DRN-4332286

The complaint

Mr W has complained about the interest rate he has been charged on a mortgage he holds with Oakwood Homeloans Limited.

What happened

Mr W took out this mortgage in November 2005 with a lender I'll refer to as K. The mortgage offer provided the following information:

- The mortgage advice was given by an independent mortgage broker.
- Mr W was borrowing around £130,000 (including fees) over a 25-year term on an Interest-only basis.
- The terms of the mortgage reflected past or present financial difficulties.
- The interest rate was fixed at 5.84% until 30 November 2006, after which it would revert to K's standard variable rate ("SVR") plus 1.90%. [This is what is known as the reversionary rate]
- At the time K's SVR was 5.65%, so with the 1.90% uplift that would be a rate of 7.55%.
- There was an early repayment charge ("ERC") for the first three years of the mortgage. In year one it would be 7% of the amount repaid, in year two it would be 6% of the amount repaid, and in year three it would be 5% of the amount repaid. The monetary sums for those charges were listed as around £9,100, £7,800 and £6,500 respectively.

The mortgage was transferred to Oakwood in March 2006.

The following are taken from the contemporaneous contact notes provided by Oakwood:

- In November 2006 Mr W was told that an ERC of 6% would be charged in year two, but if he was porting (that is, moving house and taking the mortgage with him) the ERC would be refunded. He was also told that as the interest rate was rising his new monthly payment would be around £860.
- In December 2007 Mr W called to check when the ERC ended, and he was told it was 3 November 2008, which was three years after the mortgage completed. He said he had previously been told something else and Oakwood apologised for the error.
- In February 2008 Mr W was told his interest rate was 9.55%, and the ERC was 5% until November 2008.
- In April 2008 Mr W called about the fall in the Bank of England base rate ("base rate") and was told it wouldn't affect his mortgage as his rate was based on the London Inter Bank Offered Rate ("LIBOR").

- In May 2008 Mr W was told LIBOR would be reviewed on 12 June.

- In June 2008 Mr W had a query about his interest rate as he wanted to know why his interest rate was rising when he had a letter dated February 2007 that said he is on a LIBOR rate.

- In July 2008 Mr W was told Oakwood doesn't offer new rates, and his ERC would end on 3 November 2008.

- In November 2008 Mr W was told the SVR was dropping from 6.49% to 4.99%. He was told his ERC had expired earlier that month.

- Later that month Mr W called to say he was on a LIBOR linked rate plus 1.90% and that didn't match what Oakwood was charging. Oakwood said it would take a look into it. A letter was sent to Mr W enclosing a copy of his original mortgage offer and explaining the interest rate.

- In December 2008 Mr W was told he was on the SVR with a margin of 1.90%, which equated to 6.881% from January.

- In February 2009 Mr W was told he was on the SVR plus 1.90%.

- In June 2009 Mr W called to query the interest rate. He was told it had been changed in April 2009 to 5.008%, and that a letter would be sent to him each time it changes.

- In July, August, September and October 2009 Mr W was told his rate was 5.008% and he'd be notified in writing if it changed.

- In January 2010 Oakwood carried out a remediation exercise as the wrong rate had been charged since June 2009. The note says that interest was credited to the account, the arrears were reduced and the overpayment was offered to Mr W as a refund.

- In February 2010 Mr W was told a cheque refunding the overpayment had been sent to him in January, and that his current interest rate was 3.563%.

- In September 2010 Mr W was told his payment had gone up due to the interest rate now being 3.676%.

- For three years from November 2010 the contact notes generally were in relation to some financial difficulties Mr W had encountered.

- In October 2013 there was a problem with Mr W's payment as he said his bank account was registered at his partner's address as he split his time between the mortgaged property and her address, spending most of the week at her property. Then in October 2014 Mr W formally asked to set his partner's address as the correspondence address on the account (this is the address we have registered for Mr W for this complaint).

- In February 2016 Mr W asked for a copy of the original mortgage offer and a transaction history showing all the payments he'd made since the mortgage started.

