

The complaint

Mrs W and Miss W complain about their second charge mortgage (secured loan) with Mars Capital Finance Limited. They don't think it's treated them fairly when they've experienced financial difficulty, in charging fees or in the customer service it's provided.

What happened

Mrs W and Miss W, who are mother and daughter, have a mortgage with Mars Capital. They took the loan out in 2007, borrowing around £65,000 on a repayment basis. The original lender is no longer in business and ownership of the loan has changed on several occasions, most recently to Mars Capital in 2019.

During the early years of the loan, Mrs W and Miss W missed monthly payments, or underpaid, and the loan balance didn't reduce as it should. By 2016 the loan balance was still around £65,000 as a result – because the capital hadn't reduced as expected, more interest had been charged.

More recently Mrs W and Miss W have largely made the monthly payments, and have from time to time made overpayments. But by the time of this complaint in early 2023 the loan balance was around £45,000 with the term due to end in October 2023. Around £20,000 of this was arrears and interest on arrears.

Mrs W and Miss W have complained to Mars Capital before. They complained that contact from Mars Capital was causing upset and stress – particularly letters about a failed payment arrangement. They also complained about an issue with bank details on their direct debit and about calls not being returned. Mars Capital upheld their complaint and offered £200 compensation. It confirmed Mrs W and Miss W had a payment arrangement to pay their monthly payment plus £90 towards the arrears. It reminded them that payments should be made by the last working day of each month. Mrs W and Miss W didn't refer their complaint to us at that time.

In January 2023, Mrs W and Miss W made a further complaint. They said they didn't think their account had been handled fairly. They also complained about poor customer service and failures to return calls. Mars Capital said it had handled the account fairly, including charging arrears fees appropriately. But it agreed it hadn't always returned calls as it should have done and offered £250 compensation.

Our investigator said we could only consider the period since the previous complaint in 2020. He said that Mars Capital had made a fair offer of compensation, but that it should also remove all arrears fees charged in that period from the account. Mars Capital didn't agree and asked for an ombudsman to review the complaint.

I issued a provisional decision setting out my thoughts on the complaint.

My provisional decision

I said:

“First of all I’ve thought about what we can consider as part of this complaint. I note that a previous final response was issued in 2020. A final response gives a time limit of six months to refer a complaint to us and Mrs W and Miss W didn’t do so. However, I don’t think that means that we can’t consider this complaint – because this complaint isn’t the same as the previous one. Both complaints were about customer service issues. But the 2023 complaint was also about fees and charges added to the account – this wasn’t something addressed in the 2020 final response. So the 2020 final response doesn’t make that part of this complaint out of time.

There is another time limit applicable to complaints – that a complaint should be made within six years of the date of the event complained of, or (if this gives more time) within three years of when the complainant knew or ought reasonably to have known of cause for complaint. Fees and charges added to the balance were set out in letters and statements, so I think Miss W and Mrs W would have been aware of cause for complaint about that at the time they were added. I’ve also not seen any exceptional circumstances which would allow me to set aside the time limits. That means I can only consider fees and charges added to the balance within the six years leading up to this complaint being made in January 2023.

Because of when it was taken out and because of the initial loan amount, this is not a regulated loan. So the rules of mortgage regulation don’t strictly apply here. But nevertheless I’ve taken them into account as representing good practice in the management of lending secured over residential property. I’ve also taken into account the Financial Ombudsman Service’s longstanding approach to arrears fees in secured lending (whether regulated or not).

In summary:

- The amount of an arrears fee should be no more than the fee set out in the loan agreement or associated tariff of charges, and also should be a reasonable estimate of the cost of additional work involved in managing an account in arrears. An arrears fee is a charge for the extra work a lender needs to do, it is not a penalty or fine for missing a payment.
- Where an account is in arrears, the contractual payment is not made, and the lender actually carries out additional work in managing the account as a result (such as contacting the borrower to discuss why payment wasn’t made), an arrears fee is likely to be fair and reasonable.
- However, even if an account is in arrears, an arrears fee is unlikely to be fair and reasonable where that month’s contractual payment – or some other payment agreed by arrangement – is made, or where even if that is not the case the lender doesn’t carry out any additional arrears management work.

With those principles in mind, I’ve considered the fees and charges added to the loan balance in the six years leading up to Mrs W and Miss W’s complaint.

While the account was with a predecessor lender, there were only three small fees added in 2017 and 2018. The transaction list refers to these as “sundry fees”. There is no other explanation or justification given and in the absence of an explanation as to what these were for, I’m minded to say they should be refunded.

When the account moved to Mars Capital in 2019, it took a different approach to applying fees and charges. The account was in longstanding historic arrears. So Mars Capital automatically applied an arrears fee at the start of each month, but

removing it back off the account at the end of the month if payment was made during the month.

I don't think this is the appropriate approach to have taken. An arrears fee should not be automatically applied at the start of a month by default because of historic arrears. It should only be added where it is justified by the conduct of the account in that month.

I note that in most months Mars Capital did remove the automatic arrears fee at the end of the month. The transaction history appears to suggest that the arrears fees are non-interest bearing. But when it replies to this provisional decision Mars Capital should confirm whether that is the case. If it is, there is no detriment from automatically adding arrears fees at the start of the month and then removing them at the end. But if interest is charged on the arrears fees, that would mean Mrs W and Miss W have been charged more interest than they would have been had the fees never been added rather than being added and removed. If that is the case, Mars Capital should re-work the account to remove all interest charged on arrears fees as a result of them being added at the start of the month rather than the end.

I've then gone on to think about the fees which were added and not removed, and whether it would be fair and reasonable to expect Mars Capital to remove them now. I've set out my thoughts on that in the table below.

