearly in the mortgage offer. And with regards to switching costs, I am not persuaded these are the sort of significant barriers that the CJEU and FCA had in mind when determining whether a variation clause is unfair. Ms and Mr C would incur these costs if ever they sought to switch lender.

However, while I do not think the mortgage discharge fee or other associated switching costs presented a practical and significant barrier to Ms and Mr C dissolving the contract should they have wanted to, I do think it was reasonably foreseeable that Ms and Mr C may struggle to refinance both their mortgage and unsecured loan. I know HJ has said that this wouldn't have been reasonably foreseeable to Ms and Mr C, because they weren't given clear enough information about this. But, the point is that given the special conditions attached to the unsecured loan, I think this was a real and practical barrier to Ms and Mr C dissolving their mortgage contract with NRAM.

With this in mind, alongside my finding that the terms do not necessarily satisfy the requirement for transparency, I think these terms had the potential to lead to unfairness, because if NRAM increased the SVR for an unclear reason, Ms and Mr C may not realistically be able to dissolve the contract and move elsewhere. So, I think a court may have a proper basis to conclude that elements of the variation terms were unfair.

However, our service is required to consider what is fair and reasonable in all the circumstances. That includes, but is not limited to, relevant law. So, while I've taken account of the relevant law regarding unfair contract terms, I've also thought more broadly about whether, and the extent to which, the way in which the terms have been used has resulted in unfair treatment for Ms and Mr C. I think that is the ultimate question I need to answer in deciding whether to uphold this case.

Has NRAM exercised the terms fairly?

In answering this question, I am doing so in the context that this complaint only concerns the fairness of interest charged to Ms and Mr C's mortgage since 17 September 2015. All interest charging events before that are out of time because Ms and Mr C did not refer their complaint in time.

However, as set out earlier, in order to consider the fairness of the interest Ms and Mr C were charged during the period that is in time, it's necessary for me to consider historic changes to NRAM's SVR, since the SVR charged during the period of time that is 'in time' (and the rate charged to Ms and Mr C guaranteed to be below the SVR) is the result not only of decisions NRAM made during that period, but also the result of decisions it made prior to it.

As mentioned earlier, I'm satisfied that each time NRAM made a decision to change the SVR, the SVR remained at that revised level until it made a further decision to change it – from the starting point of the level resulting from the previous variation. Therefore, the SVR charged from 17 September 2015 is the "sum of the parts" of the history that went before.

And issues impacting on those parts might have an impact on the fairness of the SVR charged from September 2015.

Having established that I need to look at the SVR both before and after September 2015, and having considered all the available evidence, I am not persuaded that anything NRAM has done in varying the rate has led to unfairness from 17 September 2015 onwards. I'll explain why.

HJ has said that NRAM breached a number of FCA principles and MCOB rules in the way it set its SVR. It says NRAM breached Principle 6 alongside Principle 8 and MCOB 12.5.1 because the interest rate Ms and Mr C were charged after coming out of the initial fixed rate period, was excessive. HJ says that by deciding to hold the SVR or not reduce it by as much as the BoEBR or by having not reviewed the SVR following a reduction in the BoEBR, NRAM didn't have appropriate regard to Ms and Mr C's interests.

HJ has also said that increasing the margin between the BoEBR and the SVR to increase profit, is not a valid reason to have charged more interest. Also, that Ms and Mr C had a legitimate expectation any relevant increase or decrease in the cost of borrowing would be passed on to them.

In terms of FCA Principle 8, HJ says (informed by 'Report A') there was a conflict of interest between NRAM maximising recovery for the taxpayer (following receipt of State Aid assistance) and treating Ms and Mr C (a "captive audience") fairly in terms of the interest they were charged.

HJ says that in the relevant period, NRAM faced significant costs, including consumer redress and that NRAM's profits were higher than they should have been (due to an inflated SVR), to cover these unrelated costs. It argues that NRAM breached Principle 6 by not affording Ms and Mr C the option to exit the contract before or after the interest rate variations, saying this led to a connected breach of MCOB 11.8.1. Related to this, it says that because NRAM was an inactive lender, it offered no other exit route out of the mortgage contract.

I cannot see how it can be said there has been a breach of MCOB 11.8.1, because I cannot see that NRAM treated Ms and Mr C differently to any other NRAM customers with similar characteristics.

NRAM says that its SVR had at all times been comparable to SVRs set by other main lenders on the market. It said it reviewed the SVR during the period of time it didn't change after the global financial crisis (GFC).