Mr W raised a complaint in June 2020. Oakwood responded in August 2020 listing the complaint points as:

- "*Interest rate information given was not clear and accurate.*

- *The monthly interest rates seem to be randomly created to exploit and keep a circle of debt.*

- *With the rate of interest being varied there have been breaches to codes of practice resulting in the breaking of laws.*

- *You did not receive written information on the metrics of how your personalised rate of interest was established.*

- *No consideration was given to the underlying lending risk when the interest rate structure changed.*

- *We failed to financially risk assess you as a customer when we purchased the loan and then within 6 months went on to charge nearly double in excess of £1100 per month for an interest only mortgage. This caused you financial hardship.*

- *From information obtained you believe [lender K] knew you were a high risk vulnerable client and at no point was this taken into consideration.*

- *At no point have we reviewed the loan in any detail and provided opportunities of other products to support the payment of the loan within the term knowing that it would be impossible to pay off."*

Oakwood said, in summary:

- Advice about the mortgage was given by a broker and the broker was responsible for the suitability of the mortgage and explaining it to Mr W. Oakwood said any complaint about those issues would normally be made to the broker concerned, but as the broker was no longer trading Mr W could contact the Financial Services Compensation Scheme to see if it could help.

- The mortgage offer from lender K set out the terms of the contract, which Oakwood had followed.

- The mortgage was on the SVR plus 1.90%, and the mortgage conditions said that the rate will vary provided the changed rate is never less than 1% or more than 3% above LIBOR.

- Oakwood had varied the interest rate in line with the mortgage offer, and terms and conditions.

- The risk of the mortgage and the interest rate applicable for that risk were part of lender K's underwriting of the mortgage when Mr W took it out. Things don't get reassessed when a mortgage is transferred (on its existing terms) to a different lender. Mr W's mortgage was part of a portfolio of mortgages that were transferred, and in those cases the mortgages continue to run as they were originally set up.

- The payment increased after Oakwood took over the loan because the initial preferential fixed rate ended in November 2006, and the increase in payment was because the mortgage had moved to the SVR in line with the mortgage contract.

- Oakwood ceased lending in 2007 and has been unable to offer any new rates since then.

Mr K referred his complaint to our service.

Our Investigator asked Oakwood if it gave its consent for our service to consider everything that it had dealt with in its final response letter, as some of those things appeared to fall outside the time limits that are set out in our rules. Oakwood confirmed we had its consent to set aside any time limit concerns for those points.

Our Investigator also asked Mr W for his recollections of the conversations he had with Oakwood when the initial fixed rate ended in 2006. Mr W said the initial call was made due to the significant increase in the mortgage payment, and his concerns about the affordability. He said many points were discussed including affordability, a transfer to other products, how the rate was calculated, moving his mortgage to another provider, concerns about why there was such a big increase in the interest rate and that he felt trapped in the mortgage. Mr W said Oakwood told him the mortgage was being administered in line with the terms and conditions of the account, and that if he wanted to move to another lender there would be a large ERC (he said from memory the figure was around £15,000). He said he then got into a spiral of debt, taking out loans to cover his mortgage payments and the value of the house continued to drop further into negative equity.

Our Investigator didn't uphold the complaint points that had been referred to in Oakwood's final response letter. But he said there was another potential issue in that he didn't think the ERC had been set fairly, and that when Oakwood told Mr W that there was an ERC until November 2008 (even though his mortgage had moved to a variable rate in 2006) he was prevented from accessing a new preferential rate at that time. Our Investigator said the mortgage should be restructured as if Mr W had obtained a new rate from Oakwood when his initial fixed rate product ended, and asked Oakwood to provide a list of the products available at the time Mr W called in 2006. He also felt Oakwood should pay £250 compensation for that issue.

Oakwood responded saying at no time has it ever offered new mortgage products to existing customers so it couldn't provide a list of rates. It said instead it could explore the possibility of a remediation calculation based on the market rate for a similar loan.

Our Investigator said the earliest rates he was able to source were from 2008/09 and Oakwood agreed that was acceptable. He said he assumed the loan to value remained at 90% and he selected the three lowest interest rate products that were similar to Mr W's existing mortgage. Taking an average of those gave him a potential market rate of 5.76% to use in the remediation calculation.

