

## **The complaint**

Mr S complains that Topaz Finance Limited trading as Heliodor Mortgages has not:

- Set the interest rate on his mortgage fairly.
- Treated him fairly when he was in financial difficulty.

## **What happened**

In 2005, Mr S took out a mortgage with Northern Rock. He borrowed £147,025 over 23 years. There were two sub-accounts – 1. £98,405 on a repayment basis and 2. £48,620 on an interest only basis.

Both sub accounts were taken out on a product that tracked 0.84% above the Bank of England base rate (the base rate) for two years. Both sub accounts would then revert to Northern Rock's standard variable rate (SVR) – which was 6.59% at the time. A loyalty discount of 0.25% applied to the SVR once Mr S had the mortgage for seven years and the mortgage was up to date.

In August 2007, Mr S switched both sub-accounts to a 1.5-year fixed rate of 6.99%. After this expired on the 1 April 2009, the mortgage would again revert to the SVR – then 7.84%. The loyalty discount would apply on the same terms.

Northern Rock was nationalised following the financial crisis of 2007/8 – and Northern Rock (Asset Management) (NRAM) took responsibility for the loan. But it couldn't offer new interest rate products to any borrowers.

In April 2009, Mr S's mortgage reverted to the SVR. The lender said that Mr S did not qualify for the loyalty discount in 2012 as Mr S was in arrears. In October 2016, the loyalty discount was applied.

In 2019, Topaz bought Mr S's mortgage. It is an inactive lender and does not offer new interest rate products to any borrowers. But in April 2020 it reduced the SVR from 5.04% to 4.39% - so Mr S paid 4.14% after the loyalty discount was applied.

From 2010, the mortgage has fallen into arrears. NRAM obtained a suspended possession order against Mr S. And Topaz has also taken legal action.

Mr S's representative, on his behalf, complains, in summary:

- Topaz has not treated him fairly when he experienced financial difficulty.
- Mr S is a "mortgage prisoner". He is unable to arrange a new interest rate product with Topaz as it is an inactive lender. And he can't remortgage because of the mortgage arrears.
- The SVR has been set unfairly high and Mr S has been overcharged.

- It was inappropriate for Topaz as an inactive lender to take into account SVRs charged by active lenders. Active lenders set the SVR high to encourage borrowers to switch to a new fixed rate when their current fixed rate ends. But Topaz is not an active lender and can't offer new rates to its borrowers. By setting the SVR with reference to active lenders Topaz is exploiting borrowers who are "mortgage prisoners".
- Topaz is suggesting by not increasing the SVR, adopting the NRAM SVR and applying the loyalty discount it has not set the SVR fairly. Topaz's discretion to set the SVR was subject to an implied term that it would not be exercised dishonestly, for improper purpose, arbitrarily, or in a way that no reasonable lender acting reasonably would do. Topaz had fettered its discretion by simply retaining the NRAM SVR. If it had applied its discretion properly it could not have set the SVR as high as it did.

The investigator said that we couldn't consider the fairness of the SVR before 30 March 2014 because of the time limits in our rules. He did not consider the complaint should be upheld.

Mr S's representative did not accept what the investigator said.

### **What I've decided – and why**

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

#### Time limits

I agree with the conclusions reached by the investigator in his letter of 17 August 2022.

Mr S complained to Topaz on 30 March 2020. So under our rules, we can consider events from six years before that – from 30 March 2014.

But the complaint is also about events before that – he considers the SVR has been set unfairly since 2008. So I need to consider when Mr S became (or ought reasonably to have become) aware that he had cause for complaint.

I am satisfied that Mr S was given sufficient information so he reasonably should have known what his interest rate was. I also consider that he ought reasonably to have known that following the 2007/8 financial crisis the base rate was reduced to a record low level of 0.5%. So I consider that Mr S ought reasonably to have been aware that the SVR on his mortgage was set high compared to the base rate soon after he reverted to SVR in around March 2009 – he had reason to be dissatisfied with the level of the SVR, knew the lender was responsible for that and that it might be causing him a financial loss.

Topaz has not consented to us considering any part of the complaint that is out of time. And I don't consider there were exceptional circumstances that prevented Mr S from complying with our time limits. I say that as he was in contact with the lender throughout the period in question.