However, as mentioned earlier, I am conscious that there were special conditions attached to the unsecured loan attached to Ms and Mr C's mortgage that may have made it more difficult for them – and other consumers in their position at the time they took out the loan – to re-mortgage elsewhere. Ms and Mr C were highly leveraged and the unsecured "Together Loan" had a delinking premium where they would have to pay higher interest on the unsecured loan if they moved the mortgage elsewhere but weren't able to refinance the loan. I consider that it would have been reasonably foreseeable it might have been difficult to refinance the unsecured personal loan as well as the mortgage.

Ultimately I think that it is necessary to consider what, if any, unfairness Ms and Mr C suffered as a result of mortgage payments based on changes to their interest rate. That requires me to consider whether NRAM has exercised the mortgage terms fairly. So I've considered whether I think NRAM had legitimate reasons for varying the rate in the way it did and any impact on Ms and Mr C. In doing so, I am dealing with the other issues raised by HJ in relation to Principles 6 and 8.

Between December 2007 (when Ms and Mr C took out their mortgage) and April 2009, the SVR only reduced. But the difference between the SVR and the BoEBR increased from 2.19% to 4.29%.

I've already set out that this was not a tracker mortgage so NRAM was not contractually obligated to track the base rate. Nor did Ms and Mr C's mortgage have a 'cap' preventing NRAM's SVR from increasing beyond a certain 'margin' above base rate. I've also already explained that I don't think a term allowing NRAM to reduce the SVR, and with it, the amount Ms and Mr C had to pay, is likely to be unfair in principle as a matter of law. So, these changes are not impacted by the question of whether on a strict legal analysis the term would apply.

But it is necessary to determine whether the way in which NRAM exercised this term was fair.

In terms of NRAM's provision of an explanation about why the SVR was varied as it was, HJ's response to the investigator's assessment contradicts itself in that it has said both of the following:

- The Ombudsman should direct NRAM to provide evidence in relation to why it varied the SVR and that the only evidence provided is retrospective analysis by an economist. It says that, without evidence of why the SVR had been varied as it had, there could not be a fair and proper resolution to the complaint – and that if relevant material wasn't provided, the Ombudsman could draw adverse inferences from this.

- It assumes information about why the SVR had been varied as it had, has been provided by NRAM and that, under the relevant rules, this information should be shared with HJ so that it has the opportunity to review and comment on it.

As explained by the investigator in their assessment, NRAM has provided us with evidence to show how it reviewed the SVR over the relevant period, the decisions it took when it came to varying the rate and by how much as well as its general commercial strategy at the time.

HJ has said that under the relevant DISP rules (3.5.9c and 3.5.10) accepting information in confidence is only permitted in relation to confidential evidence about third parties and security information. This is incorrect. DISP 3.5.10 says "*Evidence which the Ombudsman may accept in confidence* ***includes*** (my emphasis) *confidential evidence about third parties and security information".*

For reasons of commercial confidentiality, I haven't set out the evidence provided by NRAM in full or provided copies of it to Ms and Mr C. Our rules allow me to accept information in confidence, so that only a description of it is disclosed, where I consider it appropriate to do so. In this case, I do consider it appropriate to accept the information and evidence NRAM has provided in confidence, subject to the summary of it I have set out in this decision. I am satisfied that I have provided enough information to enable the parties to make meaningful submissions and for me to reach a fair conclusion.

The information provided by NRAM shows that during this time, the mortgage market was going through a period of significant change as a result of the GFC. This impacted the funding costs of businesses and was reflected in changes to a number of lenders' interest rates charged across the market at the time. This was clear at the time and has been the subject of analysis by both the Bank of England[2] and the FCA[3] since. Whilst the BoEBR did reduce significantly during this period, the cost to lenders of funding their businesses changed, as did their prudential requirements. These were made up of several factors that are not directly linked to BoEBR. There was a substantial risk to all lenders during this period and they all had to find ways to mitigate that risk while balancing the need to treat customers fairly.

[2] Quarterly Bulletin, Q4 2014, Bank of England – Bank funding costs: what are they, what determines them and why do they matter?
[3] May 2018 Guidance Consultation GC18/2 Fairness of Variation terms in financial services consumer contracts under the Consumer Rights Act paragraphs 2.8 to 2.10

NRAM has told us that, like many lenders at the time, it was predominantly funded by wholesale funding. The cost of which was in the most part, contractually defined by reference to LIBOR and LIBOR generally followed base rate prior to the financial crisis. As a result, changes in base rate tended to result in changes to cost of funding. Before the financial crisis, changes in costs of its retail funding also tended to correspond to changes in BoEBR.

