

## The complaint

Mr and Mrs D complain about the interest rate Mortgage Agency Services Number Five Limited (MAS5) have charged on their mortgage. They complain the unfair interest rate has meant they were unable to switch to a repayment mortgage. They've now reached the end of the mortgage term and MAS5 are taking legal action to repossess the property.

## What happened

In August 2007 Mr and Mrs D took out a repayment mortgage with a term of 15 years. The mortgage offer said that a fixed rate of 5.99% would apply until 30 September 2009. From 1 October 2009, the rate that would apply would be the standard variable rate (SVR) (which was 7.74% at the time) for the remaining term of the mortgage. In September 2007 the mortgage was transferred to MAS5. And in October 2007 Mr and Mrs D asked for their mortgage to be converted to interest only, which was agreed.

In 2021 Mr and Mrs D complained about the interest rate MAS5 had applied to the mortgage, and the increases that had been made over the years. They contacted our service about the complaint at the time, but the complaint was closed as they didn't provide the information we'd asked for to allow us to progress the complaint.

The mortgage term came to an end in August 2022 and informal term extensions were agreed until 28 June 2023. Mr and Mrs D asked MAS5 to extend the term of their mortgage again for another year. MAS5 declined the request and instructed solicitors to start legal action to take possession of Mr and Mrs D's property. Mr and Mrs D complained.

MAS5 sent their final response letter on 13 July 2023. They said a complaint about the interest rate charged more than six years ago had been made out of time. They also said they had issued a final response letter on 27 April 2021 addressing Mr and Mrs D's complaint about the interest rate and the eligibility criteria for a re-mortgage. As such, they would not give our service consent to consider Mr and Mrs D's complaint about the interest rate charged before 27 April 2021. MAS5 said the changes made to the rate in 2009, 2011 and 2012 were made to reflect a change which had occurred, or which MAS5 reasonably expected to occur, in the cost of funds used in their mortgage lending business, in accordance with the terms and conditions. All other changes to the rate have followed changes to the Bank of England base rate.

MAS5 also said they're no longer an active lender which means they don't accept new customers or offer existing customers alternative interest rates or products. They also said Mr and Mrs D were not eligible for an internal re-mortgage with a different lender in the banking group because the mortgage term ended in August 2022, and the criteria is that there must be a minimum of six months left on the term.

MAS5 said that it wasn't possible to offer Mr and Mrs D a term extension, payment type conversion or a new mortgage product on their existing mortgage with the same terms and conditions.

Mr and Mrs D referred their complaint to our service. They said the cumulative effect of the unfairly high monthly charges from 2011 onwards had contributed to their worsened financial position which meant they were never able to switch to a repayment mortgage. They said they were looking to extend the mortgage at a fair fixed interest rate because due to their age and health problems, they cannot be forced out of their house.

As MAS5 had not agreed to a term extension, in August 2023 Mr and Mrs D put their house on the market for sale.

MAS5 said they did not give our service consent to consider Mr and Mrs D's complaint about events that took place before the final response was issued in April 2021. They also said they'd requested for the court hearing scheduled to be adjourned generally with liberty to restore to allow us to investigate the complaint.

One of our Investigators looked into things and explained that our service only had the power to consider Mr and Mrs D's complaint about the interest rate charged after 27 April 2021, and their concerns about how MAS5 treated them at the end of the mortgage term.

The Investigator went on to look at the merits of Mr and Mrs D's complaint that we had the power to consider. She looked at the history of the interest rate Mr and Mrs D had been charged on their mortgage in order to decide whether MAS5 had charged them fairly from 27 April 2021 onwards. She found that when the mortgage was transferred to MAS5 from the original lender, one of the terms of the transfer agreement was that the SVR charged on the mortgage would not be more than 2% above the Bank of England base rate. MAS5 had referred to this agreement as the restrictive covenant. That restrictive covenant came to an end in 2009.

She found that whilst MAS5 had said they'd increased their SVR in 2009, 2011 and 2012 as a result of an increase in their costs of funds, the evidence provided showed that MAS5's costs of funds weren't increasing at that time. Whilst she didn't have the power to consider Mr and Mrs D's complaint about those specific increases as that was out of time, she did think those increases that MAS5 made were not made for reasons permitted under the terms and conditions, and they did impact the fairness of the SVR Mr and Mrs D were charged from 27 April 2021 onwards, as the level of the SVR charged was the cumulative history of all changes that went before.

