DRN-4698288

The complaint

Mr A complains that the interest rate Mortgage Express has applied to his mortgage is excessive and unfair. He brings this complaint through a law firm.

What happened

Mr A took out this mortgage with GMAC-RFC Limited in 2005. He borrowed around £190,000 over a 25-year term, on an interest-only payment basis. The interest rate was fixed at 4.55% until 31 December 2007. The SVR at the time Mr A took the mortgage out was 6.49%.

In January 2008 Mr A rescheduled the mortgage. It was changed to a capital and interest repayment basis and a variable interest rate which was the SVR (7.5% at the time) with a discount of 1.76% until 31 January 2010 – giving an initial rate payable of 5.74%. An early repayment charge was payable if the mortgage was redeemed before 31 January 2010. From 1 February 2010 the interest rate payable would be the SVR.

In the meantime, Mr A's mortgage had been transferred from GMAC to Mortgage Express. Mortgage Express was the specialist lending brand of Bradford & Bingley Plc. During the global financial crisis of 2007-2009, Bradford & Bingley collapsed and was nationalised. Mortgage Express remained a separate firm owned by the nationalised Bradford & Bingley, and it stopped offering new mortgage interest rate products. Mr A's mortgage remained with Mortgage Express from then on.

In September 2021, through his representative, Mr A complained to Mortgage Express about the interest rate he had been paying on his mortgage. In summary, he complained that:

- Mortgage Express's SVR has consistently been too high, and excessive when compared to other lenders' SVRs, particularly when Bank of England base rate was 0.5% or less.

- Mortgage Express's discretion to set and vary its SVR was subject to an implied term that it could not be exercised dishonestly, for an improper purpose, capriciously, arbitrarily, or in a way that no reasonable lender acting reasonably would do. In varying its SVR as it had, Mortgage Express had breached both this implied term and the express terms of its mortgage contract with Mr A.

- Mortgage Express stopped offering new interest rate products in 2009, and Mr A was unable to remortgage elsewhere. He had a reasonable expectation that he would be able to take a new interest rate when the discounted rate ended, but was unable to do so – and as a result he has had to keep his mortgage on Mortgage Express's SVR. Mortgage Express should have taken this into account in setting its SVR but did not do so.

- In setting its SVR at the level it had, Mortgage Express had treated Mr A unfairly, in breach of Principle 6 in the Financial Conduct Authority's Handbook, and in breach of Mortgage Conduct of Business rules.

- Mortgage Express should refund interest charged above Bank of England base rate plus 1.5%, and pay Mr A compensation.

Mortgage Express said it had done nothing wrong and it had operated the interest rate on Mr A's mortgage fairly and in line with the mortgage terms. It said the SVR isn't a tracker rate and it had never described it as such. While it doesn't offer new interest rates, there had been no early repayment charge applicable to Mr A's mortgage since 2010 and no other barrier to his remortgaging elsewhere if he wished. It also said Mr A had complained a number of times before about the interest rate he was being charged and it had explained each time how it operated the rate.

Through his representative, Mr A referred his complaint to us. Our Investigator found that he had complained to Mortgage Express before about the fairness of its SVR and the lack of availability of new interest rate products, in 2016, 2017 and 2020, before his legal representative became involved. The Investigator said that Mortgage Express had sent Mr A its final responses to these complaints at the time. Mr A had referred the first complaint about the mortgage interest rate to the Financial Ombudsman Service and we had dealt with it and closed our file in March 2017. But he hadn't referred the other complaints to us within the six-month time limit he had to do so.

The Investigator concluded that this meant we could only consider Mr R's complaint since the date of the last of these final response letters in 2020. He went on to look into the fairness of the SVR Mr A was charged since late 2020, and didn't recommend that the complaint about that be upheld.

Mr A didn't accept that and asked for an Ombudsman's review. The complaint was referred to me, and I issued a decision setting out my jurisdiction in this complaint. I found that the relevant time limits I must apply and Mr A's earlier complaint to the Financial Ombudsman Service mean I can only consider parts of this complaint. I said that I can only consider Mr A's complaint about:

- the fairness of the interest rate he has been charged since 9 September 2020, while bearing in mind earlier rate variations as part of all the circumstances of the complaint; and

- no new interest rate products being available and having no option but to remain on Mortgage Express's SVR from 7 October 2020 onwards.

I then issued a provisional decision about the parts of the complaint I can consider, explaining why I didn't propose to uphold the complaint.

My provisional decision

I said:

> I've now considered the parts of this complaint that I can look into, as set out above. I don't think that Mortgage Express did anything wrong in not offering Mr A a new interest rate after 7 October 2020. There was nothing to say that it had to do so, either in the mortgage offer and terms and conditions, or in law or the rules of mortgage regulation.
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> Mortgage Express didn't offer new rates to any other existing customers either, so in not offering Mr A a rate it wasn't treating him less favourably than other customers. And no early repayment charges applied to the mortgage after the discounted rate ended in January 2010, so Mortgage Express didn't stop Mr A from applying for better rates with other lenders.

I've carefully considered the fairness of the interest rate Mortgage Express charged Mr A. His mortgage was subject to Mortgage Express's SVR with a discount from January 2008 until February 2010, and then to the SVR without a discount from 1 February 2010 onwards. The SVR had reduced between December 2005, when Mr A took out the mortgage on an initial fixed rate, and February 2010, when the discounted rate expired – it had fallen from 6.49% to 4.84%. Bank of England base rate fell further during that period – from 4.5% to 0.5%.