However, during the financial crisis, there was a significant dislocation between LIBOR and BoEBR, such that reductions in base rate were not matched by commensurate reductions to LIBOR or to NRAM's cost of wholesale funding. In addition, access to wholesale funding became harder to come by as lenders became more concerned at the risk of default – NRAM in particular has shown how its credit rating was impacted and the implications this had on its ability to raise and the cost of its funding. It also experienced an outflow of its retail savings deposits following negative press in late 2007.

To avoid collapse, NRAM received State Aid in the form of a Government loan in September 2007. With the aid, came several conditions on how NRAM could operate and obligations on how and when it should look to repay the loan. Understandably, this significantly impacted its commercial strategy and with it, the cost of funding mortgages like Ms and Mr C's. To add to this, NRAM was nationalised in February 2008 with its entire share capital being transferred to HM Treasury. One of the conditions of the restructure was that NRAM would be limited to a maximum 1.5% share of all retail funding in the UK and 0.8% in Ireland.

In addition, as part of its restructure, it was agreed NRAM would transfer all its higher quality assets to a third party, whilst the lower quality assets would remain with NRAM and be wound down. Given the perceived 'quality' of its remaining assets, this had a further impact on the cost of NRAM's funding.

From 2010 onwards, NRAM's cost of funding after receiving the government loan, was increasingly defined by reference to BoEBR.

I've thought about what HJ has said about the alleged conflict of interest issue and the interest charged being high in order to boost profits, not only in the context of its state aid obligations, but also in order to cover significant unrelated costs, including consumer redress.

As part of this, I've considered both Report A provided by HJ and Report B provided by NRAM. In the context of the complaint made, I consider that Report A raises two fundamental issues:

- Was the interest rate charged by NRAM unfairly high, by reference to other rates available on the market and given the wider context?

- Did NRAM breach Principle 8 (and thus Principle 6), by charging a level of interest designed to increase profits in order to pay customer redress and meet its obligations under the government bailout?

NRAM reduced its SVR on several occasions during the financial crisis, just not by the same proportion as the BoEBR. Given the documented increase in cost of funding across the industry, including for NRAM specifically, and the obligations surrounding the Government loan (which included that NRAM's interest rate couldn't distort competition in the market), I am satisfied NRAM balanced its own financial position and obligations at the time with the impact such changes would have on customers like Ms and Mr C.

After 2010 the only changes made to the SVR were in line with changes made to the BoEBR. NRAM has shown that the SVR was continually reviewed, with it having regard to the changes made by other lenders and its continuing obligations under the government loan. During that period, the interest on the government loan was directly set by reference to BoEBR, and that resulted in NRAM's costs becoming more in line with those movements.

Comparing SVR rates charged over time, it is evident that NRAM's SVR was at the higher end of what was being charged across the industry at the time. However, it was not an outlier – particularly when taking into account what report B shows when the analysis becomes more nuanced.

I note that HJ has said that the comparator analysis in Report B is flawed, because NRAM was in a very different position to other lenders in terms of its funding and not offering new loans. However, even on just a simple comparison, several lenders charged a higher SVR. While the SVR charged by other lenders is not directly relevant to NRAM's cost of funds, these factors reassure me in my conclusion that NRAM's decisions on how much to reduce its SVR by were proportionate to the costs it – along with the rest of the industry faced at this time and not unfair.

So, while I accept that a court may potentially find the relevant terms to be unfair pursuant to UTCCR, I am not persuaded that NRAM operated them in an unfair manner when setting and varying the interest rate that applied to Ms and Mr C's mortgage or that they have led to Ms and Mr C being charged an unfairly high rate of interest on their mortgage.

I have not seen any evidence to suggest the changes it made were arbitrary, excessive, or unfair. Rather, the evidence I've seen satisfies me that NRAM acted to protect its legitimate interests while balancing its obligation to treat Ms and Mr C fairly. And I'm further satisfied that the evidence NRAM has provided is corroborated by evidence of wider market conditions at the time.

In terms of the points HJ has made regarding NRAM's profits over time and what it says this means in terms of NRAM not managing a conflict of interest between itself and Ms and Mr C properly, Report A suggests that NRAM's profits in terms of pre-tax profit and average interest margins, were excessive. Report B says that net interest margin is a more appropriate measure of profits and when this is considered in the context of NRAM's position in the market in terms of the type and size of lender, the profit level is not excessive.

HJ has said that NRAM's accounts show that it had a large consumer redress liability and that this is likely to have influenced the level at which NRAM set its SVR. HJ says that this has resulted in unfairness, because this means Ms and Mr C have, in effect, paid towards costs that have nothing to do with their mortgage. HJ has also said there are question marks about NRAM making any level of profit, given the government backing and that it was effectively in run-off.

