

## The complaint

Mr J complains that Mortgage Agency Services Number Five Limited (MAS5) unfairly increased the interest rate on his mortgage from 2.99% to 6% from 2009 onwards. He says the increases were not made in line with the terms and conditions of his mortgage. Mr J also complains about the way MAS5 has treated him in relation to his mortgage account generally, as it hasn't taken into account his personal circumstances, or recognised he's a vulnerable customer.

## What happened

In April 2006 Mr J took out an interest only mortgage. The mortgage offer stated that the interest rate would be fixed at 5.34% until 31 March 2008. It said from 1 April 2008 the rate that would apply would be the lender's standard variable rate (SVR) (which was 6.49% at the time the mortgage was agreed) for the remaining term of the mortgage. In June 2006 the mortgage was transferred to MAS5.

When Mr J's mortgage reverted to the SVR in 2008, the rate was 7.24%. Since then, the SVR has varied in the following ways up until this complaint was made.

- May 2008 – decreased by 0.25% to 6.99%
- November 2008 – decreased by 0.5% to 6.49%
- December 2008 – decreased by 1.5% to 4.99%
- January 2009 – decreased by 1% to 3.99%
- February 2009 – decreased by 0.5% to 3.49%
- March 2009 – decreased by 0.5% to 2.99%
- July 2009 – increased by 0.75% to 3.74%
- October 2009 – increased by 0.76% to 4.50%
- March 2011 – increased by 0.75% to 5.25%
- May 2012 – increased by 0.50% to 5.75%
- October 2016 – decreased by 0.25% to 5.50%
- December 2017 – increased by 0.25% to 5.75%
- August 2018 – increased by 0.25% to 6.00%
- March 2020 – decreased by 0.5% to 5.5%
- May 2020 – decreased by 0.15% to 5.35%

Mr J has told us he's suffered with both mental and physical health issues over the years, which have led to him having periods out of work. There have been times when he hasn't been able to pay his monthly mortgage payments and arrears have accrued on the account. MAS5 has sought to take legal action to recover arrears during some of these periods, but Mr J has been able to clear the arrears by selling his buy-to-let property and other possessions, and with help from friends and family.

Further arrears began to accrue during the pandemic as Mr J was unable to work during that time and was shielding. In May 2021 MAS5 wrote to Mr J to inform him it would be starting legal action if he did not contact it about the arrears balance (which was £11,029.62 at the time).

Mr J complained to MAS5 in June 2021. He said MAS5 had unfairly increased the interest rate charged on his mortgage from 2009, as the changes made were not permitted under the terms and conditions of his mortgage. He said he was a vulnerable customer and wanted tailored support in line with the Financial Conduct Authority's (FCA's) guidance.

MAS5 issued its final response letter on 17 August 2021. It said that any part of Mr J's complaint concerning events that took place more than six years ago had been made out of time under the time limits set by the FCA. It said Mr J had sufficient information from his mortgage offer, the interest rate change letters, and annual statements of account to make him fully aware of the terms of his mortgage and the interest rate changes at the time they occurred. As a result, it only investigated Mr J's concerns about events that took place after 1 June 2015.

MAS5 said that since that date, it had changed the interest rate applied to Mr J's account on five occasions following changes to the Bank of England base rate. It said those changes were made in line with the terms and conditions of Mr J's mortgage and it'd written to Mr J each time to let him know the new amount he would have to pay. MAS5 explained it is no longer an active lender which means it is not accepting new customers, or offering existing customers alternative interest rate products. As a result, it was unable to reduce the interest rate charged on Mr J's mortgage.

MAS5 said that since November 2019, following new rules introduced by the FCA, it has offered customers the opportunity to apply for a Britannia branded mortgage from The Co-operative Bank, subject to meeting the FCA definition of a 'mortgage prisoner' and the bank's lending criteria. It said as Mr J didn't meet the criteria, he was not eligible for a new Britannia mortgage as he was not up to date with his payments. MAS5 explained that Mr J's mortgage had been in arrears since 2018. Over the past nine years Mr J had received assistance from its specialist team trained to help customers with sensitive personal circumstances. It said it had done its utmost to support Mr J and help him keep his home.

MAS5 said the evidence shows that due to Mr J's overall long term position his mortgage is not sustainable. It said as a result, pending any alternative proposal made by Mr J's debt adviser, the most suitable option for his situation was its assisted voluntary sale scheme. MAS5 strongly recommended Mr J speak with his debt adviser about his options.

Mr J responded to MAS5's letter. He said that MAS5 had discriminated against him on the basis of his disability. He said it'd rejected his offers to make payments towards his mortgage using the Department for Work and Pensions scheme for claimants receiving Universal Credit, as the payments weren't sufficient to cover the full monthly payments which were based on the exceptionally high SVR. He said it also hadn't allowed any payment holidays other than the ones mandated by the Government during the pandemic, despite it being aware of his circumstances and how the pandemic had affected him and his ability to work. Mr J raised specific instances in 2017, 2019, and 2020 where he felt MAS5 had not considered his circumstances and had taken inappropriate action to collect payments due on his mortgage.

Mr J contacted our service in September 2021 and asked us to look into things. One of our Investigators looked into Mr J's complaint, and said that in his view, part of the complaint had been made outside of the time limits our service must apply. He concluded that our service had the power to consider Mr J's concerns about the interest rate MAS5 had charged from 8 January 2014 onwards – which was the six years leading up to the date he could see Mr J had expressed his dissatisfaction to MAS5.

The Investigator went on to consider the merits of Mr J's complaint that he had the power to

consider. In summary he concluded the following:

- Mr J's mortgage offer said the mortgage would revert to the SVR after the initial fixed rate period and that's what happened. There was nothing in the mortgage offer or terms and conditions which said MAS5 would make new interest rate products available, and there's no regulation that says it has to either. Mr J was not being treated any less favourably than other MAS5 customers. He didn't think MAS5 had treated Mr J unfairly by not offering him a lower interest rate.

- MAS5 was a different legal entity to The Co-operative Bank, and so it's allowed to charge a different rate.

- MAS5 had not shown that the changes made to the SVR during 2009-2012 were made for reasons allowed for under the terms and conditions of the mortgage. But the 2009 increases effectively balanced out the impact of a restrictive covenant MAS5 had agreed with the original lender of Mr J's mortgage which had resulted in the rate being much lower than it otherwise would have been.