The Investigator thought it wasn't fair and reasonable for MAS5 to charge Mr and Mrs D interest after 27 April 2021 that reflected the 1.25% increases in 2011 and 2012. But she didn't think it would be fair to reach the same conclusion about the 2009 increases, because that would have had the effect of continuing the benefit of the restrictive covenant after it ended and put Mr and Mrs D's mortgage on a lower interest rate than they could have expected from the operation of their mortgage terms and conditions alone. As a result, she said removing the effect of the 2009 increases would result in over-compensation. The Investigator didn't think any of the changes made to the SVR after 2016 were unfair.

To put things right the Investigator said that MAS5 should re-work Mr and Mrs D's mortgage account as if the interest rate charged after 27 April 2021 was 1.25% lower than it was from time to time. They should also ensure the interest rate was reduced by 1.25% going forwards – though MAS5 could continue to vary the interest rate in the future if permitted to do so by the terms and conditions. She said that MAS5 should treat the resulting overpayments Mr and Mrs D made each month as overpayments reducing the mortgage balance. She said it wouldn't be fair and reasonable to refund the overpayments made to Mr and Mrs D because the mortgage term has expired, and the entire capital is repayable. So the redress should be used to reduce the balance owed.

In respect of Mr and Mrs D's concerns about how MAS5 had treated them at the end of the mortgage term, the Investigator said MAS5 had engaged with Mr and Mrs D about their plans to repay the mortgage, and should provide forbearance before proceeding to repossession, including allowing Mr and Mrs D reasonable time to market and sell their property.

In addition to re-working the mortgage account to reflect the unfair interest rate rises, the Investigator also recommended MAS5 paid Mr and Mrs D £150 for the trouble and upset caused.

MAS5 responded and disagreed that the 1.25% reduction should be applied beyond November 2022. They said their decisions not to pass on the Bank of England base rate increases between December 2021 and November 2022 balanced out the increases in 2011 and 2012 that the Investigator found were unfair. They said in December 2021, the base rate increases were not passed on immediately. And then in August and September 2022, base rate increased by 0.5% each time but MAS5 chose not to pass on those increases to their SVR customers. In November 2022 base rate increased by 0.75% and MAS5 took the decision to only pass on 0.38% to their SVR customers. That meant a total of 1.37% was not passed on to MAS5 customers in 2022 despite MAS5 having the right under condition 3.1(a) of the terms and conditions to pass all of those increases on. That 1.37% exceeds the 1.25% reduction the Investigator said they should make to the rate.

MAS5 also said the Investigator should consider the passage of time that had passed between the interest rate increases in 2011 and 2012, and the period of time that fell within our service's jurisdiction to consider (from 2021 to date). They said arguably, the increases that took place in 2011 and 2012 had little causative effect on the rate Mr and Mrs D were paying from 2021 onwards, particularly in light of the decisions made in 2022 as mentioned above. MAS5 made an offer to settle Mr and Mrs D's complaint on the basis that the 1.25% reduction in the rate would be made from 27 April 2021 to the end of November 2022.

Mr and Mrs D said that they agreed with the overall outcome that MAS5 had not acted fairly but felt the whole period of the mortgage needed to be taken into account. They said they had a written agreement with the original lender that said the interest rate would not be more than 1.99% above Bank of England base rate. That should take precedence over the restrictive covenant. They said if we looked back to the point they started paying the SVR, they've been overcharged more than £60,000.

Mr and Mrs D said there were exceptional circumstances that prevented them from raising a complaint earlier. They had an immediate family member in hospital for several weeks in 2012 which required regular visits and home care and support after discharge. They also asked how our service could expect borrowers to realise that the 2011 and 2012 rate rises MAS5 made were unfair at the time, when our service didn't uncover that information until much later. They said even though they didn't complain within the time limits, there are people that did, and because those complaints have been upheld, it is only fair that applies to them too. The time limits aren't advertised prominently enough so consumer awareness is low. They said our service should be protecting vulnerable members of the public in situations like this regardless of the timescale.

Our Investigator considered the additional comments made by the parties, and explained that she was still satisfied she had applied the time limits correctly, considering the circumstances of this complaint. She also considered what MAS5 had said about the calculation of redress. She said she thought that had the SVR been 1.25% lower than it was prior to August 2022, MAS5 would have likely passed on the base rate increases as allowed under the terms and conditions of Mr and Mrs D's mortgage. That would have resulted in the SVR ending up in much the same position as it actually was from November 2022 onwards. The Investigator was satisfied that as a result, from November 2022, the SVR was no longer higher than it should have been and said that to put things right, MAS5 should re-work Mr and Mrs D's mortgage as if the interest rate charged after 27 April 2021 was 1.25% lower than it was from time to time until 30 November 2022.