I can take into account interest rate variations before 20 March 2014 in determining whether the SVR was set fairly from that date onwards.

#### Financial difficulty

Topaz had a duty to treat Mr S fairly when his mortgage was in arrears. In my experience, good practice is for a lender to take steps to understand a borrower's circumstances,

including details of their income and expenditure, and work with them to explore if there are any concessions it can offer – either to give the borrower some breathing space or to get the mortgage back on track. Repossession action is a legitimate step for a lender to take – but it should be a last resort.

The focus of this complaint is on events from 2019 when the mortgage was transferred to Topaz. But the mortgage had been in arrears for a number of years before that – and it was reasonable for Topaz to take that into account in its decisions.

Looking at the evidence I have, I think that Topaz took reasonable steps to understand Mr S's circumstances and to gather evidence of the payments that Mr S was expecting. But looking at the information it was given, I can't see that there was any forbearance it could have offered Mr S at that time. It had no reason to consider that there were any affordable and sustainable proposals to get the mortgage back on track – or that there were any concessions that would help Mr S.

Mr S appears to have proposed taking additional borrowing from Topaz to clear the arrears. Bearing in mind Mr S could not afford the existing borrowing, it was reasonable for Topaz to reject that proposal – and it does not offer new borrowing in any case. The investigator suggested that what Mr S was effectively asking for was to capitalise the arrears. I agree that it wouldn't have been reasonable for Topaz to capitalise the arrears, bearing in mind it could not satisfy itself that the mortgage was affordable as it was.

Based on the information available to Topaz, I consider it was reasonable for it to continue with the legal action. The mortgage was significantly in arrears and there was nothing to suggest that it would get back on track. I can't see that Topaz was presented with sufficient evidence to accept that funding to Mr S's business was guaranteed – and Mr S's representative said that funding stalled because of the pandemic.

I also accept that Mr S told Topaz that he was trying to get a breathing space loan from his local council to repay the arrears. Topaz decided to go ahead with the hearing because while the loan might clear the arrears, there was no evidence that the mortgage was affordable or sustainable. Looking at the information available to Topaz, I consider that was a reasonable stance for it to take.

Once the court looked at things, it adjourned the hearing with Topaz to meet any costs, to allow Mr S to explore the breathing space loan. I can see why that would lead Mr S to think it was unfair for Topaz to continue with the legal action. But I don't think it follows it was unfair for Topaz to go ahead with the hearing in view of the history of arrears, the lack of affordability and the uncertainty around the breathing space loan. The evidence we have does not show that the breathing space loan was in place by October 2021.

Topaz has accepted that it did not tell Mr S that it adjourned the November 2019 hearing. Mr S did not attend. I think the apology it has given Mr S is sufficient.

### Mortgage prisoner

I was sorry to hear what Mr S had been through. I know he feels that being with an inactive lender has contributed to his financial difficulty. Inactive lenders do not usually offer new concessionary interest rates products such as fixed rates. But after considering all the circumstances, I don't consider Topaz has treated him unreasonably.

Mr S's representative said he is a mortgage prisoner because Topaz is an inactive lender and Mr S is unable to obtain a new mortgage elsewhere because of the arrears. It has mentioned guidance from the FCA to help borrowers with inactive lenders.

There is no requirement for Topaz to lend or offer new interest rate products – and I don't consider the FCA rules and guidance make any difference to that. Topaz is obliged to record information about how Mr S conducts his mortgage with credit reference agencies. I've not been given any evidence to show that it has recorded inaccurate information about Mr S.

It is for other lenders to decide whether to lend or not. But I can't find Topaz responsible for decisions made by other lenders. Most active lenders will take into account any arrears when deciding to offer a new interest rate product – even to existing customers.

#### Arrears fee

Mr S said that Topaz applied an arrears fee in March 2020 when he'd agreed a Covid payment deferral. But the deferral did not start until 1 April 2020. The arrears fee was applied on 31 March 2020 and reflected the additional work undertaken by Topaz in respect of the arrears the preceding month. So I don't consider it was wrong for it to apply the fee – and looking at the additional work carried out in relation to the arrears I don't consider it has been applied unfairly in the circumstances.