The SVR remained at the same level until 2016. Between 2016 and September 2021, when Mr A made this complaint, the SVR varied at the same time, and by the same amount, as Bank of England base rate.

In changing the interest rate from time to time, Mortgage Express was limited by the terms of the mortgage contract. I've seen copies of the terms and conditions which applied when Mr A took out his mortgage on the initial fixed rate in 2005, as well as the terms and conditions which currently apply (the ones Mr A and Mortgage Express agreed to when Mr A took out the discounted rate product in 2008). There's a term in both sets of terms and conditions which says that Mortgage Express could only vary the interest rate in certain circumstances.

There's nothing in the mortgage offer or in either set of terms and conditions to say that the SVR must track Bank of England base rate, with or without a margin. That said, in the limited period I can consider between 9 September 2020 and Mortgage Express's final response to this complaint on 1 November 2021, neither the SVR nor Bank of England base rate changed.

I've also thought about whether the SVR was set at a fair level at the start of the period that's in time. In order to do so, I've taken account of historic variations to the SVR, which – from the starting point of when Mr A took the mortgage out – cumulatively led up to the rate he was charged from 9 September 2020 onwards. That's because if one of those earlier changes wasn't made in accordance with the contract, for example, it might not be fair to charge an interest rate from 9 September 2020 which relied – in part – on that earlier variation.

In making the changes to the SVR it made from when the mortgage was taken out to when it reached 4.84% in late 2008 – after which the only other changes before 9 September 2020 reflected changes to Bank of England base rate – Mortgage Express has told us that it relied on the condition which provided for it to vary the SVR to reflect actual or anticipated changes in the cost of funding its mortgage lending business. That condition was included in both relevant sets of terms and conditions applicable to Mr A's mortgage. Mortgage Express has given us detailed information about the relevant costs. I'm satisfied it's appropriate to receive that information in confidence, as permitted by our rules, subject to providing a summary of it.

In summary, the information shows that Mortgage Express was funded by its parent company, Bradford & Bingley, in the form of loan facilities. Bradford & Bingley, before its collapse and nationalisation, predominantly raised funding on the wholesale markets. These wholesale market funding costs were generally driven by or related to the London Interbank Offered rate (LIBOR), not the Bank of England base rate. Before the financial crisis, LIBOR and base rate were broadly comparable. But during the financial crisis there was a significant dislocation between LIBOR and base rate, such that reductions in base rate weren't matched by corresponding reductions in LIBOR – and, therefore, reductions in Bradford & Bingley's cost of wholesale funding.

> This divergence meant that while Mortgage Express's SVR reduced (reflecting the reductions in LIBOR), it didn't reduce by as much as base rate. This was the case across the mortgage industry, not just for Mortgage Express's SVR.
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> Following Bradford & Bingley's collapse, it was less exposed to movements in the wholesale markets and became primarily government funded. There were certain conditions and costs associated with its government funding – which in turn influenced the funding it, as the parent company, was able to provide to Mortgage Express.
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> Having considered all this information, I'm satisfied that when Mortgage Express made changes to the SVR between 2005 and 2008, it did so relying on the condition that provided for it to do so to reflect actual or anticipated changes in the cost of funding its mortgage lending business. I'm further satisfied that it was entitled to rely on that condition, including in reducing the SVR but increasing the margin over base rate, because the cost of funding its mortgage lending business was in fact changing, and the changes to the SVR reflected the changes to the cost of funding its mortgage lending business. It's true that Mortgage Express ceased to be an active mortgage lender, seeking out new business. But it still operated a mortgage lending business in respect of its existing loan book, which included Mr A's mortgage.
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> It's also important to note that the mortgage conditions give Mortgage Express the power to vary the interest rate, but they don't create an obligation to vary it. In other words, Mortgage Express has the power to change the SVR – but only if certain conditions are met. If those conditions are not met it has no power to change the SVR – and even if they are met, it is not obliged to change the SVR.
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> I don't accept Mr A's representative's argument that Mr A had a reasonable expectation that the SVR would always be at 1.5% or a similar margin above Bank of England base rate. That's not in the mortgage offer or terms and conditions, and I've seen no evidence of such a policy or, if there was one, that it applied to Mr A's mortgage. Mr A's representative has referred to an archived webpage, but that refers to Mortgage Express's variable interest rate products, not its SVR. It also pre-dates the financial crisis. I've seen nothing to indicate that GMAC made any such commitment, and Mr A can't have relied on something Mortgage Express said when he originally took out his mortgage with GMAC, a different lender.
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> Mr A's representative has also said there is an implied term that Mortgage Express shouldn't exercise its power to vary the interest rate dishonestly, for an improper purpose, capriciously, arbitrarily, or in a way that no reasonable lender acting reasonably would do. I've explained why I've found that Mortgage Express acted fairly in varying its SVR during the period I can consider, and in reaching my conclusions I've also kept in mind the Unfair Terms in Consumer Contracts Regulations, as well as the relevant rules about mortgage lending and FCA requirements. I don't think Mr A's representative's argument about an implied term adds anything substantive for me to consider.
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> In all the circumstances, I'm satisfied that Mortgage Express acted in line with the mortgage terms in varying the SVR as it did, and I don't consider that it applied interest to Mr A's mortgage unfairly for the period I can consider.

I invited Mr A and Mortgage Express to let me have any more evidence or arguments they want me to consider before I make my final decision. Both parties said they had no further submissions to make.

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.

Having done so, given that neither party has added anything more for me to consider, I find no basis on which to change my provisional decision.

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 A to accept or reject my decision before 23 April 2024.

Janet Millington
Ombudsman