Mr and Mrs D said they did bring their complaint to us in 2021, so they met the six month time limit. They said that in regards to the six and three year time limit rule, they said there is not an 'event' or an 'incident' as such but ongoing grossly unfair activity from 2009 to date which violates the contractual agreement and obligations. They said an ordinary person cannot be expected to realise that the rate rises were unfair with the clarity and resources needed to make appropriate representations. So we should re-consider and apply the six and three year rules more reasonably in their case.

They also said that in 2009 their family was going through a very stressful and emotional time as a result of their son's health issues and their daughters completing university. They did write to MAS5 many times asking for help, and to switch to a repayment mortgage. Mr and Mrs D provided a calculation of what they thought ought to have happened to the mortgage balance had they been charged a fair rate of interest.

I issued a decision which said that our service could, or should, only consider the following parts of Mr and Mrs D's complaint:

- The unfairly high interest rate charged from 27 April 2021 onwards.
- The way MAS5 treated Mr and Mrs D in 2023 when they requested a term extension.

### **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.

#### The interest rate MAS5 charged on the mortgage

MAS5 have made an offer to settle Mr and Mrs D's complaint by re-working their mortgage account as if the interest rate they were charged between 27 April 2021 and 30 November 2022 was 1.25% lower than what MAS5 did actually charge. They say that would put right the higher rate Mr and Mrs D paid as a result of the increases they made to the SVR in 2011 and 2012. They don't think the redress should go beyond November 2022 as from that point, Mr and Mrs D have been charged a rate that is 1.38% less than what it would have been had they decided to pass on the full increases to the base rate that year. Mr and Mrs D dispute that offer goes far enough to put things right. Largely because they disagree with the time period the redress covers – which I've already covered in my jurisdiction decision so won't go into that again here. Instead, I'll focus on whether the offer MAS5 have made is a fair and reasonable way to put things right for the time period we're able to consider.

The offer puts Mr and Mrs D's mortgage account back into the position it would have been in had the increases MAS5 made to the rate in 2011 and 2012 not been made (from April 2021 to 30 November 2022). I've thought about whether they need to go further than that and account for the increases made in 2009 too, but I don't think that would result in a fair and

reasonable outcome. Whilst – like the 2011 and 2012 increases – MAS5 haven't been able to demonstrate the changes they made in 2009 were done in accordance with the terms and conditions of Mr and Mrs D's mortgage, the impact of the restrictive covenant meant the rate had previously reduced to a rate that was much lower than it would have been had the covenant not been in place. And whilst Mr and Mrs D may not have benefitted from the existence of the covenant, as a result of the higher fixed rate they were on for much of 2009, I'm not persuaded that's a result of anything MAS5 did wrong.

That restrictive covenant did not form part of the contract between Mr and Mrs D and the lender, it was an agreement between the two businesses and did not alter the original terms and conditions that Mr and Mrs D agreed to when they took out this mortgage. Mr and Mrs D have said that they did have a written agreement with the lender that the interest rate would not go more than 1.99% above base rate. But they haven't provided any evidence of that. There is nothing in the mortgage offer, or the terms and conditions of Mr and Mrs D's mortgage that linked the interest rate to base rate or any other reference rate. So considering the evidence I have seen, I'm not persuaded such a condition existed.

While MAS5 may not have had any contractual justification for increasing the SVR once the covenant came to an end, I have to take all the wider circumstances into account when thinking about what's fair and reasonable more broadly during the period I can consider. And for the reasons I have given, I am satisfied that directing MAS5 to essentially deduct the 2009 increases from interest charged from April 2021 onwards would provide Mr and Mrs D with a level of compensation that I think goes beyond what is fair and reasonable in view of how long ago the changes were made, and the fact that those increases would not have been necessary had MAS5 been able to vary the rate in line with the terms and conditions Mr and Mrs D agreed to without the covenant in place. To do so would result in the interest rate after 27 April 2021 being lower than Mr and Mrs D could have expected it to be by operation of the mortgage terms and conditions alone, and would result in over-compensation.

I've also thought carefully about the fact MAS5 have only offered to re-work the interest rate charged on Mr and Mrs D's account up to 30 November 2022. If the MAS5 SVR had been 1.25% lower than it actually was, it would have been lower than the SVR charged by other lenders within the group, as well as other lenders in the wider prime mortgage market.

