

The complaint

1. Mr and Mrs J are unhappy with the mortgage advice they received from Rookery Mortgage Consultants in May/ June 2020. They've said Rookery's failings caused them to incur an early repayment charge (ERC) when they moved home.

What happened

Background to the complaint

2. In early 2020 Mr and Mrs J approached Mr M from Rookery to advise them on a mortgage. Mr and Mrs J were selling their existing property for £909,000 and purchasing a new property for £1.3 million. Mr M was known to Mr and Mrs J as they had previously used his mortgage services.
3. Mr and Mrs J's existing mortgage was with Lender A and it was split into three mortgage sub-accounts. All three sub-accounts had early repayment charges (ERCs) which meant if the existing mortgage with Lender A was repaid during the ERC periods, Mr and Mrs J would incur financial penalties. The total ERC at the time in question was £13,181.46. The ERCs for the two larger sub-accounts were due to end at the end of October 2020, while the third sub-account would be free from an ERC at the end of April 2021.
4. To avoid the ERCs Mr M submitted a mortgage application to Lender A in May 2020 to buy the new property. The application included changes Mr and Mrs J wished to make to their existing mortgage. They wanted to increase the amount they were borrowing by £10,846, bringing the total borrowing to £675,671. The reasons for the additional borrowing were not recorded at the time, but when bringing this complaint, Mr and Mrs J initially told us that the additional borrowing was to help cover the £16,000 cost of a building warranty required to facilitate the sale of their existing property. Mr and Mrs J also wanted to switch as much of the existing repayment mortgage to an interest-only mortgage as they could. Their plan was to use Mr J's work bonuses together with the eventual sale of the new property to repay the capital balance.
5. Making these changes to the existing mortgage meant Lender A, as a responsible lender, had to ensure the new mortgage was affordable for Mr and Mrs J.
6. Lender A's underwriters emailed Mr M on 15 June 2020 setting out that Mr and Mrs J were failing Lender A's affordability requirements by £732 per month. This point had been reached after it was discovered the income Mr J declared on the mortgage application (£192,000 per annum) had in fact been reduced to an annual base salary of £164,000 due to a change in his overall income package. Also affecting the affordability calculation was the fact the household income had also reduced due to income from a buy-to-let property no longer being available at that time, and because Mr and Mrs J were no longer clearing a significant amount of their other outstanding debts (their total outstanding debts at this time were around £79,908). Lender A therefore required some further information to progress the application. Lender A

noted there may have been some scope to extend the term of the mortgage beyond Mr J's retirement age (which could help the affordability calculation), but they would need to have satisfactory proof of retirement income and this was something Mr M needed to discuss with Mr and Mrs J.

7. On the understanding that the mortgage application with Lender A had been declined, a discussion took place between Mr M and Mr J to make an application to a different mortgage lender.
8. On 17 June 2020 Mr M therefore submitted an application to Lender B. The amount of borrowing was increased to £700,999 and it was arranged on a part repayment and part interest-only basis over 18 years. The outstanding balance on the existing mortgage with Lender A at the time of completion was £659,073. The new monthly mortgage payment with Lender B was £956.78 (compared to Mr and Mrs J's existing Lender A monthly mortgage payment of £3,675).
9. On 3 July 2020 Lender B issued the mortgage offer, and completion for the sale and purchase took place in mid-July 2020. Mr and Mrs J paid the ERC to Lender A using funds raised through the new mortgage.
10. Mr and Mrs J then brought a complaint against Rookery for not completing information on the initial application correctly and for giving them assurances that if they complained to Lender A the ERC would be refunded to them. Our investigator did not uphold Mr and Mrs J's complaint.
11. During the course of this complaint Mrs J learned the application with Lender A had not in fact been declined, but was still under consideration subject to further information/ evidence. Mrs J therefore said if they had known this, she and Mr J would have taken steps to meet Lender A's affordability requirements.
12. Later on during the complaint, Mrs J referenced the mortgage market review (MMR) in her submissions.
13. For context the MMR was a review of the mortgage market instigated by the regulator, the Financial Conduct Authority (FCA). The review led to the introduction of new industry rules for dealing with mortgages. These rules came into effect on 26 April 2014. In summary, the changes meant lenders were solely responsible for ensuring mortgages were affordable for customers and, notably, if there were no variations to an existing mortgage it was possible to port an existing mortgage on a like-for-like basis without the lender needing to carry out an affordability assessment.
14. With the MMR in mind Mrs J said she and Mr J would have ported their existing repayment mortgage with Lender A to the new property without making any changes to the existing mortgage – so they would have ported on a like-for-like basis. Mrs J said Mr M should have made them aware of being able to port on a like-for-like basis as it would have allowed them to remain with Lender A, avoid the need for an affordability assessment, and avoid the ERCs.
15. Mr M maintained he had followed instructions to move the mortgage to Lender B so that Mr and Mrs J would not lose out on the property they wanted which he said was their priority. Mr M also said Mr and Mrs J were aware of the need to pay the ERCs in order to change lenders, and he has more recently said they had a strong wish for an interest-only mortgage.