- As the interest rate Mr J was charged from 8 January 2014 onwards was a cumulative result of the changes made before then, it wasn't fair and reasonable that MAS5 charged an interest rate that reflected the impact of the increases made in 2011 and 2012. However, it wouldn't be fair to reach the same conclusion about the 2009 increases because that would have the effect of continuing the benefit of the restrictive covenant years after it ended. And would result in Mr J being charged a rate that was much lower than he ever could have expected from the operation of his mortgage terms and conditions alone. As a result, removing the effect of the 2009 increases would result in over-compensation.

- The changes MAS5 made to the SVR after 2012 were not unfair.

- No payments have been made to the mortgage account since March 2020. There was no evidence MAS5 had told Mr J it wouldn't accept payments. There was no evidence that Mr J's situation was improving or that there were any more forbearance measures MAS5 could reasonably offer.

- MAS5 should re-work Mr J's mortgage as if the interest rate charged after 8 January 2014 was 1.25% lower than it was from time to time. It should also ensure the rate is reduced by 1.25% going forwards. MAS5 should re-calculate the mortgage using the payments Mr J actually made, but with revised monthly payments using the lower rate. This should result in changes to the arrears balance from time to time, and so MAS5 should also amend Mr J's credit file to reflect the changed position. Any resulting overpayments should be used to reduce the arrears balance at the time. If there are any overpayments after repaying the arrears, Mr J should be given the choice of either having those overpayments refunded to him, with simple interest of 8% running from the date of each payment to the date of settlement; or having the overpayments used to reduce the mortgage balance. Should MAS5 determine the account would not have moved to possession proceedings based on the revised position, it should refund any fees associated with those proceedings.

- MAS5 should pay Mr J £150 for the distress and inconvenience caused by charging him more than it should have done.

Mr J responded and said he didn't feel like we'd addressed all of his concerns. He provided further detailed accounts and evidence about his history of mental and physical health issues and how he had been impacted by them.

MAS5 responded and disagreed that the 1.25% interest rate reduction should be applied beyond November 2022. It said its decisions not to pass on the Bank of England base rate increases between December 2021 and November 2022 balanced out the increases made in 2011 and 2012 that the Investigator found were unfair. It 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 its SVR customers. In November 2022 base rate increased by 0.75% and MAS5 took the decision to only pass on 0.38% to its 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 it 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 2014). It said arguably, the increases that took place in 2011 and 2012 had little causative effect on the rate Mr J was paying from 2014 onwards, particularly in light of the decisions made in 2022 as mentioned above. MAS5 made an offer to settle Mr J's complaint on the basis that the 1.25% reduction in the rate would be made from 8 January 2014 to the end of November 2022.

Our Investigator considered what both parties had said, and explained that he thought 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 J'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 J's mortgage as if the interest rate charged after 8 January 2014 was 1.25% lower than it was from time to time until 30 November 2022.

As a resolution could not be reached, the complaint was passed to me to issue a decision.

Mr J sent us further information to consider. That included information about MAS5's specific funding costs in relation to his mortgage at the relevant times. He made detailed submissions about the outcome of the complaint, which I will summarise below.

- There is no evidence that had MAS5's SVR been 1.25% lower than it was in November 2022, MAS5 would have passed on the base rate rises that year. MAS5 chose not to pass on the increases at the time, and to allow it now to benefit from an increase it failed to make is unfair and provides it with a windfall gain from its breaches of the terms and conditions.
- He is now paying an SVR of 9.13% which is 3.88% over base rate. This is higher than the margin of 2.5% over base rate that existed when his mortgage reverted to the SVR. It's also higher than the 2% margin set by the restrictive covenant.
- MAS5 lied to customers about the increases in its funding costs, and a fair and reasonable outcome to this complaint is for a refund of all the increases made between 2009 and 2012 to be given. He requests the full 2.76% unfair rate increases to be refunded.
- MAS5 overcharging interest meant that he was unable to re-mortgage. If interest had been charged in line with the terms and conditions, then he could have moved to an active lender which would have allowed him to extend the mortgage term and access

lower rates. His mortgage was not sub-prime, and he had an excellent credit rating when he applied for this mortgage.

- We have not addressed DP 14/2, the Fairness of Changes to Mortgage Contracts (an FCA discussion paper). He said MAS5 took advantage of the fact he was 'trapped' and unable to exit the mortgage contract and re-mortgage. As a result, it's fair for all the increases MAS5 made to the rate to be refunded. MAS5 did not comply with this guidance when it removed the restrictive covenant.
- He disagrees that the restrictive covenant was a matter between MAS5 and the previous lender. He said it was communicated to customers in the Key Facts Illustration document. When the restrictive covenant was removed MAS5 had a duty to pay due regard to the interests of its customers and treat them fairly. It also had to pay due regard to the information needs of its customers, and to manage conflicts of interest fairly. As a result, MAS5 should be required to pay redress as if the limit of the SVR being only 2% above base rate had remained in place for the term.
- Failing to order a refund of all the increases MAS5 made in breach of the terms allows it to significantly benefit from its misconduct and does not take into account what a Court would award.
- There is no obligation in the contract for MAS5 to charge a rate that was in line with the wider market. There is no term in the contract that allows MAS5 to increase the rate for a 'good objective reason' or to re-align it with market rates. The increases made in 2009 were done so in breach of contract and should therefore be refunded.
- MAS5's average funding costs declined during the relevant period. Our outcome allows MAS5 to benefit from those reductions as well as gain from its misconduct. It is not fair and reasonable to ignore the 'windfall' MAS5 has benefitted from when we haven't done the same for him.
- It is unfair that we have changed our decision from earlier decisions published last year in regard to fair and reasonable redress for similar complaints. This process raises important questions about abuse of process, bias, competence, irrationality, and breaches of human rights – specifically Article 8 of the Human Rights Act 1998, "Everyone has the right to respect for his private and family life, his home and his correspondence." As a public body, our service has to uphold human rights and act lawfully. Are human rights being upheld by this decision, or are we acting unlawfully by allowing MAS5 to make excess profits at the expense of customers who will lose their homes?

Mr J has also sent submissions in relation to other complaints that do not relate to his own mortgage. Mr J has also made our service aware of legal proceedings he intends to take in relation to this matter. He's also raised concerns about how our service has handled his complaint and refused to accept his request for more time to provide us with more information.