Oakwood reworked the mortgage account and calculated that it owed Mr W around £10,500. We put that offer to Mr W and he accepted it. He said he wanted the money as soon as possible because the property was up for sale and he didn't have anyone renting it, so he was paying the mortgage. He said he hadn't had anyone in the property for the last two months and hadn't been able to get rid of it or get it rented out.

Due to Mr W accepting the redress over the phone the case was closed. Mr W then contacted our Investigator asking for a full breakdown of the calculations. He said his acceptance was only in principle and he needed visibility of the calculations before he formally signed off on it. He confirmed he'd received the payment from Oakwood but hadn't received any breakdown of how the figure had been reached. He also said that if he'd got a new rate in 2006 it would have had a lower reversionary rate, rather than the SVR plus 1.90% he was currently being charged, so that also needed to be resolved.

After some email and phone contact between the parties Mr W asked the matter be escalated to an Ombudsman.

The case was reallocated to another of our Investigators whilst it was waiting to be passed to an Ombudsman. The new Investigator provided an explanation of the redress calculation to Mr W, and in correspondence with the new Investigator Mr W said he is a mortgage prisoner and the redress doesn't give him a way forward. He said the interest rate was still too high and he wasn't able to remortgage or sell because he was in negative equity. He said the 1.90% uplift on the SVR was unfair, and if he'd got a new rate in 2006 (as per the redress) then that new rate would have reverted to a "normal" SVR, rather than one with a 1.90% uplift.

The case was passed to me to decide. Having reviewed the case I thought the issue about the ERC potentially fell outside the time limits that are set out in our rules so I asked our Investigator to speak to Mr W and Oakwood about that point before I took any further action.

Whilst Oakwood had given us its consent to consider the points it dealt with in its complaint response, the ERC issue didn't form part of that complaint and so we didn't have Oakwood's blanket consent for us to deal with that issue. Under our rules consent can't be implied, it has to be expressly given.

Oakwood confirmed, when asked by our Investigator, that it didn't give us its consent to consider that point. For that reason I needed to make a decision about our jurisdiction before I could take any further action on this complaint.

I issued my decision about our jurisdiction in November 2023. In that I said:

> *"We can't consider a complaint about the ERC overhang, and it follows from that we can't deal with a complaint that Mr W could have had a new preferential interest rate product from November 2006 or that he would now be on a different variable rate product.*
>
> *We can however consider the remainder of the complaint points as Oakwood has given us its consent to consider those."*

What I've decided – and why

In January 2024 I issued a provisional decision setting out my thoughts on what a fair outcome would be for the complaint points I'd said we could consider, the findings of which said:

> *"Although I've read and considered the whole file, I'll keep my comments to what I think is relevant. If I don't comment on any specific point, it's not because I've not considered it but because I don't think I need to comment on it in order to reach the right outcome. This service is impartial between, and independent from, consumers and businesses.*
>
> *Mr W has understandable concerns about the future, as interest rates have risen substantially. He said if he had been able to take a new interest rate product back in 2006 then he wouldn't now be on a reversionary rate which is a 1.90% premium on top of the SVR. But for all the reasons I explained in my decision about our jurisdiction I can't consider a complaint about the ERC and so it flows from that I can only decide this complaint on the basis of the mortgage product Mr W took out in 2005 and upon which he remains. That product being the interest rate was fixed at 5.84% until 30 November 2006, after which it would move to the reversionary rate, which was K's SVR plus 1.90%.*
>
> *Where a mortgage application is made through a third-party mortgage broker, such as happened here, there's no obligation on the part of the lender to replicate the role of the mortgage broker. The responsibility for any advice that may have been given about suitability lay with the mortgage broker rather than with the lender. It was also the role of*

the broker to ensure Mr W understood the nature of the interest rate product he was taking out, including the reversionary rate it would move to after the fixed rate ended.