Date of fee	Description	Amount	Should fee be removed?	Reasons
26/4/17	Sundry fees	£12	Yes	No explanation given for charging
26/2/18	Sundry fees	£12	Yes	No explanation given for charging
20/3/18	Sundry fees	£10	Yes	No explanation given for charging
1/9/19	Arrears fee (not reversed but payment made 27/9/19)	£40	Yes	Payment greater than contractual payment made that month
1/11/19	Arrears fee (no payment that month)	£40	Yes	No evidence of work done (other than automated letter) to contact Mrs W and Miss W in November or December to see why November payment not made
1/1/20	Arrears fee (no payment that month)	£40	No	Attempts made to contact Mrs W and Miss W to find out why direct debit had been cancelled

1/5/20	Arrears fee (no payment that month)	£40	Yes	No evidence of work done (other than automated letter) to contact Mrs W and Miss W in May or June to see why May payment not made
1/8/20	Arrears fee (not reversed but payment 31/8/20)	£40	Yes	Payment in full made 31/8/20
1/9/20	Arrears fee (not reversed – part payment made 28/9/20)	£40	No	Payment not made in full. Discussion with Miss W about reasons for reduced payment
1/12/20	Arrears fee (no payment that month)	£40	No	Discussion with Miss W about circumstances in January 2021. Payment deferral agreed for January to March
1/5/21	Arrears fee (no payment that month)	£40	No	Discussion with Miss W in June about missed payment and payments going forward
1/8/21	Arrears fee (no payment that month)	£40	No	Discussion with Miss W in September about missed payment and payments going forward
1/10/21	Arrears fee (no payment that month)	£40	No	Discussions about payments and income and expenditure
1/11/21	Arrears fee (no payment that month)	£40	No	Discussions about payments and income and expenditure
1/3/22	Arrears fee (partial payment made that month)	£40	No	Discussion about issues with direct debit and alternative payment methods
1/8/22	Arrears fee (partial payment made that month)	£40	No	Unsuccessful attempts to contact Mrs W and Miss W
1/2/23	Arrears fee (no payment that month)	£40	Yes	No evidence of work done in response to missed payment

The fees I've set out above should be refunded, together with interest charged on them, with the outstanding balance being reduced accordingly.

I think Mars Capital's offer of £250 compensation for not responding to contact requests and not returning calls is fair and reasonable in all the circumstances. I've no doubt this would have caused Mrs W and Miss W some frustration and concern when they were trying to understand the position on their account – particularly as it approached the end of the term.

Since the complaint has been with us, the term has now ended but there is still a substantial outstanding balance. What happens now doesn't form part of this complaint. But whether or not the contractual term has come to an end, Mars Capital has an obligation to continue to treat Mrs W and Miss W fairly and show appropriate forbearance. It will need to carefully consider any proposals they make for dealing with the outstanding balance – thinking about how to do so in a sustainable way. If Mrs W and Miss W are unhappy with any decisions Mars Capital makes, they can make a further complaint about that."

Mrs W and Miss W had no further arguments to make in response to my provisional decision, but said that they continued to be concerned about whether Mars had treated them fairly.

Mars said that it only took over the loan on 13 May 2019, so any fees applied before that were the responsibility of the previous lender and should not be included in this complaint. In respect of fees after that, it said it automatically applies arrears fees if an account is in arrears, but then refunds the fee if the borrower is in an arrangement or makes the contractual payment. It doesn't charge interest on fees.

Mars agreed that the September 2019 arrears fee should have been refunded.

Mars said that it did carry out work in November 2019, including sending messages to Mrs W and Miss W and speaking to them over the phone. In respect of the May 2020 fee, it said there was work done in June. It said that in August 2020, Mrs W and Miss W had not paid the full monthly payment. And it said that in February 2023 the reason it hadn't done any additional work regarding the arrears was because the account was on hold pending a complaint Mrs W and Miss W had made.

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.

I've also considered again the conclusions I reached in my provisional decision in light of the responses from the parties.

It's not for me to tell Mars how to manage its loans. But, in this case, I think its decision to charge fees up-front in every month and then refund them if they later turned out not be justified led to unfairness. Had Mars made an active decision to charge fees where justified, rather than to refund them where unjustified, then the issues I've identified might not have occurred. But I note that Mars has confirmed that at least charging fees in this way does not lead to extra interest.

I've noted that Mars only took over this loan in May 2019. But as the current lender it's responsible for this complaint, and in any case should only collect from Mrs W and Miss W sums that have been fairly charged and that as a result it's fair and reasonable to collect. I

therefore haven't changed my mind about the fees charged before transfer.

In respect of the fees Mars has disagreed should be refunded:

- November 2019 – I agree further work was done, and therefore agree that fee should not be refunded.
- May 2020 – I don't think this fee was justified. There's no evidence of work being done until 30 June.
- August 2020 – I don't agree that Mrs W and Miss W didn't make their monthly payment. They paid the contractual monthly payment in full, though they didn't pay any extra towards the arrears. While this was a breach of an agreed arrangement, the fact remains that Mrs W and Miss W made their contractual payment. I remain of the view that this fee should be refunded.
- February 2023 – I don't think the reason Mars didn't do any further work in respect of the arrears is relevant. The fact is that it didn't, and therefore it's not in my view fair and reasonable to charge for work that wasn't done.

I'm therefore satisfied that it's fair and reasonable to require Mars to refund the fees I've set out.

My final decision

My final decision is that I uphold this complaint and direct Mars Capital Finance Limited to:

- Remove the fees I said should be removed in my provisional decision, reproduced above – with the exception of the November 2019 fee.

This is in addition to the £250 compensation Mars had already offered. If it hasn't done so already, it should pay this sum to Mrs W and Miss W.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs W and Miss W to accept or reject my decision before 15 April 2024.

Simon Pugh
Ombudsman