These issues have been dealt with separately by our service and so I won't be commenting on them in this decision. Although I am satisfied that Mr J has had sufficient opportunity to provide any submissions before I issue this decision.

I issued a decision which said our service could only consider the following parts of Mr J's complaint:

- The interest rate MAS5 has charged him from 18 December 2013 onwards.
- The way MAS5 has treated him during periods of ill health and financial difficulty from

29 June 2015 onwards.

I will now move on to decide the parts of Mr J's complaint that are within our service's jurisdiction.

### **My provisional decision**

I issued a provisional decision on 6 August 2024. This is what I said.

"I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I'm sorry to hear about the difficulties Mr J has faced over the years in relation to both his physical and mental health. I appreciate he's found himself in extremely difficult circumstances at times and it's clear that this mortgage has been a significant burden that's added to his stress and worry. I'm pleased to hear that Mr J has been feeling better in more recent times, although I understand this complaint process has caused him a great deal of stress. I'm grateful for Mr J's patience and understanding during the time this complaint has been with our service.

#### Mr J's complaint about the interest rate

Before I turn to the specific parts of Mr J's complaint about the increases MAS5 made to the SVR charged on his mortgage, I will address the wider, more general points he made about the interest rate in his initial complaint to MAS5.

Mr J's mortgage offer said that on expiry of the fixed rate product, from 1 April 2008 the rate that would apply to his mortgage was the SVR for the remaining term of the mortgage. There was nothing in the rest of the offer document or the terms and conditions of the mortgage that stated Mr J would be entitled to a new fixed rate once his initial rate had ended.

Since Mr J's mortgage has been on the SVR, MAS5 has not offered any preferential interest rate products to any of its customers. There's nothing in the law, or the regulator's rules that requires lenders to offer new products or rates. Since Mr J's mortgage has been on the SVR, he wouldn't have incurred any early repayment charges if he'd decided to re-mortgage elsewhere to a lender that does offer rates.

Overall, MAS5 hasn't treated Mr J any differently to any of its other mortgage customers by not offering him an interest rate product. It's contacted him in more recent years about applying for an internal re-mortgage to another lender within the banking group, but unfortunately Mr J wasn't eligible to re-mortgage because of the arrears on his mortgage. Any concerns Mr J has with the fairness of that decision, or the eligibility criteria, would be a matter for that other lender, and isn't something I can consider against MAS5. Considering all the circumstances, I'm not satisfied MAS5 has treated Mr J unfairly by not offering him a new interest rate product.

Mr J has also raised concerns about MAS5's SVR being higher than the SVR charged by The Co-operative Bank (The Co-op). Whilst MAS5 is a subsidiary of The Co-op, they are different businesses and different legal entities. They are not legally obliged to charge the same SVR. MAS5 is legally obliged to charge an SVR that is in line with the terms and conditions of the mortgage contract that both parties agreed to – which I'll come back to later. But when Mr J agreed to this mortgage, he agreed to pay the lender's SVR after 1 April 2008 for the remaining term of the mortgage. When the mortgage was sold to MAS5, all the lender's rights and obligations transferred to MAS5. Therefore, MAS5 was entitled to charge Mr J its SVR in line with the agreed terms of the contract.

Mr J has asked whether MAS5 is taking advantage of borrowers who are trapped as they're unable to move, by keeping them on a higher SVR than that charged by The Co-op. He says that this is a breach of the FCA's Principle 6. Principle 6 says that the firm must pay due regard to the interests of its customers and treat them fairly. I'm not persuaded that it's inherently unfair for firms to charge different SVRs to one another when they're in the same banking group. Instead, I think what I need to decide here is whether MAS5 treated customers fairly by changing the rate as it has.

Mr J has also complained about the terms of the mortgage that allowed MAS5 to vary the interest rate. He says the terms are unfair. In my view, the law relating to unfair terms in consumer contracts is of particular relevance to this aspect of the complaint, specifically the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR), which applies to this agreement, and whether the term *'contrary to the requirement of good faith... causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.'*

The relevant terms in Mr J's mortgage contract state that the lender can vary the interest rate charged on the mortgage 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.”

Having considered the relevant law, I am satisfied that in this case I need to think about whether the terms in this agreement go further than reasonably necessary to protect MAS5's legitimate interests, whether the variation clause is sufficiently transparent, and whether there were significant barriers to Mr J dissolving the contract.

I think it's likely that a court would conclude that the variation terms were not unfair. I am satisfied that overall they do not create a significant imbalance between the parties contrary to the requirement of good faith, or that at the time the mortgage was taken out there were foreseeable barriers to exit were MAS5 to rely on the term, and that a consumer in a hypothetical negotiation, understanding that over the course of an agreement as long as a mortgage a lender's costs might change, would have agreed to the term. Bearing that in mind, I will proceed on the basis that the variation terms are not unfair as a matter of law.

I've also considered whether the concept of an SVR, or a variable reversion rate, is an inherently unfair one. But I don't think it is. It's a standard feature of the UK mortgage lending market. An SVR reversion rate allows a lender to attract new customers with a preferential initial rate, while building in the flexibility a variable rate allows to manage its longer-term costs after the initial preferential interest rate period. Many borrowers treat the reversion point as an opportunity to shop around for another preferential rate – either with their existing lender or moving to another lender.

In this case, MAS5 did not offer new rates and Mr J didn't or couldn't move elsewhere. But that doesn't affect my conclusions that maintaining his mortgage on the SVR was not inherently unfair and not a breach of contract. Mr J's mortgage was

operating as it should under the terms and conditions when he reverted to and remained on the SVR.

If I am wrong about that, I've reminded myself that legally, the effect of a term being unfair as a matter of law is that it won't apply. But that doesn't mean that MAS5 would have no power to vary the SVR. As I've said above, I think a reasonable consumer in a hypothetical negotiation would agree that a lender might need to vary the interest rate for good reason over the length of a mortgage term. So even if this specific term were to be struck down as unfair, I think a court would in its place imply a term allowing MAS5 to vary the SVR for good reasons such as changes to cost of funds and changes to base rate. So even if the term was unfair as a matter of law, it wouldn't inevitably follow that it was unfair for MAS5 to change the SVR. For that reason, I think it's important to consider the changes MAS5 actually made. Under our rules I am required to consider what is fair and reasonable in all the circumstances. That includes – but is not limited to – relevant law.