Previous provisional decisions

16. I issued provisional findings about this matter on 26 October 2022, 13 September 2023 and 29 January 2024 departing from our investigator's conclusions and upholding Mr and Mrs J's complaint in part. Following receipt of new evidence (which was an invoice for the building warranty dated prior to either mortgage application, showing the cost of the warranty to be £5,225 – not £16,000), I issued further provisional findings on 18 March 2024 upholding Mr and Mrs J's complaint in full.
17. I will not repeat all the contents of those provisional decisions here as both parties are in receipt of them and they have had the opportunity to comment on them. But I include here a brief summary of these provisional decisions for reference.
18. The earlier provisional decisions recognised failings in Mr M's handling of the mortgage process (I will refer to these in more detail later on), and concluded that on balance, given their needs and circumstances, Mr and Mrs J would more likely than not have still ended up in the position they are in now with Lender B.
19. The new evidence, submitted most recently, altered my understanding of what Mr and Mrs J's needs and objectives were likely to have been, which in turn persuaded me to change my conclusions and issue my provisional decision dated 18 March 2024. That is, I now thought it likely that but for Mr M's failings, Mr and Mrs J would more likely than not have remained with Lender A in the short-term by porting their mortgage on a like-for-like basis. This would have avoided the need for an affordability assessment. Mr and Mrs J would not have been able to switch part of the mortgage to interest-only or increase their borrowing, but it would have avoided the cost of the ERCs. I therefore set out how I thought the matter should be put right.

Responses to my provisional decision dated 18 March 2024

20. Mr and Mrs J accepted my provisional findings and provided some further evidence to show they had paid the invoice for the building warranty prior to either mortgage application to Lender A or Lender B.
21. Mr M strongly disagreed with the provisional findings. He said Mr and Mrs J's real priority – even at the expense of the ERCs – was to change their existing mortgage to interest-only. Mr M referenced a conversation with Mrs J in which he says she impressed upon him the importance of obtaining an interest-only mortgage in the knowledge that it may be necessary to pay the ERC to achieve that aim.
22. Mr M also said additional borrowing was required in order to complete the purchase and included his own calculations to support this.
23. Mr M's calculations were predicated on a purchase price of £1.1 million and took into account that Mr and Mrs J had £79,908 of debt to be repaid. They also referenced fees of £12,000 and relied on Mr and Mrs J's proven available savings being £269,035.
24. Mr M was invited to make further comments about his calculations, in part due to the purchase price in fact being £1.3 million. He was also asked to provide any other evidence or submissions he wished to be considered.
25. Mr M explained the difference between the £1.1 million used in his calculation and the £1.3 million recorded purchase price was because Mr and Mrs J did not have the balance of funds required to complete the purchase. He said an agreement was therefore made with the vendors to defer payment of the £200k balance to a later

date. Mr M maintained Mr and Mrs J's other debts needed to be repaid in order to meet affordability thresholds, so overall additional borrowing was required.

26. In support of his submissions that Mr and Mrs J's overriding preference was for an interest-only mortgage, Mr M submitted another copy of the suitability letter already reviewed by this service. Mr M made no comments about the proposed remedy to put things right, and did not provide any other evidence or submissions for me to consider.