There was no regulatory requirement for the lender to check the suitability of the advice or contact the consumer to ensure the nature of the mortgage and interest rate product was understood. I can only consider this complaint based on the regulations and normal industry practice at the time, and without the use of hindsight.

The mortgage was transferred from K to Oakwood in March 2006, which was allowed under the terms of the mortgage as set out in the 'General Mortgage Conditions Booklet' with section 58 entitled 'Our Rights of Transfer' stating:

'58.1 We may sell or transfer our rights and obligations under your Mortgage, including the Debt, and any security for it, to anyone at any time without giving prior notice to you.

58.2 If we sell or transfer any or all of our rights, benefits or obligations, your own rights and obligations under your Mortgage will stay exactly the same but you will be bound to any person or organisation to whom we sell or transfer. That person or organisation will have all our rights and powers instead of us including the power to change the Variable Rate.

58.3 Upon any such transfer your own rights and obligations under your Mortgage will stay exactly the same save that references to the Variable Rate shall be the rate of interest determined from time to time by the transferee.'

The transferring of a mortgage from one lender to another isn't unusual and Mr W's mortgage was transferred as part of a large portfolio of loans. The new lender doesn't re-underwrite the mortgage as they accept the portfolio of loans on the same terms and basis as they were held with the previous lender. There was no requirement for Oakwood to reassess Mr W's mortgage or his financial standing, and that isn't something I would expect a new lender to do. The mortgage simply transferred over on the same terms, the only difference being that the mortgage lender was now Oakwood rather than K. Nothing else changed at that time.

The monthly payments would always have increased from December 2006 as the fixed rate of 5.84% only ran until the end of November 2006. The mortgage offer explained Mr W's mortgage would revert to the SVR plus 1.90%, and in December 2006 that equated to a rate of 8.20%. So irrespective of whether the loan had stayed with K or moved to Oakwood Mr W's payment would still have gone up substantially from December 2006.

Mr W's mortgage offer says:

'…we are prepared to offer you a mortgage loan ("Offer") on the terms set out below and in our General Mortgage Conditions Booklet 2004 1st Edition.

[…]

The interest rate is a fixed rate of 5.84% until 30 November 2006 followed by [K's] standard variable rate currently 5.65% plus 1.90% currently 7.55%. The terms of this mortgage reflect past or present financial difficulties.'

The General Mortgage Conditions Booklet 2004 1st Edition says:

'We may change the Variable Rate at any time in our absolute discretion whenever we

want (including before any Advance is released), provided that the changed rate is never less than 1% or more than 3% above LIBOR Rate'

I think this is clear – the mortgage offer says that Mr W will be charged the SVR plus 1.90%, and the terms and conditions booklet says the SVR will be between 1% and 3% above LIBOR. Putting those together, Mr W's interest rate will always be between 2.90% and 4.90% above LIBOR. I can see from the history of the mortgage that the interest rate Mr W has been charged has stayed within that range.

The mortgage offer says that the mortgage would revert to the SVR plus 1.90% from December 2006, and this happened, and the SVR has stayed within the range – relative to LIBOR – set out in the terms and conditions.

The lending environment when Mr W took his mortgage out was very different. Now, it's much harder to get an interest only mortgage. Since he took the mortgage out, Mr W said his property fell into negative equity, he'd got into a spiral of debt to maintain the payments, and moved out of the property, with him telling our Investigator it had been rented out. Mr W has no means of paying back the mortgage at the end of the term (other than trying to sell the property for more than the outstanding mortgage amount). For all those reasons, he's not able to move his mortgage to another lender and considers himself trapped. That means that, in reality, he's got no choice but to pay the reversionary rate he is on – whereas if he was with another lender he might be able to access lower fixed or tracker rate products.

Soon after Oakwood took over the mortgage it moved to the reversionary rate and that continues to be applied. Oakwood has said that it's not an active lender. That means it's taken a commercial decision to maintain all its customers on their applicable reversionary rate once their previous interest rate products expire. To that extent, it's not treating Mr W any differently to any of its other customers.