Having considered the evidence MAS5 have provided, I'm satisfied that on balance, if the SVR had been 1.25% lower than it was at the start of 2022, MAS5 would have increased the SVR by more than they did during 2022, by passing on all of the base rate rises. That would have been permitted under the terms and conditions of Mr and Mrs D's mortgage.

However, whilst I'm persuaded that's what MAS5 would have done, I still have to consider whether that would have been fair and reasonable in order to determine whether the offer MAS5 have made is a fair resolution to this complaint. It's important to remember it is not the role of our service to decide what a fair interest rate should be. However, I can determine whether I think MAS5 have acted fairly when considering how to vary the rate they've charged Mr and Mrs D, and the impact that's had on them.

MAS5 have provided evidence of the risk profile of the mortgages they hold in comparison with the banking group's 'prime' mortgages. I'm satisfied that information shows that there is a greater cost to the group when a MAS5 mortgage defaults, and there is also a much higher risk of those mortgages defaulting. I don't think it's unreasonable that MAS5 considered that risk when deciding where their SVR should sit not only in relation to the 'prime' SVR charged by other lenders in the group, but also the wider mortgage market. I'm satisfied that had the SVR been 1.25% lower than it was, and MAS5 had not decided to pass on the base rate

rises in 2022, the resulting SVR would have been significantly lower than not only the group's 'prime' SVR, but also the SVRs charged by mainstream lenders in the wider market.

Under the terms and conditions of Mr and Mrs D's mortgage MAS5 were entitled to increase the SVR to reflect changes in base rate. It's more likely than not, in my view, that if the SVR had been 1.25% lower because the 2011 and 2012 increases had not happened, MAS5 would have passed on the base rate changes in 2022 to move the SVR to a level comparable with other lenders in the group. Therefore, from November 2022, the SVR ended up at broadly the same level it would have been even without the 2011 and 2012 increases.

When considering the SVR Mr and Mrs D have been charged since 27 April 2021 in the round, and the impact of the previous unfair increases that resulted in that rate, I'm persuaded on balance that any previous unfairness was essentially 'put right' by the decisions MAS5 made when they varied the rate in the way that they did in 2022. And so, to instruct MAS5 to make an ongoing reduction to Mr and Mrs D's interest rate when that rate would be much lower than the rate they would actually have been on had MAS5 not done anything wrong, would be putting them in a better position than they ought to have been. To continue the redress beyond November 2022 means that Mr and Mrs D would benefit both from the SVR being lower because of the removal of the ongoing effect of the 2011 and 2012 increases, and also benefit from the SVR being lower because of the decision not to pass on base rate cuts. I don't think it's likely Mr and Mrs D's mortgage would ever have been in a situation where both those things happened, and therefore to require MAS5 to reduce their interest rate as if both had happened would be over-compensation.

As a result, considering the circumstances, I think the offer MAS5 have made is a fair and reasonable way to put this part of Mr and Mrs D's complaint right.

#### Mr and Mrs D's request for a term extension

The term of Mr and Mrs D's mortgage ended in August 2022. As a starting point, it's reasonable that MAS5 expected the outstanding balance to be repaid when it fell due.

Mr D had several conversations with MAS5 in 2021 about his and Mrs D's circumstances, and their plans for repaying the mortgage. There were arrears on the mortgage, but Mr and Mrs D were able to clear them with the help of family and friends. They told MAS5 they had looked at re-financing but didn't think that would be possible as a result of their ages and the lack of equity in the property. So they were looking into selling the house to their daughter.

Throughout 2022 Mr and Mrs D kept MAS5 updated with their plan for their daughter to buy the property, but unfortunately they were having issues with a second charge registered by another lender. They said as a result, their daughter could not get a mortgage until that was resolved. MAS5 agreed to extend the term until 28 June 2023 to give Mr and Mrs D more time to resolve the issues with the second charge on the property, and for their daughter's mortgage application to proceed. Based on the circumstances and what MAS5 knew at the time, I think that was reasonable. MAS5 had also encouraged Mr and Mrs D to seek independent financial advice on multiple occasions.

In 2023 Mr and Mrs D asked MAS5 for another term extension, as their daughter was pregnant, and they didn't want to put any pressure on her to get the mortgage sorted. They asked for another year. By early 2023 the mortgage payments had also become unaffordable for Mr and Mrs D following the increases to the interest rate and so arrears began to accrue again. Mr D told MAS5 he was planning to go and visit family abroad to see if they could lend him money to reduce the balance, which would make the monthly payments more affordable for him.