What I've decided – and why

27. I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. To do this, I have taken into account any relevant law and regulations, regulators' rules, guidance and standards, codes of practice and – where appropriate – what is considered to have been good industry practice at the relevant time.
28. Where evidence has been incomplete, inconclusive, or contradictory, I've reached my decision on the balance of probabilities – which in other words means I have based it on what I think is more likely than not to have happened given the available evidence and the wider circumstances.
29. There have been many submissions made through the course of this matter and so the parties should note that in this decision I will only refer to what I consider to be relevant for the resolution of this complaint.
30. To decide a fair and reasonable outcome in this matter I have considered the following questions:
- (a) What were Mr M's regulatory obligations and other responsibilities when dealing with Mr and Mrs J in relation to their new mortgage arrangements?
 - (b) Did Mr M fail to meet his regulatory obligations and other responsibilities as Mr and Mrs J have alleged?
 - (c) If Mr M did fail in meeting his obligations and responsibilities towards Mr and Mrs J, did this cause the loss that Mr and Mrs J are complaining about – or would they likely have ended up in the same position as they did in fact end up in?
 - (d) And if Mr M's failings did cause the loss Mr and Mrs J have described what, in the circumstances, would be a fair resolution for the loss suffered?

What were Mr M's regulatory obligations and responsibilities?

31. As a mortgage broker Mr M is subject to regulation by the Financial Conduct Authority (FCA). The FCA's handbook of rules and guidance for firms includes the business standards expected for day-to-day conduct. Relevant to this matter is MCOB (Mortgages and Home Finance: Conduct of Business sourcebook) which applies to firms conducting regulated mortgage activities and home finance business.
32. It is agreed by both parties that Mr M's mortgage services were engaged to provide Mr and Mrs J with mortgage advice. MCOB 4.7A sets out the rules and guidance for firms giving advice to customers about regulated mortgage contracts.
33. Within these rules and guidance it is explained that a firm must take reasonable steps to ensure the regulated mortgage contract is, or after variation will be, suitable for that customer's needs and circumstances. The firm should take reasonable steps

to obtain from the customer all information likely to be relevant for the purpose of giving advice.

34. MCOB 2.5A.1(R) sets out that a firm must act honestly, fairly and professionally in accordance with the best interest of its customer.

Did Mr M fail to meet any of his regulatory obligations and responsibilities?

35. In the circumstances I do not think Mr M met his regulatory obligations and responsibilities to Mr and Mrs J when he was tasked with giving them suitable mortgage advice.
36. Mr M failed to gather all relevant information about Mr and Mrs J's circumstances – such as Mrs J's income. He also wrongly told Mr and Mrs J that Lender A had declined their mortgage application when it was still under consideration.
37. Further shortcomings included questionable record keeping and provision of information to Mr and Mrs J during the course of their dealings with him in this matter.
38. I think it's fair to say that at the point the application with Lender A was struggling to progress, it would have been good practice for Mr M to have reassessed Mr and Mrs J's needs and circumstances – particularly given their circumstances had changed. It was now apparent Mr M's base salary had reduced and Mr and Mrs J were not receiving their buy-to-let income at this time. Mr and Mrs J were also now no longer repaying all their other debts.

If Mr M did fail in meeting his obligations and responsibilities towards Mr and Mrs J did this cause the loss that Mr and Mrs J are complaining about – or would they likely have ended up in the same position as they did in fact end up in?

39. On balance, I think Mr and Mrs J did suffer a financial loss due to the mortgage advice they received from Mr M. I say this because based on the available evidence and submissions I think they more likely than not would have chosen to remain with Lender A by porting their existing mortgage with no variations to the new property.
40. This matter has turned on what Mr and Mrs J would more likely than not have done if Mr M had reassessed their needs and circumstances following the challenges with Lender A's affordability assessment. To decide what Mr and Mrs J were likely to have done it is necessary to decide what their likely needs and circumstances were during June 2020.
41. As I have said in previous provisional decisions, I have been mindful that Mrs J's submissions in particular have evolved over time and been given with the benefit of hindsight. Mr M's submissions have also been limited. Had Mr M kept better records of these events it would have offered much in terms of better understanding what happened here.
42. Due to this and the limited evidence from May/ June 2020, it has made determining what Mr and Mrs J's likely needs were and what they more likely than not would have done more difficult to decide. I consider this a finely balanced case.
43. I've previously set out that Mr and Mrs J likely had the following competing needs and objectives: to purchase the new property; switch as much of their existing repayment mortgage to interest-only; avoid the cost of the ERCs and borrow additional funds to go towards the £16,000 cost of the building warranty (which as

noted above has since been proven to have been paid in January 2020 for £5,225).

44. The original application to Lender A submitted in May 2020 met these needs and objectives, but as described earlier it became apparent Mr and Mrs J's circumstances had altered so that the change in household income and their other financial commitments were affecting their ability to meet Lender A's affordability requirements.