Oakwood is a closed lender in that it's not taking on new business, but it's still regulated by the FCA and has to follow its rules. But there's nothing in the FCA's rules that says a lender has to offer new interest rates to its customers once their old ones expire. The rules say that a lender has to treat its customers fairly taking account of their best interests; it has to communicate with them in a clear, fair and not misleading way; it has to notify them of changes to their monthly payments; and it mustn't take advantage of customers who can't move their mortgages elsewhere by treating them differently to other customers with similar characteristics.

In this case, Oakwood has notified Mr W of changes to his payments from time to time. It isn't treating him differently to any other of its customers – all customers must stay on the reversionary rate that was set out in their mortgage offer once their products expire, just like Mr W. So I don't think Oakwood is in breach of any of the regulator's rules in not offering him a new rate.

I don't think Oakwood is acting in breach of the terms of the mortgage agreement either. Mr W's mortgage offer sets out that he would pay interest at a fixed rate until November 2006, and thereafter the reversionary rate. Nothing in the mortgage offer or the mortgage terms say that Mr W would be entitled to another fixed interest rate after that one expires.

I'm aware, of course, from my knowledge of the mortgage market that it's common for borrowers to take a fixed or tracker rate product – and then, at or shortly before its expiry, take another rate rather than revert to the SVR. Sometimes that's with their existing lender, sometimes it's with another lender. But as I say, there's nothing in Mr W's mortgage agreement that says he's entitled to a new rate – and that's also true of most other lenders' *mortgage agreements too.*

I've set out that there's nothing in the regulator's rules, and nothing in the mortgage contract, that requires Oakwood to offer new interest rates. Nor is it under any other legal obligation to do so.

That's not the end of the matter though – my role is to decide what's fair and reasonable in all the circumstances. I do that by taking into account the law, regulator's rules and guidance, and good industry practice – but ultimately I'm not constrained by them if I think fairness requires me to do something else.

So the question I have to answer is whether, taking into account the rules and the mortgage terms, it's fair and reasonable in all the circumstances that Oakwood has refused Mr W a new interest rate that's lower than his reversionary rate.

I've thought about this carefully. I've taken into account everything I've set out above. It's unfortunate that, through no fault of his own, Mr W has ended up with a closed book lender that doesn't offer new rates. But Oakwood is his lender, and legitimately so. It's decided not to offer new interest rates to any customers, including Mr W.

Under current law and regulations, that's a decision Oakwood is entitled to take. I'm mindful that if Oakwood were to offer new lower rates to some customers but not others, that could mean some customers were being treated less favourably than others with similar characteristics – which in turn could potentially cause unfairness.

Oakwood's not treating Mr W any differently to how it treats its other customers. Its business model is based on not offering new products – and that's a decision about its business it's entitled to take. There's nothing in the contract, the law or the regulator's rules that requires Oakwood to offer new products. Oakwood's treating Mr W the same as it treats all its other customers. And I'm also mindful that while Mr W's reversionary rate is significantly higher than new interest rate products offered by other lenders, it's similar to other lenders' reversionary rates that would be applicable to consumers with similar characteristics.

That leads me to consider whether Mr W's reversionary rate during this period was fair.

I've already set out the relevant terms of the mortgage. In particular the terms set out in Mr W's mortgage offer and those in relation to how the relevant LIBOR rate index operated.

I'm not satisfied that all the terms are sufficiently transparent. Clause 22.6 says 'We may change the Variable Rate at any time in our absolute discretion whenever we want (including before any Advance is released), provided that the changed rate is never less than 1% or more than 3% above LIBOR Rate.'

While grammatically easy to follow, the relevant term allowing for the SVR to be varied is very broad, providing seemingly unfettered discretion about when the lender can make changes to the SVR and by how much (subject to the margin restrictions). I think this clause is wider than reasonably necessary to achieve a legitimate purpose and is so subjective that it does not explain to the consumer when a change may be made or the method for determining the new price. In my opinion it would be difficult for a customer to understand the basis and the mechanics for any decisions taken that relied on this term, to be able to understand the economic consequences of entering into the agreement and, if necessary, to challenge a variation made in reliance on it. That means that there's a real possibility a court would consider this to be an unfair term within the Unfair Terms in Consumer Contracts Regulations, which is relevant law for me to take into account.