I've also thought more broadly about whether, and the extent to which, the way in which the terms have been used has resulted in unfair treatment for Mr J in the interest charged from 18 December 2013 onwards. That is the ultimate question I need to answer in deciding whether to uphold the complaint.

#### The offer MAS5 has made

MAS5 has made an offer to settle Mr J's complaint by re-working his mortgage account as if the interest rate he was charged between 8 January 2014 and 30 November 2022 was 1.25% lower than what MAS5 did actually charge. It says that would put right the higher rate Mr J paid from January 2014 as a result of the increases it made to the SVR in 2011 and 2012. It doesn't think the redress should go beyond November 2022 as from that point, Mr J has been charged a rate that is 1.38% less than what it would have been had MAS5 decided to pass on the full increases to the base rate that year. Mr J disputes that redress is fair for broadly two reasons:

- He wants 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 2.76% reduction in the rate he's paid since the increases were made, for several reasons. Or, alternatively, he wants the SVR to be set at a margin of no more than 2% above base rate since reversion.
- MAS5 had the opportunity to increase the rate in 2022 but it chose not to do so at the time. There is no evidence to show that had the rate been lower in 2022, MAS5 would have increased the rate to reflect the base rate changes. It shouldn't be allowed to benefit from an increase it failed to make at the relevant time. It's also unfair that our service changed our decision on what fair redress would be. So the redress should not be capped to November 2022 as the current rate is still too high.

#### The SVR increases in 2009

As a reminder, in my jurisdiction decision I explained that Mr J's complaint about the increases made to the SVR in 2009, 2011, and 2012 has been made out of time. However, I have still considered the circumstances surrounding the increases as they are an important factor in determining whether the rate MAS5 charged Mr J during the period I can consider (from 18 December 2013 onwards) was fair and reasonable.

Mr J's mortgage was not taken out with MAS5 originally. In 2007 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 has referred to this as the restrictive covenant. That term did not form part of the contract between Mr J and the lender, it was an agreement between the two businesses and did not alter the original terms and conditions that Mr J agreed to when he took out his mortgage. Mr J has said that this restrictive covenant was communicated to customers, but he hasn't provided any evidence to show that was the case for his mortgage. I've not seen anything in Mr J's mortgage offer or terms and conditions that refers to this covenant, or a restriction in how high the SVR can go above base rate.

The terms and conditions of Mr J's mortgage said the following about the interest rate.

"3.1 If the interest rate is the standard variable rate we may vary it for any of 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 J's mortgage offer stated that the interest rate that applied to Mr J's mortgage would be a fixed rate of 5.34% 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 interest rate 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 its 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 it started to increase the SVR. MAS5 has said the increases made to the SVR in 2009 were because of an increase that had occurred in the cost of funds used in its mortgage lending business. It's sent us evidence to support its 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 J'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 has 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 J'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 it must do so. Mr J has said the Key Facts Illustration document stated that the SVR would not exceed 2% above Bank of England base rate. I've reviewed that document, and I'm satisfied it does not state that there would be any link between the SVR charged on Mr J's mortgage and the base rate.

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

Mr J has said that it's not a fair reflection to say that the restrictive covenant ended – as MAS5 actively sought to remove it. He says the covenant was there to protect borrowers, and MAS5 was acting unfairly by removing it so it could increase the rate.

I've already said that I'm satisfied that the restrictive covenant did not form part of the contract between MAS5 and Mr J. It was a commercial agreement between MAS5 and Mr J's original mortgage lender. The fact that MAS5 sought to remove the restriction in 2009 does not necessarily mean that Mr J has been treated unfairly. The key question is whether Mr J was treated unfairly when MAS5 made changes to the interest rate charged on Mr J's mortgage after the restrictive covenant was removed, rather than the removal of the covenant itself.

Mr J has also stated that MAS5 did not pass on the final base rate cut in March 2009. But under the terms and conditions it was not obliged to do so – since the terms say that it “may” (not “must”) vary the SVR to reflect changes in base rate. The SVR is not a tracker rate and the terms and conditions do not oblige MAS5 to treat it as such.

MAS5 noted at the time that not passing on the final base rate cut meant that the SVR went above the cap in the restrictive covenant. But while that might have put MAS5 in breach of its obligations to the previous lender under the covenant, the covenant was not part of its contract with Mr J, and I've not seen anything to suggest that he had any enforceable rights under it. MAS5 was not in breach of its contractual obligations to Mr J.

Whilst MAS5 may have increased the SVR when the covenant ended for reasons that weren't permitted under the terms and conditions of Mr J's mortgage, it was 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 as part of the wider circumstances to help me determine whether the rate Mr J has been charged since 18 December 2013 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 2013 onwards would provide Mr J 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 J agreed to without the covenant in place. To do so would result in the interest rate after 18 December 2013 being lower than Mr J could have expected it to be by operation of the mortgage terms and conditions alone, and would result in over-compensation.

### The increases MAS5 made to the SVR in 2011 and 2012

MAS5 increased the SVR charged on Mr J'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 its mortgage lending business. I am not satisfied that the evidence MAS5 has sent us shows that there was actually an increase in MAS5's own cost of funds at that time. It's now offered to re-work Mr J's mortgage account from January 2014 (up until November 2022) as if those increases never took place. Given my jurisdiction decision found that the period in scope for this complaint actually extends back to December 2013, I would expect MAS5 to adjust its offer accordingly. So I won't consider this point any further, as the offer puts Mr J back in the position he would have been in had the increases not been made (for the time period that is in scope of this complaint).

After 2012, the only changes MAS5 made to the SVR before this complaint was made followed changes made to the Bank of England base rate. Those changes were permitted under the terms and conditions of the mortgage, and I'm not persuaded it was unreasonable for MAS5 to pass those changes on to its SVR.

### Should the redress go beyond November 2022?

MAS5 has offered to re-work Mr J's mortgage account as though the interest rate he's been charged since January 2014 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. It's said this is because it made the decision in 2022 not to pass on the full Bank of England base rate rises to customers when it could have done. That resulted in the SVR being 1.38% lower than it would have been had it passed on the full extent of the increases. It's said if the SVR had in fact been 1.25% lower than it was before 2022, as we've said it should have been, it 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 has provided our service with evidence to support its arguments, including the factors the wider banking group considered when it was 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 J'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 has 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 it did during 2022, by passing on all of the base rate rises. That would have been permitted under the terms and conditions of Mr J'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 has 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 has acted fairly when considering how to vary the rate it's charged Mr J, and the impact that's had on him.