45. So what then became most important to Mr and Mrs J?

Additional borrowing

46. It has now been brought to light that Mr and Mrs J did not in fact require additional borrowing to pay for the building warranty. This therefore alters the perspective on Mr and Mrs J's needs and circumstances and whether they in fact did require any immediate additional borrowing.

47. In reply to my provisional decision of 18 March 2024 Mr M said he had never known anything about needing to borrow money to pay for a building warranty (despite not disputing this when referenced in earlier provisional decisions). Mr M said the additional borrowing was needed in order to meet Lender A's (and then later Lender B's) affordability requirements because to enable completion of the sale and purchase Mr and Mrs J were required to repay their outstanding debts.

48. I've given this, and Mr M's calculations, careful consideration. In doing so I am mindful that a like-for-like mortgage would have meant the lender did not need to carry out an affordability assessment. With no changes being made to the existing repayment mortgage, and therefore no requirement on the lender to carry out an affordability assessment it meant Mr and Mrs J would not have needed to immediately repay their other outstanding debts. They therefore would not have needed to borrow any additional funds for this purpose. (I will comment later on whether I think Lender A was likely to have agreed a like-for-like mortgage).

49. Because of this I think it's reasonable to say there was no immediate need for additional borrowing.

50. As I've said previously, the details of the balance of funds are not something I have needed to know given completion was successful – so I have not investigated this further. The £200k shortfall (if there was one) would have applied regardless of whether Mr and Mrs J took out a new mortgage with either lender or a like-for-like one with Lender A and so it does not affect the outcome of the complaint.

51. With this in mind, Mr and Mrs J had savings that covered the difference between the sale price of their existing home (£909,000) and £1.1 million. A bank statement shows that on 29 June 2020 (not long before completion) they had funds available to them of £270,398, so this would have covered that difference and the associated costs for completing their mortgage chain.

52. In light of the above, I therefore do not think Mr and Mrs J had an immediate need for additional borrowing in order to complete if the mortgage had been applied for on a like-for-like basis.

Interest only

53. I've considered the suitability letter once more, but it is not disputed that switching as

much of the mortgage to interest-only was a mortgage goal for Mr and Mrs J. Something I've said was not unsurprising given the reduction in Mr and Mrs J's household income and the wish to take advantage of Mr J's bonuses to reduce the capital balance. Taking out an interest-only mortgage would also reduce the monthly pressure at a time Mr and Mrs J were financially stretching themselves to buy the new property.

54. That said, I've previously acknowledged that I think Mr and Mrs J could more likely than not have continued to manage the existing monthly mortgage payment with Lender A. Therefore, if this was then the only variation to the mortgage, it seems likely Mr and Mrs J could have postponed achieving the aim to switch part of the mortgage to interest-only in the short-term until later when the ERCs ended.

Purchasing the property

55. The question of pressure to complete on the sale and purchase has been discussed in previous provisional decisions.
56. Mrs J's submissions on this point are contradictory given she told our service early on during the complaint that around the time the Lender A application was failing, she and Mr J were about to lose their buyers and so in turn would lose their purchase. However, later submissions from Mrs J were that there was no pressure to complete.
57. Mr M's submissions on this point have always been that Mr and Mrs J were under pressure to complete and that they did not wish to lose out on the property they wished to purchase. Mr M said his involvement ensured Mr and Mrs J did not miss out on the property they were very keen to buy.
58. I've considered all the available submissions and evidence on this point, and on balance I've remained of the view there was some pressure on Mr and Mrs J to complete the chain.
59. That said, I am mindful that had a like-for-like mortgage been considered, with no further checks, I think on balance progressing to a mortgage offer with Lender A on this basis was unlikely to have delayed things any more than completing the mortgage application process with Lender B.

ERC

60. As the remaining need and objective, I think it's fair to say that most mortgage customers would have reasonably looked to avoid the cost of the ERC. I therefore think it's reasonable to say that on balance Mr and Mrs J would have looked to avoid this cost if possible.
61. In view of the above, I therefore think this casts a different light on Mr and Mrs J's needs and circumstances in June 2020. It now appears there was no immediate need for Mr and Mrs J to take out additional borrowing in order to complete on their sale and purchase. So the only potential change to the existing mortgage would have been to change it to interest-only – which in the circumstances I think it's fair to say, given their other competing needs, was likely to have been outweighed by avoiding the cost of the ERC. A like-for-like mortgage would have facilitated this.
62. So would a like-for-like mortgage have been possible?
63. On balance I think it would. I think it likely Lender A would have agreed a like-for-like

mortgage. Mr and Mrs J were established, good existing borrowers. There were no issues with the new property as security and the new loan-to-value (LTV) would have reduced Lender A's exposure to risk.

