

The complaint

Mr and Mrs C complain that Mortgage Agency Services Number Five Limited (MAS5) have charged them an unfairly high interest rate on their mortgage account. They say increases were made to the rate for reasons that weren't permitted under the terms and conditions. They would like to be put back in the position they would have been in had those increases not been made.

What happened

In 2006 Mr and Mrs C took out an interest only mortgage with a 23 year term. The mortgage was taken out on the standard variable rate (SVR) with a discount of 1.54% until 31 March 2008. The mortgage offer said that from 1 April 2008, the SVR would apply (which was 6.49% at the time of offer). In June 2006 the mortgage was transferred to MAS5.

In December 2022 Mr and Mrs C complained about the interest rate MAS5 was charging on their mortgage. MAS5 issued their final response letter on 16 January 2023. They said a complaint about the interest rate charged more than six years ago had been made out of time. They didn't uphold the rest of the complaint.

Mr and Mrs C brought their complaint to our service. They said as a result of MAS5's actions they've been forced into greater hardship to try and keep pace with the mortgage payments. They said they've missed out on family trips, essential repairs were put on hold, and other expenses were defaulted on leading to stress and hardship.

MAS5 didn't give our service consent to consider Mr and Mrs C's complaint about the interest rate that was charged more than six years before they complained. Our investigator agreed that Mr and Mrs C's complaint about what had happened more than six years ago had been brought outside the time limits. But he said he would need to take account of how the rate was varied since the mortgage was taken out to determine whether the rate charged in the last six years was fair and reasonable.

The investigator considered the merits of Mr and Mrs C's complaint, and said that MAS5 should re-work the mortgage account as if the increases they made to the SVR in 2011 and 2012 had not been made. That meant reducing the rate by 1.25% from December 2016 onwards (the period of time that was in our jurisdiction). He said Mr and Mrs C should have the choice of either applying the overpayments to the mortgage balance, or having them refunded. He said if Mr and Mrs C choose to have the overpayments refunded directly to them, MAS5 should add simple interest of 8% per year from the date of each overpayment to the date of refund. He didn't think they needed to pay any additional compensation.

Mr and Mrs C said from around 2007, Mrs C's health deteriorated, and she was unable to work. The increases in the mortgage interest rate meant they became reliant on benefits. Mr C was having to work whilst also caring for Mrs C and their two small children. At one point they ended up in arrears and MAS5 started repossession action. But since then, they have managed to keep up and have even made overpayments to reduce the balance. They said they've been trapped in the mortgage due to a change in financial regulations and their own unforeseen circumstances – being limited with income.

MAS5 said the 1.25% reduction in the interest rate should not go beyond November 2022. This is because they chose not to pass on the base rate rises during 2022 when, if the rate

had been 1.25% lower than it was at the time, they would have done. As the terms and conditions permitted them to do. The investigator reflected on what both parties had said and explained that he thought MAS5's latest offer to put things right was a fair and reasonable resolution to Mr and Mrs C's complaint.

Mr and Mrs C felt that the redress should also include a refund of the historic charges that were added when the mortgage was in arrears. They also didn't feel the 1.25% was a reasonable reduction – and that a reduction of between 2.7% and 3.25% would be appropriate in the circumstances. They wanted the increases made to the rate in 2009 to be accounted for in the redress. They also weren't satisfied that the rate was 'put right' in November 2022 as they thought it was still too high.

The investigator wasn't persuaded to change his opinion, so the complaint has been passed to me to issue a final decision.

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.

Our jurisdiction to consider this complaint

Before turning to the merits of Mr and Mrs C's complaint, I've first thought about our jurisdiction and which parts of the complaint our service has the power to consider. Having done so, I agree with the investigator that our service only has the power to consider Mr and Mrs C's complaint about the interest rate MAS5 have charged them for the six year period leading up to their complaint in December 2022. A complaint about earlier interest charging events is out of time under the six year rule, and I also consider it to be out of time under the three year rule as well, as I'm satisfied Mr and Mrs C ought reasonably to have been aware of their cause to complain more than three years before they did complain. They were sent annual mortgage statements which contained information about the interest rate MAS5 were charging on their mortgage, and MAS5 also wrote to them each time the interest rate changed.

I note Mr and Mrs C have said they did complain about the increase MAS5 made to the rate in 2012 at the time. MAS5 issued a final response letter in 2012 which gave Mr and Mrs C six months to refer their complaint to our service if they remained unhappy. Mr and Mrs C didn't refer the complaint at the time, and we haven't been made aware of any exceptional circumstances that caused the delay in the complaint being made. As such, I'm satisfied that a complaint about the interest rate charged before December 2016 (six years before Mr and Mrs C made their current complaint), is out of time.