MAS5 has provided evidence of the risk profile of the mortgages it holds in comparison with the wider 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 its 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.

I've taken into account that Mr J has said that he had an excellent credit rating when he took this mortgage out and that he did not need, and did not take, a sub-prime mortgage. But given the more recent history, Mr J's mortgage is now higher risk. And in any case, as I explain below, mortgages aren't individually priced and I'm satisfied that in general the mortgages MAS5 holds are higher risk than those held by other parts of the banking group and active current lenders, and that it was reasonable for MAS5 to take this into account.

Under the terms and conditions of Mr J's mortgage MAS5 was 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 J has been charged since 18 December 2013 in the round, and the impact of the previous unfair increases that contributed to that rate, I'm persuaded on balance that any previous unfairness was essentially 'put right' by the decisions MAS5 made when it varied the rate in the way that it did in 2022. And so, to instruct MAS5 to make an ongoing reduction to Mr J's interest rate when that rate would be much lower than the rate he would actually have been on had MAS5 not done anything wrong, would be putting him in a better position than he ought to have been. To continue the redress beyond November 2022 means that Mr J 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 J's mortgage would ever have been in a situation where both those things happened, and therefore to require MAS5 to reduce his interest rate as if both had happened would be over-compensation.

I appreciate Mr J feels that his rate is still too high currently, and he feels it would be fair for his rate to be reduced on an ongoing basis, but unfortunately, we are in an economic climate where interest rates are much higher than they've been in recent years, and the rate he's now paying is not significantly out of line with reversion rates being charged by other lenders of similar mortgages.

Mr J has also said he has evidence that his mortgage was not taken out on a 'sub-prime' basis. But it was taken out on a self-certification basis, which meant he did not need to provide evidence of his income before the lender agreed to offer him this mortgage. Agreeing to mortgages that have been taken on this way does, generally, carry a higher level of risk than those where borrowers have provided evidence of their income during the

application process. They were typically taken out by borrowers who were self-employed or who had multiple income streams (as Mr J did at the time), and so it would have been more onerous to provide the evidence required by the lender to prove income.

By not verifying the level of income the borrower has stated they have to afford the mortgage payments, lenders were taking on a higher level of risk that the mortgage payments may not have been sustainable over the course of the mortgage term. These types of mortgages aren't sold any more, and there are much more stringent checks required before lenders can offer to lend now. But based on the rules that were in place at the time, lenders were able to lend on this basis, and many chose to do so.

In any case, MAS5 does not set its SVR for each individual customer. It has one SVR that it charges to all borrowers who took their mortgages out with the same terms and conditions. When setting its SVR, I consider it's reasonable for MAS5 to take account of the overall risk of its book as a whole. I would not expect it to consider the risk of each individual mortgage defaulting when deciding how to vary the rate. It's also worth noting that, even leaving aside the fact that this was a self-certified mortgage, Mr J's circumstances have changed significantly since he took the mortgage out such that his mortgage is now a greater risk to MAS5 than it was at that time. I've seen evidence it considered the overall risk of the mortgage book, and I'm satisfied that's fair.

I can understand Mr J is disappointed that the investigator changed his opinion in regards to what a fair redress award should be for his complaint. Mr J's also referred to previous decisions that our service has issued which didn't limit the redress to November 2022 in the way this decision does. But we are an impartial service that has to consider the evidence provided by both parties throughout the complaints process. After the investigator issued his initial opinion, MAS5 provided more information and evidence that changed what the investigator considered would be a fair outcome for both parties. Those submissions weren't available when previous cases were decided, so were not taken into account. Mr J has also had the opportunity to provide further submissions to our service before I've reached this decision. He has done, and I've considered what both parties have said carefully. The fact that the outcome has changed since the investigator's initial opinion is not a result of unfair or biased practice as Mr J has suggested, although I appreciate the disappointment it would have caused.

### Summary

Overall, I'm satisfied that the offer MAS5 has now made to put this part of Mr J's complaint right is fair (with the exception of the start date changing to 18 December 2013 in line with my jurisdiction decision).

I appreciate Mr J has said that if it wasn't for MAS5's unfairly high interest rate, he would have been able to re-mortgage to an active lender and secure a lower interest rate product. But I'm not persuaded that's the case. I've not been made aware of any attempts Mr J actually made to re-mortgage away from MAS5. But there was nothing preventing him from applying elsewhere. I think it's likely that he would have struggled to re-mortgage after he'd fallen into arrears, but for reasons I'll come on to next – I'm not persuaded those arrears were caused by unfair treatment from MAS5. Rather, it was Mr J's wider circumstances that left him unable to pay his mortgage payments from time to time. As a result, I'm not satisfied it would be fair and reasonable to instruct MAS5 to compensate Mr J for the fact he was unable to re-mortgage to another lender.

### Mr J's complaint about how MAS5 have treated him during periods of arrears

As well as the complaint about the interest rate, Mr J has also raised serious concerns about how MAS5 has treated him during periods when he's not been able to maintain the full monthly mortgage payments due to his ill health.

There are clear rules and guidance set by the regulator that lenders must follow when borrowers are experiencing financial difficulties and struggling with their mortgage payments. These are set out in the Mortgages and Home Finance: Conduct of Business Sourcebook (MCOB) chapter 13. In summary, lenders must ensure they are considering appropriate forbearance to support borrowers with getting the mortgage back on track. And taking steps to repossess the property should only be considered as a last resort.

I've reviewed the extensive contact notes for Mr J's account, as well as carefully considered the comments made by both parties. It's clear that Mr J has been through extremely difficult times, and he's engaged openly with MAS5 about his circumstances throughout. There have been periods where Mr J has been unable to work as a result of his health, and also as a result of the pandemic. I'm pleased to hear he's been feeling better in more recent times, although I understand he still feels he's unable to work.

As explained in my decision which set out our service's jurisdiction, I'm only able to consider Mr J's complaint about how MAS5 treated him from 29 June 2015 onwards. Although I have reviewed the whole history of the account as it's relevant background and context for the period that is in scope of this decision. I've focused in this decision on the periods Mr J was having difficulties that impacted his ability to maintain his monthly mortgage payments, but I have reviewed the contact between Mr J and MAS5 for the entire period.

