

The complaint

This complaint is about a mortgage Mr and Mrs B hold with Topaz Finance Limited trading as Heliodor Mortgages (Heliodor). There are four broad elements to the complaint, which I've summarised below in my own words. In essence, Mr and Mrs B say:

- the mortgage was mis-sold at the outset in 2005, because they were told at the time that they'd be able to take on another fixed rate when the initial deal expired in 2010;
- they were wrongly advised to switch from capital repayment to interest-only in 2006, as no consideration was given to how the capital would be repaid when the mortgage fell due for repayment;
- Heliodor has unfairly increased the variable interest rate on their mortgage independently from movements in Bank of England Base Rate (BoEBR); and
- Mr B was made to wait an inordinately long time for a phone call he made on 29 March 2023 to be answered.

This is a joint mortgage, and Mr and Mrs B have brought the complaint together. However, all of our dealings have been with Mr B, on behalf of himself and Mrs B.

What happened

By way of a provisional decision dated 8 April 2024, I set out my provisional conclusions on this complaint. The following is an extract from the provisional decision.

"Mr and Mrs B's mortgage started in 2005, with a lender I'll call N. The mortgage was initially on a fixed rate of 5.99% running until October 2010. At that point the mortgage would revert to N's standard variable rate (SVR) unless a new interest rate deal was agreed to take its place. The offer records that the mortgage was arranged on a non-advised basis. That is where a lender (here that was N) doesn't provide any recommendation and it is up to the borrowers to decide if the mortgage is suitable for their needs and circumstances.

The mortgage began on a capital repayment basis but was switched to interest only in 2006; contact notes from the time indicate this was at Mr and Mrs B's request. During 2007, Mr and Mrs B took three separate further advances. The respective offer documents show that all three further advances were capital repayment loans taken – like the original mortgage – on a non-advised basis. The offers also record that in each case, the interest rate that would apply for the life of the loan would be N's standard variable rate (SVR) or SVR minus a fixed percentage.

Since the fixed rate expired on the main mortgage in 2010, no interest rate product has been attached (N had become a closed lender and stopped offering new rate products in 2008). That means that since October 2010, all four loans have been charged interest either at SVR or at a rate that uses SVR as its reference point.

In November 2019, a large tranche of N's mortgage accounts (including Mr and Mrs B's) was transferred to Heliodor. Like N before it, Heliodor is a closed lender; that is, one that administers existing mortgages on their existing terms but does not offer

new loans or new terms for existing loans. However, it is, contrary to what Mr B has claimed, a regulated business. It is regulated by the Financial Conduct Authority (FCA).

Mr and Mrs B started this complaint in March 2023. Heliodor largely rejected the complaint, although it apologised for the long wait Mr B experienced on the phone. The complaint was passed to our service.

Our Investigator didn't think we could consider all of the complaint; he thought the element of the complaint relating to the first mortgage being interest-only with no repayment vehicle had been made too late under the time limits in our rules. He subsequently came to the same conclusion about the mis-selling aspect. As far as the interest rate component was concerned, the Investigator's opinion was that our remit was confined to looking into movements in the interest rate between March 2017 (six years back from the start of the complaint in March 2023) and May 2023 (when Heliodor provided its final response to the complaint).

When the Investigator then looked into movements in the interest rates Heliodor had charged during the relevant period, he wasn't persuaded that Mr and Mrs B had been treated unfairly.

Mr and Mrs B asked for the complaint to be reviewed by an ombudsman. By way of a jurisdiction decision dated 2 April 2024, I confirmed that my power to consider this complaint is confined to the following:

- movements in the SVR charged on Mr and Mrs B's mortgage between March 2017* and May 2023; and
- the amount of time Mr B was kept waiting on the phone on 29 March 2023.

* In order to consider what is fair and reasonable in all the circumstances, I need to look at the impact of what may or may not have contributed to those charges – including things that happened before March 2017 but which influenced the rate charged after March 2017. But in the event I find something unfair about what happened before March 2017, I can only consider its impact on the interest charged after that date – and therefore any redress I might award would only cover interest charged after that date.

What I've provisionally decided – and why

I'll start with some general observations. We're not the regulator of financial businesses, and we don't "police" their internal processes or how they operate generally. That's the job of the Financial Conduct Authority (FCA). We deal with individual disputes between businesses and their customers. In doing that, we don't replicate the work of the courts.

We're impartial, and we don't take either side's instructions on how we investigate a complaint. We conduct our investigations and reach our conclusions without interference from anyone else. But in doing so, we have to work within the rules of the ombudsman service, and the remit those rules give us.

I've considered all the available evidence and arguments in order to decide what's fair and reasonable in the circumstances of this complaint. Having done so, these are my conclusions, and the reasons for them.

Movements in the SVR charged on Mr and Mrs B's mortgage between March 2017 and May 2023.

The starting point here is the respective agreements Mr and Mrs B entered into for the mortgage and further advances. In all cases, the rate Heliodor (or N before it) was permitted to charge during the period under consideration in the absence of a separate interest rate product was set by reference to its SVR. In the case of the mortgage, that was SVR, and SVR minus 0.25% thereafter; for the further advances it was SVR minus a specified percentage.

Meanwhile, N had stopped offering new interest rate deals before the mortgage reverted to an SVR-based rate in 2010. That being the case, I'm satisfied that the interest rates that Heliodor was permitted to charge under the terms of the mortgage and secured loan during the period I can consider were either SVR or discounted rates using SVR as their reference point.

One of the considerations that I am required to take into account is relevant law. I consider that the application of the Unfair Terms in Consumer Contracts Regulations (UTCCRs) to the relevant terms in this case falls into that category of relevant law. The way the UTCCRs apply to the relevant terms of Mr and Mrs B's mortgage contract is ultimately a matter for the courts. But they are a relevant consideration I must take into account when determining what is fair and reasonable in all of the circumstances of this case.