However, as the investigator explained, the interest rate charged from December 2016 onwards is, in part, the result of the cumulative rate changes that took place beforehand. And so, it is therefore appropriate for our service to consider the interest rate history of Mr and Mrs C's mortgage account dating back to when it was taken out in 2006, to determine whether the interest rate MAS5 have charged them from December 2016 onwards was fair and reasonable.

The interest rate MAS5 have charged on Mr and Mrs C's mortgage

MAS5 have made an offer to settle Mr and Mrs C's complaint by re-working their mortgage account as if the interest rate they were charged between December 2016 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 C paid from December 2016 onwards 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 C 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 C dispute that redress is fair for the following reasons:

- They want the increases MAS5 made to the SVR in 2009 to be taken into account in the rate reduction, therefore asking for MAS5 to make a reduction of at least 2.7% in the rate they've paid since December 2016.
- The rate MAS5 have charged since November 2022 is still unfairly high.
- They have been charged arrears fees on the mortgage when they were struggling to pay the unfairly high payments.

The SVR increases in 2009

Mr and Mrs C's mortgage was not taken out with MAS5 originally. In 2006 the mortgage was transferred to MAS5 by the originating lender. At the time of the transfer, there were certain terms that were agreed between the two businesses, one of which was an agreement that the SVR MAS5 charged on the mortgage would not be more than 2% above the Bank of England base rate. MAS5 have referred to this as the restrictive covenant. That term did not form part of the contract between Mr and Mrs C and the lender, it was an agreement between the two businesses and did not alter the original terms and conditions that Mr and Mrs C agreed to when they took out their mortgage.

The terms and conditions of Mr and Mrs C's mortgage said that the lender could vary the standard variable rate for the following reasons:

“(a) to reflect a change which has occurred, or which we reasonably expect to occur, in the Bank of England base rate or interest rates generally;

(b) to reflect a change which has occurred, or which we reasonably expect to occur, in the cost of the funds we use in our mortgage lending business;

(c) to reflect a change which has occurred, or which we reasonably expect to occur, in the interest rates charged by other mortgage lenders;

(d) to reflect a change in the law or a decision by a court; or

(e) to reflect a decision or recommendation by an ombudsman, regulator or similar body.”

Mr and Mrs C's mortgage offer stated that the interest rate that applied to the mortgage would be the SVR with a discount of 1.54% until 31 March 2008, after which the SVR would apply for the remaining term of the mortgage. There was nothing in the terms that stated the SVR would be linked to any particular reference rate, and it was not a tracker rate that would track movements in the base rate.

The Bank of England base rate fell significantly during 2008 and 2009, and as a result of the restrictive covenant, the SVR MAS5 charged to their mortgage customers reduced significantly too.

The agreement MAS5 had in place to charge an SVR no higher than 2% above base rate ended in 2009, and that is when they started to increase the SVR. MAS5 have said the increases made to the SVR in 2009 were because of an increase that had occurred in the cost of funds used in their mortgage lending business. They've sent us evidence to support their arguments about that, but I'm not satisfied the evidence provided does show that MAS5's cost of funds had increased at that time.

However, that isn't the end of the matter. I also have to consider what is fair and reasonable in all the circumstances. Having done so, I'm not satisfied it would be fair and reasonable for

MAS5 to reduce Mr and Mrs C's interest rate as if those increases in 2009 had not taken place.

Whilst interest rates fell generally during 2008 and 2009 as a result of the financial crisis, the SVRs charged to mortgage customers within the banking group MAS5 operated in, as well as the wider market, did not fall by the same proportions as the base rate. That is for a variety of reasons, but generally the costs to firms of funding their mortgage business did not reduce by as much as the base rate did, and their prudential requirements changed.

Having considered the information MAS5 have sent us, as well as my knowledge and understanding of how the mortgage market was operating at that time, I think it's likely that had the restrictive covenant not been in place during that period, the SVR MAS5 would have charged during 2008 and 2009 would not have reduced by as much as it did. As explained, there was nothing in the terms and conditions of Mr and Mrs C's mortgage that linked the SVR to the base rate, and whilst the terms allowed MAS5 to vary the SVR following changes to base rate, they didn't say they must do so.

The effect of the restrictive covenant therefore meant that the SVR MAS5 were charging their mortgage customers was lower than it would have been had the covenant not been in place. As a result, MAS5 customers, including Mr and Mrs C, received the benefit of paying a lower reversionary rate than they would have been charged by most other lenders at that time.

Whilst MAS5 may have increased the SVR when the covenant ended for reasons that weren't permitted under the terms and conditions of Mr and Mrs C's mortgage, they were restoring the rate to what it would have been had the covenant not been in place.

It's important to remember that a complaint about the interest rate variations that took place in 2009 is actually out of time and our service doesn't have the power to consider it. I'm only taking account of what happened to the rate at that time as I think it's relevant context to help me determine whether the rate Mr and Mrs C have been charged since December 2016 is fair and reasonable.