64. Taking everything above into account, I think that Mr M should have reassessed Mr and Mrs J's needs and circumstances in June 2020, including by gathering more information from them as to their demands and needs. Had he done so, I think it more likely than not Mr and Mrs J's more immediate need would have been to focus on avoiding the ERCs as the two largest ERCs were due to expire at the end of October 2020, after which they could have reviewed meeting their need for an interest-only mortgage (and lower mortgage interest-rate).
65. With the removal of the need to borrow additional funds to complete the purchase, I think on balance Mr and Mrs J would have managed a like-for-like mortgage. On balance, for the reasons above, I think Lender A would have agreed this and I think it is something Mr and Mrs J would more likely than not have chosen to do if the option had been presented to them as a suitable recommendation.
66. It is therefore my decision that the recommendation to take out the Lender B mortgage in June 2020 was not suitable for Mr and Mrs J's needs and circumstances at that point in time. This brings me to consider my final question: If Mr M's failings did cause the loss Mr and Mrs J have described what, in the circumstances, would be a fair resolution for the loss suffered?

Putting things right

67. As I set out in my provisional decision of 18 March 2024, this is not a straightforward matter to put right as it is not possible to unwind what has happened. There are many variables at play here such as Mr and Mrs J borrowing significantly more on their new mortgage, on a lower mortgage interest-rate, over a different term and on a different repayment basis.
68. There is also the question of whether Mr and Mrs J would have moved their mortgage to Lender B at the end of October 2020 when the first two sub-accounts became free of ERCs or April 2021 when the ERC for the third sub-account ended.
69. I think it's fair to say Mr and Mrs J have had gains and losses resulting from taking out the mortgage with Lender B, and now making any attempt to calculate an accurate financial impact to Mr and Mrs J is very difficult. My direction below is therefore to put things right as far as it is practical and pragmatic to do so, taking into account that it is not disputed Mr and Mrs J paid an ERC of £13,181.46 which is something they could have avoided with a like-for-like mortgage with Lender A.
70. Rookery Mortgage Consultants should therefore pay Mr and Mrs J the cost of the ERC with interest.
71. Mr and Mrs J paid for the ERC by borrowing the sum as part of their new mortgage with Lender B. For the purposes of resolution and pragmatism, I have assumed the borrowing to form part of the interest-only element of Mr and Mrs J's mortgage.
72. The mortgage offer with Lender B shows the interest rate was 1.28% fixed until 30 September 2022. So I think 1.28% interest should be applied to the amount of £13,181.46 for the time that rate was in force.

73. It is not clear what Mr and Mrs J did with their mortgage interest rate after this time or if they made any lump sum payments towards the outstanding balance. In the absence of that information and again in the interests of pragmatism, I think 8% annual simple interest from October 2022 to the date of payment on the amount of £13,181.46 should be applied to recognise the cost of paying for these additional funds borrowed.
74. I do not agree with Mr and Mrs J that they should have the product fee of £999 returned to them. That is something which would still have likely been payable when they changed their mortgage interest rate once the existing rates expired.
75. Rookery Mortgage Consultants should also pay Mr and Mrs J £500 for the inconvenience and upset this matter has caused.
76. This matter should therefore be settled as set out below.
- A. The ERC £13,181.46
 - B. Interest on the ERC of £13,181.46 at 1.28% simple interest per annum between completion in July 2020 and 30 September 2022.
 - C. Interest on the ERC of £13,181.46 at 8% simple interest per annum between 1 October 2022 and 30 April 2024.
 - D. £500 for distress and inconvenience
 - E. Total of A + B + C
 - F. Daily interest from 1 May 2024 until payment
77. So Rookery Mortgage Consultants should pay Mr and Mrs J: D + E + F

My final decision

78. For the reasons above, my final decision is that Mr and Mrs J's complaint is upheld and Rookery Mortgage Consultants should put things right as I have set out above.
79. Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs J and Mr J to accept or reject my decision before 14 June 2024.

Kristina Mathews
Ombudsman