During 2017, Mr J was very unwell and was admitted to a specialist hospital where he stayed for some months. During that time, no payments were made to the mortgage, and he asked his friend to help oversee his finances. MAS5 had several conversations with Mr J's friend during that time about Mr J's circumstances and agreed to put collections activity on hold. With the help of his friend, Mr J was selling his buy-to-let property to help him get back on track with his overall finances, and repay the arrears on his mortgage.

Mr J says that he was forced to sell his investment property as a result of MAS5 threatening repossession whilst he was in hospital. Having reviewed the letters sent during that period, and the notes of the calls that MAS5 had with Mr J's friend at the time, I'm not persuaded MAS5 was threatening to repossess Mr J's home. The letters asked Mr J to contact it about his plans to clear the arrears, and signposted him to other organisations for support. MAS5 told Mr J's friend that the account would be put on hold on a monthly rolling basis on the understanding Mr J's friend would keep it updated about Mr J's circumstances. There is no evidence of MAS5 saying it was looking to take repossession or start legal action, and in fact the notes state that Mr J's friend was assured that no further action would be taken.

I appreciate MAS5 had started legal action in previous years when arrears had built up on the mortgage, and so it's understandable that Mr J was worried that might happen again. But from considering all the evidence available to me, I'm not persuaded that MAS5 forced Mr J to sell his buy-to-let property to avoid repossession. Rather, I think it's likely Mr J decided to take that step to help him with his overall financial situation – which it did at the time as he was able to use the proceeds of the sale to clear the arrears on his mortgage, as well as his substantial unsecured debts and council tax arrears. Overall, I'm satisfied MAS5 offered appropriate forbearance by putting collections activity on hold whilst Mr J remained in hospital.

However, during that time MAS5 did send Mr J a letter explaining it was sending a field agent to visit Mr J as he hadn't contacted them, and the arrears remained unpaid. When that letter was sent, MAS5 knew that Mr J was in hospital, and it had been told by Mr J's friend

that there was a plan in place to clear the arrears. Whilst I think it's likely that letter was sent in error, I think sending it was inappropriate. Mr J did not receive the letter as he was still in hospital when it was sent, but Mr J's friend was checking his mail so it's likely he was made aware of it. I think that would have been distressing for Mr J. MAS5 should ensure that no fee was charged for arranging a field agent visit during that time.

MAS5 also asked Mr J's friend to complete an income and expenditure form on Mr J's behalf whilst he was still in hospital. Mr J's friend had told MAS5 Mr J was successfully receiving benefits but planned to return to work once he was well enough. I can appreciate why MAS5 wanted to get an up-to-date view of Mr J's circumstances as they had changed, but I'm not persuaded it was appropriate or necessary to ask Mr J's friend to complete that assessment on Mr J's behalf whilst Mr J was still in hospital, was not working, and his circumstances were likely to change in the future when he returned to work. MAS5 had agreed to put the account on hold whilst Mr J was in hospital, and I think it would have been fair and reasonable for that to include gathering information about his income and expenditure until Mr J was well enough to discuss things with MAS5 himself, and had a better understanding of his future plans. I think it's likely Mr J's friend discussed MAS5's requests with him, and I think that would have been distressing.

Towards the end of 2018 Mr J had recovered and was back at work. He was planning to change jobs after his contract came to an end. He told MAS5 his plans and it agreed to a nil payment arrangement for a couple of months whilst Mr J was in between jobs. On 11 February 2019 Mr J told MAS5 that he would get back in touch to let it know the outcome of his recent job application and provide details of his income and expenditure. However, no further contact was received and on 19 March MAS5 wrote to Mr J to say it intended to start legal proceedings. A court hearing was scheduled for May 2019.

As I've explained, the regulator's rules state that a lender must not repossess a security property unless all other reasonable attempts to resolve the position have failed. When MAS5 decided to start legal proceedings in 2019, I'm not satisfied it had reached the point of last resort.

MAS5 was aware of Mr J's vulnerabilities. He had experienced severe mental health issues with long lasting impacts. He had not long ago spent six months in a specialist hospital where he was receiving treatment, and whilst he had returned to work after that, he was still susceptible to his condition deteriorating if he became triggered. Whilst MAS5 was not aware of it at the time, that is in fact what had happened, and Mr J became extremely unwell in 2019 which led to him having a serious accident and he was hospitalised again.

Mr J had told MAS5 his plans in February 2019, and by March it had referred his account to its litigation department to start legal action. I'm persuaded that was premature. In taking that step MAS5 was not considering Mr J's particular circumstances, and it had not reached a point of last resort. I'm satisfied that legal action should not have happened. Even if it didn't know of his relapse at this time, it knew that he was planning to resume working shortly.

Mr J was in hospital during 2019 and whilst MAS5 did show some forbearance during that time once it learned of his relapse, it still maintained regular contact with Mr J, and still expected the arrears to be cleared to avoid further action. I'm not persuaded that was appropriate. There were conversations that took place during that period that I find concerning. For example, Mr J's mother spoke to MAS5 in May 2019 and offered to send a cheque to clear the arrears in order to stop the court hearing going ahead. MAS5 refused to cancel the hearing as it was unlikely a cheque would reach it in time. When Mr J's mother told MAS5 that Mr J would not be well enough to attend the hearing as he had concussion, MAS5 suggested she attended the hearing with him to assist him. Mr J's mother was able to

clear the arrears before the hearing and so MAS5 requested for it to be adjourned at the hearing, and there was no further legal action.

After Mr J was discharged from hospital, he had many discussions with MAS5 about his future plans. He hoped to return to work, at which point the mortgage would be affordable. But in the meantime, he was selling some of his possessions to generate some income. MAS5 suggested Mr J contact some money advice services to ensure he was receiving all the benefits he was entitled to, and kept collections activity on hold whilst he was recovering. MAS5 also acknowledged Mr J was experiencing memory problems after his accident, and his account was kept under the management of its specialist team who support vulnerable customers. It also suggested Mr J appointed a third party to discuss things on his behalf, but Mr J said there wasn't anyone appropriate and he was fine to discuss things himself. He was able to make some sporadic small payments in late 2019 as a result of selling his items, but unfortunately could not pay any more whilst he remained out of work.