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 December 2016 onwards would provide Mr and Mrs C 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 C agreed to without the covenant in place. To do so would result in the interest rate after December 2016 being lower than Mr and Mrs C could have expected it to be by operation of the mortgage terms and conditions alone, and would result in over-compensation.

The SVR increases in 2011 and 2012

MAS5 increased the SVR charged on Mr and Mrs C's mortgage in 2011 and 2012. The effect of both of those changes meant the rate went from 4.5% to 5.75%.

MAS5 said those increases were made as a result of the increases in the cost of funds used in their mortgage lending business. I am not satisfied that the evidence MAS5 have sent us shows that there was actually an increase in MAS5's own cost of funds at that time. They've now offered to re-work Mr and Mrs C's mortgage account from December 2016 (up until November 2022) as if those increases never took place. So I won't consider this point any further, as the offer puts Mr and Mrs C back in the position they would have been in had the increases not been made (for the time period that is in scope of this complaint).

Should the redress go beyond November 2022?

MAS5 have offered to re-work Mr and Mrs C's mortgage account as though the interest rate they've been charged since December 2016 was 1.25% lower than it was to reverse the effect of the 2011 and 2012 increases – but only up until the end of November 2022. They've said this is because they made the decision in 2022 not to pass on the full Bank of England base rate rises to customers when they could have done. That resulted in the SVR being 1.38% lower than it would have been had they passed on the full extent of the increases. They've said if the SVR had in fact been 1.25% lower than it was before 2022, as we've said it should have been, they would have taken the decision to pass on all of the base rate rises when they took place in 2022. This would have ensured that the SVR was priced at an appropriate level for its risk profile and market position. Therefore, the rate would have ended up 0.12% higher than it actually was in December 2022.

MAS5 have provided our service with evidence to support their arguments, including the factors the wider banking group considered when they were deciding whether to pass on the base rate rises to customers in 2022. It's clear the priorities for the banking group were to balance increases to the SVR to reflect increases to cost of funds with keeping down increases to maintain their market position, and to minimise customer stress. While that wasn't the case specifically for Mr and Mrs C's mortgage – since there's no evidence of a change in the costs of funding MAS5 itself at this time, the position of the MAS5 SVR comparative to the SVR charged to 'prime' customers in the group was also a key factor.

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 C'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 C, 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 C'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 C have been charged since December 2016 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 C'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 C 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 C'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.

I appreciate Mr and Mrs C feel that their rate is still too high currently, but unfortunately, we are in an economic climate where interest rates are much higher than they've been in recent years, and the rate they're now paying is not significantly out of line with reversion rates being charged by other lenders of similar mortgages.

I know Mr and Mrs C discussed re-mortgaging within the banking group in 2021, but as Mr C is self-employed the underwriters required specific information and the conversations never went any further. If Mr and Mrs C are able to provide the information requested, I'd encourage them to discuss their options with MAS5 again to see if there are lower rates they might be able to benefit from by re-mortgaging to another lender within the group – or to take independent financial advice about moving their mortgage elsewhere.

Historic arrears charges

I note Mr and Mrs C feel MAS5 should also refund the arrears charges they added to the account during the periods Mr and Mrs C weren't able to pay the full monthly payments. As I've explained, I only have the power to consider the complaint about the interest rate charged from December 2016 onwards – that includes a complaint about the impact that interest rate had on Mr and Mrs C. MAS5 haven't added any arrears charges in that period, as Mr and Mrs C have paid their monthly payments, and even overpaid, during that time. As such – I'm not instructing MAS5 to refund any arrears charges.

Putting things right

For the reasons I've explained, I'm satisfied MAS5 should do the following to put things right for Mr and Mrs C:

- Re-work Mr and Mrs C's mortgage account as if the interest rate charged after 31 December 2016 was 1.25% lower than it was from time to time, up until 30 November 2022.

MAS5 should give Mr and Mrs C the choice of

- having the resulting overpayments they've made each month treated as overpayments reducing the mortgage balance, reducing the balance and so the monthly payment in subsequent months; or
- having the resulting overpayments refunded to them, adding simple annual interest of 8%* running from the date of each overpayment to the date of refund.

I am not making an award for any distress and inconvenience caused, as whilst I appreciate Mr and Mrs C have experienced financial hardship and stressful times in the past, I'm only able to consider the direct impact of the unfair interest rate MAS5 have charged from December 2016 onwards. And during that period Mr and Mrs C have been able to make all their payments and indeed overpay to reduce the capital.

*Interest is at the rate of 8% a year simple. If MAS5 considers that it's required by HM Revenue & Customs to take off income tax from that interest, it should tell Mr and Mrs C how much it's taken off. It should also give them a certificate showing this if they ask for one, so they can reclaim the tax from HM Revenue & Customs if appropriate.

My final decision

Considering everything, for the reasons I've explained, I uphold his 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 Mrs C and Mr C to accept or reject my decision before 22 July 2024.

Kathryn Billings
Ombudsman