Even though I consider that there is a reasonable basis to conclude that the variation terms are overly broad and do not explain adequately the mechanism for determining the new price, the central issue is whether there has been any unfairness to Mr W. The fairness of the underlying variation clause will not of itself properly answer that question.

Under our rules, we are required to consider what is fair and reasonable in all the circumstances. That includes – but is not limited to – relevant law. So, while I have taken account of the relevant law regarding unfair contractual terms, I've also thought more broadly about whether the way the terms have been used has resulted in Mr W being treated unfairly. I think that is the ultimate question I need to answer when weighing up if Mr W's case should be upheld.

Firstly I must point out that there isn't anything inherently unfair about a mortgage reverting to an SVR (or an SVR plus a pre-determined premium). They serve a legitimate purpose in permitting lenders to provide for future changes that justify changes in the rate, where costs to them are variable. Some borrowers choose to pay the reversionary rate on their mortgage as a result of the flexibility it offers.

The reversionary rate had varied multiple times throughout the life of the mortgage. The majority of these variances did not completely track the fluctuations in the relevant LIBOR index. But the lender wasn't contractually obligated to do so (so long as it stayed within the 1% to 3% tolerance stated in clause 22.6). And in any event, the variances were mostly less than 0.05% so were minimal.

As with most lenders, this reversionary rate reduced during the financial crisis. During this period, the wider market was going through significant change as a result of the financial crisis. This impacted on the funding costs of businesses, including Oakwood, 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 and the FCA. The FCA has specifically noted the adverse impact the financial crisis had on lender's costs during that period, and that it had not seen that SVR variation terms have generally been relied on unfairly to cause widespread detriment to consumers.

Whilst LIBOR did reduce significantly during this period, the costs to lenders of funding their business changed, as did their prudential requirements. There was a substantial increase in risk to all lenders during that period, and that led to them having to mitigate that risk in different ways.

Mr W has protection against extreme changes in cost of funds since the margin over LIBOR is capped at 3% for its SVR (subject to the additional premium of 1.90% in Mr W's case). When the mortgage was taken out in 2005, the SVR was 1.05% above LIBOR. Hence the maximum permitted change in margin above LIBOR was 1.95% - since the margin could not increase above 3% under the terms and conditions. I've explained above that during the financial crisis of 2007-2009, the lender's costs didn't reduce to the same extent LIBOR did, so it increased the margin. The maximum margin over LIBOR was 3%. The margin over LIBOR was in practice increased from that it was in November 2005 but it never breached the cap.

I haven't seen any evidence that suggests Oakwood's pricing decisions were arbitrary or made without regard to the interests of its customers like Mr W.

Overall, taking into account all of the changes made to Mr W's reversionary rate, while the terms do provide Oakwood with wide discretion in regard to when or whether to vary the

SVR upon which Mr W's mortgage interest rate is based, I don't think there is anything to suggest that Oakwood has acted unfairly or unreasonably, or that Mr W has overpaid interest.

I acknowledge Mr W's strength of feeling and I appreciate this will likely come as a disappointment to him. This decision doesn't intend to in anyway downplay or disregard his situation, but for the reasons I've given I simply can't uphold this complaint however much Mr W may want me to."

Oakwood didn't make any further submissions. Mr W responded, but most of what he said related to matters I've already decided don't fall within our jurisdiction and what flowed from that; such as the offer from Oakwood, the conversations and correspondence Mr W had with our Investigator about the offer, and whether or not Mr W would have obtained a new rate with Oakwood in 2006.

Whilst I've a great deal of sympathy for Mr W's position, I can only make findings on things that fall within our jurisdiction, and so I can't comment on any of those points.

In relation to Mr W's points about Oakwood not offering new products more recently there's nothing further I can add to the findings I reached on this point in my provisional decision as these points were dealt with there.

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

Having done so I see no reason to depart from the findings I reached in my provisional decision.

My final decision

I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 5 March 2024.
Julia Meadows
Ombudsman