I don't consider that either of these things mean that Ms and Mr C have been treated unfairly. First, I don't think there is anything wrong in NRAM having made a profit. In terms of customer redress payments featuring in NRAM's accounts, such redress is a factor that regulated firms need to deal with and is part and parcel of the running of the business. I don't think it is correct or necessary to separate out this element of the accounts from anything else, in the way that Report A seeks to do.

HJ has also said that the suggestion NRAM couldn't reduce its SVR so as not to distort the market cannot be correct, because it wasn't offering new mortgages. As such, irrespective of how it set its SVR, there would have been no distortion to competition in terms of rates offered by other lenders. I find this analysis flawed. The interest charged by NRAM would affect the propensity of existing borrowers to consider looking elsewhere. Therefore the interest charged by NRAM could distort competition in the market.

Taking everything into account, I don't consider that NRAM breached Principle 8 in relation its obligations to HM Treasury and its obligation to treat its customers fairly. I'm satisfied that NRAM had regard to the impact any changes to the SVR would have on its customers and balanced that reasonably with its financial position and obligations at the time.

NRAM's communications about the interest rate variations

HJ has also said that NRAM has breached Principle 7 and, connected to this, MCOB 2.2.6R.

It says this is because NRAM didn't inform Ms and Mr C of the reasons behind changes to the SVR / their Guaranteed Rate. HJ says that the lack of reason given meant that the communications relating to interest rate changes were unclear and, as a consequence of this, misleading because it meant Ms and Mr C had no knowledge of how NRAM's discretion had been exercised.

NRAM says MCOB 2.2.6R isn't engaged, because it only applies to specified regulated activities and that exercising its discretion to change the interest rate on the mortgage doesn't relate to any of the specified activities. It also says that all of its communications about interest rate changes have been clear, fair and not misleading.

I'm not persuaded by HJ's argument here. I've seen the relevant communications informing Ms and Mr C about changes to the interest rate applying to their mortgage and I consider them to have been clear. They gave Ms and Mr C accurate information about the change to the interest rate – in terms of by how much (and the associated change to the monthly repayment amount) and when.

I've considered that the contract didn't set out that NRAM needed to communicate the reasons why it decided to vary the interest rate – only the basis upon which it could make variations. NRAM not communicating the reason why it made a particular change doesn't mean that the communication was unclear.

I also consider that, if Ms and Mr C had wanted to know the reason behind a particular change, for example because this was particularly important to them, I can't see there was anything preventing them from asking.

The extent to which what HJ has said about *Braganza* and *Paragon vs Nash* influences the outcome of the complaint.

I consider that it isn't necessary for me to make a finding on whether there are implied terms in the contract relating to the judgments in *Braganza* and *Paragon vs Nash*. This is because even if such terms were implied, I'm satisfied from all the evidence I've seen, described above, that NRAM's decisions to vary the SVR as it did, were reasonable and based on legitimate commercial judgments.

Other matters

In response to the investigator's assessment, HJ said that when entering into the mortgage contract, Ms and Mr C expected they would have the opportunity after their initial rate expired, to switch to a more favourable rate than the SVR, either with NRAM or another lender. HJ said that, after the Mortgage Market Review (MMR) changes came into force, it would've been more difficult for NRAM customers to effect such a rate switch and that such customers should be categorised as 'mortgage prisoners'.

HJ also said that, whilst is appreciated that Ms and Mr C hadn't tried to attempt to exit the mortgage arrangement, the fact it would have been difficult to do so, should be considered.

HJ's comments provided about NRAM customers in general being mortgage prisoners aren't about Ms and Mr C's specific circumstances. My role is to consider the specific complaint brought by Ms and Mr C, which means having regard to their specific circumstances.
HJ has said Ms and Mr C didn't try to move, but if they had, they would have found it more difficult.

Given that Ms and Mr C didn't try to move, I cannot say what would have happened if they did. Regardless, because I think it was reasonably foreseeable that the Together Loan *might* make it more difficult for Ms and Mr C to move, I've considered the fairness of the interest rate they were charged. For the reasons given above, I don't consider that the rate charged on Ms and Mr C's mortgage has led to any unfairness.

In conclusion, I'm not persuaded that NRAM treated Ms and Mr C unfairly and I do not uphold this complaint.

My final decision

My final decision is that I don't uphold Ms and Mr C's complaint about NRAM Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms C and Mr C to accept or reject my decision before 9 June 2023.

Ben Brewer
Ombudsman