#### Interest rate

Mr S and his representative said the SVR has been set too high since 2008. But the mortgage has operated in line with the agreement that Mr S entered into. Once his initial tracker and then fixed rates ended, his mortgage was correctly transferred to the SVR.

The SVR has been varied in line with the terms and conditions of the mortgage for reasons set out in those terms. I don't consider the terms are unfair – and there is no evidence that they were applied unfairly. Looking at the circumstances of the changes – taking into account the lender's circumstances, the quality of its loan book and the wider financial environment following the financial crisis, particularly in regard to the lender's funding costs and balanced against the impact any changes would have on borrowers – I consider they were made fairly and reasonably.

Overall, I am not persuaded that Mr S has been overcharged or that the SVR was set too highly.

Mr S's representative has made two main points why they believe the SVR has been set unfairly:

1. It was wrong for it to take into account the SVRs set by active lenders

Topaz said that in April 2020, it reduced the SVR following changes in the Bank of England base rate. It said that in the future it would set its SVR *"in response to movements in trends in the market, and in particular SVRs in the residential mortgage market"*.

When Mr S complained in 2020, it does not appear that Topaz had, at that point, made any changes to its SVR with reference to trends in the market and in particular SVRs on residential mortgages. It said it intended to do that "going forward". So it's not clear that other lenders' SVRs was factor in how Topaz set the SVR once it owned the mortgage – at least for the period I am considering.

Nevertheless, I can't see that setting the SVR with reference to other lenders' SVRs would be outside the terms and conditions of the account. That was a reasonable thing for a lender to take into account in setting an SVR.

The previous lender did take other lenders' SVRs into account when setting its SVR. But that

was not the only or main factor. I don't consider the SVR applied was significantly outside the SVR charged by other lenders – and several lenders charged a higher SVR.

From my experience, I'm not aware that lenders set SVRs to encourage borrowers to switch to fixed rate products. And I am only looking at the SVR on this mortgage – not what other lenders did. But there was no requirement for the SVR to be set to be competitive

SVRs will usually be set higher than fixed rate products. That reflects the costs to the lender of funding the different types of interest rate products and also the greater flexibility offered by SVRs, where there are no early repayment charges.

The level of SVR is also likely to reflect the level of risk. While lower rates might be available on the market, it seems unlikely that Mr S would have qualified for such rates in view of his credit history. The SVR is in line with other lenders in this area of the market – and is not the highest.

Overall, I don't consider that there was any unfairness in the way the SVR was set. It has been set in line with the terms and conditions of the account.

2. Topaz was wrong to adopt NRAM's SVR – by doing so it had fettered its discretion.

Mr S's representative said Topaz's discretion to set the SVR was subject to an implied term that it would not be exercised dishonestly, for improper purpose, arbitrarily, or in a way that no reasonable lender acting reasonably would do. Topaz had fettered its discretion by simply retaining the NRAM SVR. If it had applied its discretion properly it could not have set the SVR as high as it did.

I have not seen any persuasive evidence to show any relevant factors in setting the SVR had changed on the transfer to Topaz. I'm not aware of any factors that would have compelled Topaz to vary the SVR.

The terms and conditions of the mortgage allowed Topaz to "reduce the SVR at any time". So Topaz had a wide discretion to reduce the interest rate. But there was nothing in the terms and conditions that set out when it must do so. And I've already found that the SVR was set fairly and in line with the SVR before Topaz took over the mortgage.

Following reductions in the base rate in March 2020, Topaz reduced the SVR from April 2020. So it was not passively or arbitrarily allowing the SVR to remain at the same level set by the previous lender. It actively applied its discretion, even though there was no specific requirement for it to do so. I haven't been given any persuasive evidence or reasons why it would have been obliged to do so earlier.

I don't consider Topaz acted unfairly by maintaining the SVR charged by the previous lender until April 2020.

The evidence I have shows that the loyalty discount was applied to Mr S's mortgage from November 2016. I am satisfied that under the terms of the mortgage offer, the lender was only required to apply the discount if the mortgage was up to date. So I don't consider there was any error in not applying it sooner. And it acted fairly by applying the discount, even though Mr S remained in arrears.

### **My final decision**

My final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 12 March 2024.

Ken Rose  
**Ombudsman**