The crux of this is whether any of the terms, contrary to the requirements of good faith, cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. As part of this, relevant considerations are:

- the extent to which the terms are sufficiently clear and transparent;
- the extent to which there are any significant barriers imposed by Heliodor (or N before it) to Mr and Mrs B being able to exit the contract.

As regards clarity and transparency, I accept that it's possible a court may find the terms to be unfair under UTCCR but this in itself is not determinative of this complaint. I also need to consider whether the application of these terms has led to Mr and Mrs B being treated unfairly. And for the reasons set out above, I don't think this is the case.

At a general level, interest variation clauses such as those that applied to Mr and Mrs B's mortgage 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, by 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 cost of funding. A reversionary rate also permits lenders to provide for future changes that justify increases in the rate, and a lender's own costs of funds are by nature difficult to foresee.

The time period I'm looking at (March 2017 to May 2023) followed on from a time of significant change in the wider market as a result of the financial crisis in 2008/09.

This had a long-term impact on the funding costs of businesses and was reflected in changes to a number of lenders' interest rates charged across the market at the time and subsequently. It's also what led to N becoming a closed lender in the first place.

I'm also mindful that the FCA has noted the adverse impact the financial crisis had on lenders' costs during that period, and that it hasn't seen that SVR variation terms have generally been relied on unfairly to cause widespread detriment to consumers (see for example the May 2018 Guidance Consultation GC18/2 Fairness of Variation terms in financial services consumer contracts under the Consumer Rights Act 2015 paragraphs 2.8 to 2.10).

N has provided the Financial Ombudsman Service with detailed information about the reasons why it varied its SVR in the way that it did during the period leading up to March 2017, and then up to November 2019 when it transferred the mortgage to Heliodor. The information we've received is commercially sensitive, so can be treated as confidential. The information has been reviewed in line with the mortgage documentation, relevant law and regulations.

I've considered whether Heliodor (and N before it) acted fairly overall. Having done so, I'm satisfied the SVR was varied in line with the mortgage terms and conditions and that Heliodor (and N before it) exercised those terms fairly. This means that I'm satisfied neither Heliodor nor N before it overcharged interest on Mr and Mrs B's mortgage account between March 2017 and May 2023.

Whilst BoEBR had reduced significantly leading up to this period, the costs to lenders of funding their businesses changed, as did their prudential requirements. These are made up of several factors that are not directly linked to BoEBR. There was a substantial increase in risk to all lenders before and during that period, and that led to them having to mitigate that risk in different ways. So, with none of Mr and Mrs B's mortgage accounts being on an interest rate product that tracks BoEBR movement directly, there are objectively justifiable reasons why Heliodor would not necessarily have always reduced the applicable rate at the same level as the reduction in BoEBR.

That aside, it's relevant to note that even after the rapid sequence of increases in BoEBR seen during 2022 and 2023, the margin between BoEBR and Heliodor's SVR is currently *lower* than it was when Heliodor took the mortgage over from N. In the same period that BoEBR went up incrementally by 3.50%, Heliodor increased its SVR incrementally by 2.70%. That means that during the time it has held Mr and Mrs B's mortgage, Heliodor has not passed on all of the increases in BoEBR to its borrowers.

Overall I am not persuaded there is any basis to say that the variations Heliodor (or N before it) made to its SVR between March 2017 and May 2023 resulted in Mr and Mrs B being charged an unfairly high rate of interest on their mortgage during the period I can consider. Nor does the evidence lead me to conclude that the interest rate applied during that period was unfair for any other reason.

That leaves the question of whether Heliodor (or N before it) placed any barriers in the way of Mr and Mrs B being able to exit the contract. Being on SVR (or a discounted rate using SVR as its reference point) meant that Mr and Mrs B's mortgage wasn't subject to an early repayment charge in the event they repaid the mortgage, whether that was the result of selling the mortgaged property or re-financing it with another lender.

I accept it's possible that there may have been difficulties for Mr and Mrs B to do that as a result of their wider financial circumstances, and if that was the case, then I can understand their frustration. But it's not something I could fairly hold Heliodor (or N before it) responsible for.

The amount of time Mr B was kept waiting on the phone on 29 March 2023

Being kept waiting on the telephone when trying to contact a business is irksome and annoying; of that, there's no doubt whatsoever. Having no regulatory power means it's not within my remit to order Heliodor to upgrade its phone system or add more staff to its call-handling function to cope with periods of high demand.

What I can do is look at how Heliodor responded to the complaint from Mr B that he'd been kept waiting so long on 29 March 2023. Where someone has been kept waiting longer than they reasonably should have been, I'd expect to see an apology from the business, and Heliodor provided one in its final response. I don't think it needs to do more than that. Whilst undoubtedly annoying for Mr B, I'm not persuaded the delay was so serious that it warrants a payment of compensation."

I gave the parties two weeks to comment on the provisional decision; that time has now passed. Heliodor replied confirming it had no further comment to make. Mr and Mrs B haven't responded. As the provisional decision was sent to the same email address they have used to correspond with us throughout this case, I'm satisfied the reason for them not having replied isn't because they haven't received it.

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 considered afresh everything that both parties have said and provided, I won't be departing from my provisional conclusions.

My final decision

My final decision is that I don't uphold this complaint or make any order or award against Topaz Finance Limited trading as Heliodor Mortgages.

My final decision concludes this service's consideration of this complaint, which means I'll not be engaging in any further discussion of the merits of it.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs B to accept or reject my decision before 21 May 2024.

Jeff Parrington

Ombudsman