After several months of conversations and no prospect of Mr J returning to work, MAS5 told Mr J it would be starting legal action to repossess the property unless he agreed to accept a place on its Assisted Voluntary Sale scheme, where it would help him sell his house. Mr J said he had looked into his benefits options further, and had applied for Support for Mortgage Interest (SMI) (a loan available to homeowners on certain benefits that will pay towards the interest charged on the mortgage), and Personal Independence Payments (PIP) (a benefit available to those living with a health condition or disability). He also said he was looking into renting out some of the rooms in his house. Mr J was able to clear the arrears by borrowing money from a friend. But as he still felt unable to work, and his benefits claims hadn't been assessed, he was still unable to afford the monthly mortgage payments.

After the onset of the global pandemic in 2020, there was no contact from Mr J until October 2020. At that time, he told MAS5 that he was unable to leave the house as he was classed as extremely vulnerable. He was unable to work but had set up two businesses online and was managing to sell some items, albeit wasn't making a profit. Mr J was also applying for benefits again as his previous applications had been unsuccessful. MAS5 agreed to put in place a payment deferral that it backdated.

In December 2020 Mr J told MAS5 he was travelling to his mother's house for his step-father's funeral which was on Christmas Eve. MAS5 told him it would hold off from contacting him for one week, but then contacted him again on 29 December to ask for an update.

In May 2021 as MAS5 hadn't heard anything further from Mr J it instructed a field agent to visit him at his property. The field agent had attempted to call Mr J before visiting but was unsuccessful. Mr J was unhappy MAS5 had sent someone to his home when it knew he was shielding and vulnerable. I do appreciate Mr J's concerns about this. But MAS5 and the field agent had tried to contact Mr J without success. No payments had been made to the mortgage and I don't think it was unreasonable for MAS5 to want an update on Mr J's circumstances and plans. As he had not responded to its contact attempts, I don't think it was unreasonable of it to instruct a field agent to visit Mr J after five months of no contact. MAS5 also wrote to Mr J to inform him of the visit beforehand so he had the opportunity to call MAS5 and have the appointment cancelled. No further payments were made, and MAS5 started legal action on the account. Mr J then complained.

In September 2021 Mr J sent MAS5 the relevant forms to claim Support for Mortgage Interest, and this was paid from March 2022. Although it was not enough to cover the monthly payments on the mortgage and no payments have been made by Mr J since March 2020.

I have a great deal of empathy for Mr J's circumstances. He's experienced a number of serious health issues which have impacted the type of work he's been able to do – and will likely be able to do in the future. I've referred previously to the regulator's rules and guidance that MAS5 was obliged to follow when dealing with Mr J in regards to his mortgage. There are a range of short term and longer-term forbearance measures that lenders should consider when deciding how best to support borrowers. Over the years MAS5 has put in place short term arrangements and holds on the account whilst Mr J was unwell, which I think was appropriate at the relevant times.

However, the aim of forbearance is to achieve a position where the mortgage is sustainably affordable for Mr J. At the time MAS5 started legal action in 2021, it was unclear how Mr J was going to be in a position where he would be able to afford this mortgage over the longer term based on his income at the time. His applications for benefits had not yet been successful, and he wasn't making any profits from his businesses. He had no immediate plans to return to paid work, and the wider circumstances meant he no longer felt he could consider renting out his spare rooms. Whilst none of these things could have been helped by Mr J, it was not in his interest to remain tied to a mortgage that he had no feasible way of paying. Whilst the mortgage continued to go unpaid, the balance was increasing as a result of the interest charged on the arrears. I'm also mindful of the fact this is an interest only mortgage and Mr J has no current plans in place for how he will repay it at the end of its term in 2031 – and that situation will become more difficult as the balance continues to increase.

I appreciate Mr J feels that he wouldn't have been in this position if MAS5 had not increased the interest rate unfairly. But whilst a lower interest rate would have reduced the arrears position, there were several long periods during the time I've considered under this complaint where no payments had been made at all. Even if the interest rate had been 2.76% lower than it was (as Mr J says it should have been), the monthly payments would not have been affordable for Mr J during those periods. MAS5 has calculated what the account position would have been had the interest rate been 1.25% lower as recommended by the investigator (and now by me in this decision) – and that confirms the mortgage account would still be in arrears now had the unfair rate increases not been made. As a result, I'm unable to conclude that it's the unfairly high interest rate that has caused Mr J's mortgage account to be in arrears.

Mr J has also complained that MAS5 refused to accept SMI payments earlier than it did because they weren't going to cover the full monthly payment amount. From reviewing the evidence provided by both parties, I'm not satisfied that's the case. MAS5 expressed concerns to Mr J that even if his application for an SMI loan was successful, it wouldn't cover the full monthly payments so Mr J would still need to find a way to pay the difference. I don't think it refused to accept the payments; it was explaining that it wouldn't solve the problem of the overall affordability of the mortgage. Which is the current situation the mortgage is in even now that Mr J is in receipt of the SMI payments.

Since this complaint was brought to us, Mr J's circumstances are likely to have changed. And I'm also planning to instruct MAS5 to make changes to the mortgage account in order to put things right. As a result, once any account re-structures or refunds have been made, it's important that Mr J and MAS5 have an open conversation about the future of this mortgage and whether Mr J will be able to afford the mortgage payments sustainably until the end of the term. I'd also encourage Mr J to seek independent advice about his options for how he may be able to repay the mortgage capital balance in 2031.

Overall, I'm satisfied that at times MAS5 has taken appropriate steps to offer Mr J reasonable forbearance during periods of non-payment for the most part. But there have also been instances, which I've referred to above, where I think it took inappropriate or unfair actions. I would like to make a general point that I agree with Mr J that at times MAS5's

communication and action to recover the arrears has come across as aggressive and insensitive, which is particularly disappointing given that he's been under the care of the specialist team who deal with vulnerable customers. I would suggest that MAS5 ensures that staff Mr J deals with in future have appropriate training and support. However, I'm also satisfied that when MAS5 started legal action in 2021, it did so reasonably as a last resort.

In reaching this decision I have taken into account Mr J's circumstances, and the fact that he's a vulnerable customer. The FCA has published guidance that makes it clear that lenders need to treat vulnerable customers fairly, and make reasonable adjustments where necessary. Whilst MAS5 is required to make reasonable adjustments based on Mr J's circumstances, that would not reasonably include, in my opinion, allowing Mr J's mortgage to continue running indefinitely whilst no payments are being made. That would not be in Mr J's interests and there needs to be some sort of plan for this mortgage to be repaid. However, the expectations set out in that guidance, as well as MCOB 13, have been taken into account when deciding what is a fair and reasonable way to resolve this complaint. And in particular, the occasions that I think MAS5 has treated Mr J unfairly during collections activity.