MAS5 declined Mr and Mrs D's request to extend the term for another year. Having considered the circumstances, I don't think that was unreasonable. I appreciate Mr and Mrs D are in a difficult position. They have an interest only mortgage with no repayment strategy and limited options because of their age and the lack of equity in the property. I'm sorry to hear about the impact Mr D says this issue has had on his health as well. But they were aware that the mortgage term was due to end in 2022, and I'm satisfied they had sufficient time to explore their options for repayment. MAS5 have engaged with Mr and Mrs D and provided reasonable forbearance by allowing them more time to sort a way of repaying the mortgage without them having to move out of their home. But unfortunately, Mr and Mrs D haven't been able to do so.

The monthly payments became unaffordable for Mr and Mrs D when the rates went up in 2023, and as I've explained earlier in this decision, I'm satisfied the rate MAS5 were charging after November 2022 was not an unfair rate. I'm not persuaded it would have been in Mr and Mrs D's best interests to extend the mortgage for another year when they couldn't afford the payments. I also think it's important to note that Mr and Mrs D still hoped that their daughter would be able to secure a mortgage and buy the property at the end of that extension. But there was no guarantee that was going to be successful, particularly given the issues Mr and Mrs D have experienced with the second charge registered with the Land Registry. When Mr and Mrs D asked MAS5 for an extension, they weren't exploring any other options for redemption other than trying to reduce the mortgage balance via a loan from family. As there wasn't a clear plan in place with a realistic timeframe, I'm not persuaded MAS5 were acting unreasonably by declining Mr and Mrs D's request.

I appreciate Mr and Mrs D really don't want to have to sell their home to someone outside of the family as they'd have to move out. But they do need to find a way to repay the mortgage balance in a reasonable timeframe. I note the property has been on the market for nearly a year and I'm unsure if Mr and Mrs D have received any offers. We've also reached the point where it's been a year since Mr and Mrs D requested the term extension, so it may be that their daughter has now made progress with her mortgage application. Whatever the latest position is, it's important Mr and Mrs D are keeping MAS5 updated so they can decide the appropriate next steps. I'm satisfied they've offered appropriate forbearance so far, but am aware there is legal action in the background that is currently on hold. If Mr and Mrs D are able to demonstrate to MAS5 they have a clear plan in place to redeem the mortgage soon (for example, they've accepted an offer and a sale is progressing with a clear timeframe), I would expect MAS5 to allow them a reasonable period of time to see that plan through before resuming legal action.

### **Putting things right**

In order to put things right for Mr and Mrs D, I'm satisfied MAS5 should re-calculate the mortgage using the payments Mr and Mrs D actually made, but with revised monthly payments using the lower interest rate (for the period 27 April 2021 to 30 November 2022). This will result in changes to the arrears balance from time to time, and so MAS5 should also amend their credit files to reflect the revised position. Any overpayments each month should be used to reduce the arrears balance at that time.

If there are any overpayments left after repaying the arrears, MAS5 should treat the resulting overpayments they've made each month as overpayments reducing the mortgage balance, reducing the balance and so the monthly payment in subsequent months. It wouldn't be fair and reasonable to refund the overpayments they've made to Mr and Mrs D, because the mortgage term has expired and the entire capital is repayable, so the redress should be used to reduce the balance owing.

I'm satisfied that being charged a higher interest rate than they should have been would have caused some distress and inconvenience to Mr and Mrs D. Having considered all the circumstances, I'm satisfied MAS5 should pay them £150 to compensate for that in addition to the redress I've set out above. That should be paid to Mr and Mrs D directly unless they tell MAS5 they would like to use it to reduce the mortgage balance.

I appreciate Mr and Mrs D feel that the higher interest rate has prevented them from switching their mortgage to a repayment mortgage, but I'm afraid I'm not persuaded that's the case. In 2021 Mr and Mrs D were unable to afford the monthly payment on an interest only basis. Whilst the rate was 1.25% higher than it should have been at that time, the monthly payments on a repayment mortgage would have been much higher than that. Especially considering that Mr and Mrs D's ages meant extending the term on a repayment basis was unlikely to be a feasible option. So I don't think it would be fair and reasonable to instruct MAS5 to re-work Mr and Mrs D's mortgage as if it operated as a repayment mortgage.

### **My final decision**

Considering everything, for the reasons I've explained, I uphold this complaint and instruct Mortgage Agency Services Number Five Limited to put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D and Mrs D to accept or reject my decision before 17 July 2024.

Kathryn Billings  
**Ombudsman**