Mr J has also made reference to the Equality Act 2010, and the fact that he feels MAS5 has discriminated against him because of his disability. Whilst it's not for our service to determine whether or not there has been a breach of the Act – that's a matter of law – I have considered whether MAS5 has taken account of Mr J's vulnerable characteristics, including his disability, in the way it's treated him. I don't think it's always done so appropriately for the reasons I've said above.

I will take this opportunity to remind MAS5 that when agreeing next steps for this mortgage after the resolution of this complaint, it will need to pay due regard to Mr J's particular circumstances, including his vulnerabilities, and ensure it's putting in place reasonable adjustments where required. But for clarity, I do not consider a reasonable adjustment would include such things as allowing this mortgage to continue for an indefinite period without any payments being made by Mr J.

#### Putting things right

MAS5 should re-calculate Mr J's mortgage using the payments he actually made, but with revised monthly payments based on what they would have been if the interest rate had been 1.25% lower than it was from time to time between 18 December 2013 and 30 November 2022.

This will result in changes to the arrears balance from time to time, and so MAS5 should also amend Mr J's credit file to reflect the revised position. Any overpayments each month should be used to reduce the arrears balance at that time, and if there was no arrears balance, carried forward. If there are any overpayments left after repaying the arrears, Mr J should be given the choice of either having those repayments refunded to him, with simple annual interest of 8% running from the date of each payment to date of refund\*; or having the overpayments treated as periodic overpayments to reduce the mortgage balance.

MAS5 should also refund any arrears fees or legal fees that were added during any periods the mortgage would not have been in arrears after the re-work has been calculated above.

MAS5 should also refund any legal fees added to Mr J's mortgage during the period it unfairly took legal action in 2019. It should also refund any interest charged on the fees set out above.

I'm also satisfied an award for the distress and inconvenience MAS5 has caused Mr J is appropriate here. Both because of the interest rate, and therefore monthly payments, being

higher than they should have been from time to time since December 2013, and also because of the way it handled the collections activity on Mr J's mortgage account and the inappropriate contact and legal action.

In deciding an appropriate award I've taken account of the fact that Mr J was seriously unwell at the relevant times, and I'm satisfied that enduring legal action and the threat of repossession during a time when he was in hospital recovering from a serious head injury and mental health episode would have been particularly distressing. Considering all the circumstances, I'm currently persuaded that an award of £1,500 would be fair and reasonable here.

\*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 J how much it's taken off. It should also give him a certificate showing this if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate."

### **Responses to my provisional decision**

MAS5 said, in summary:

- It didn't wish to submit any further information in relation to the findings about the interest rate charged on Mr J's mortgage.
- It strongly disagrees with the way I'd characterised some of its treatment of Mr J whilst he was in arrears. It believes it has always acted fairly and with appropriate forbearance to try to support Mr J, in line with its regulatory obligations. It has held collections activities on numerous occasions in response to Mr J's ill health. Despite this, the position remains that Mr J has made no payments towards his mortgage since 2020.
- It disagrees that it was inappropriate to ask Mr J's friend to complete an updated income and expenditure assessment on Mr J's behalf when he was in hospital in 2017. Mr J's friend was clearly trusted and put in place by Mr J to support him with his financial position. Assessing affordability is a key element of forbearance to ensure MAS5 is supporting its customers appropriately. As Mr J was hospitalised at the time, in order to ensure the correct forbearance was provided, MAS5 needed to engage with Mr J's representative. It disagrees sending an affordability form to Mr J's friend was unfair, given those steps were taken to support Mr J's position, and to delay implementing appropriate forbearance may have risked causing detriment to Mr J.
- On 11 February 2019 it completed an income and expenditure assessment with Mr J and he confirmed he was back at work and did not envisage any issues with making payments to the mortgage. A positive disposable income of £3,575.21 was confirmed. In that phone call it did not appear that Mr J's vulnerability was still affecting his ability to pay his mortgage. His detailed description of the nature of his work gave MAS5 no reason to doubt what he'd told it. However, no further payments were made and Mr J did not respond to its attempts to contact him. Mr J was three months in arrears, which meets its trigger for litigation action. It would not be reasonable to expect MAS5 to delay litigation action as Mr J had evidenced he could afford the mortgage, but failed to make payments and didn't engage with MAS5 when it attempted contact. The arrears were later cleared by Mr J's mother, which evidences that the mortgage was not affordable by Mr J's own means.

Mr J said, in summary:

- The Co-operative Bank no longer owns MAS5. Legal title for the MAS5 mortgages has been transferred to a third party – with the exception of mortgages that are subject to complaints being investigated by our service. He says The Co-op has done this to limit liability as a result of legal action it expects to be taken in relation to this matter.
- As a result of the above, there is no need for MAS5's SVR to 'fit in' with the rest of the banking group's SVRs.
- The latest reduction in the Bank of England base rate has not been passed on to MAS5's SVR. The variation term allows MAS5 to ignore all future reductions in the base rate, as it did in 2009, but then increase the SVR when base rate rises. This is why, as a point of law, it has to be decided in court whether the variation term is fair under Unfair Terms in Consumer Contracts Regulations. The Co-op Bank has warned the investors who fund the mortgages about this.
- He has calculated the overpayments he has made as a result of MAS5 overcharging him interest. Overpayments should not be used to reduce the mortgage balance because this would not reflect the fact that the money would have remained in his bank account, and been available to make payments in the months when payments were missed.
- During the periods in which MAS5 threatened legal action, the account would actually have been in credit if MAS5 hadn't been overcharging interest. That includes the period in 2017 when Mr J sold his buy-to-let property to clear his mortgage arrears. He would not have sold his investment property just to clear his unsecured debts. Given his mental state in 2017, he would not have been able to give consent for his friend to pass any information on to MAS5.
- In 2019 MAS5 tried to convince him to sell his home when he asked them for help. He was still very unwell, and when he tried to raise concerns, MAS5 convinced him to have his complaint investigated internally instead of going to the FCA. He wasn't in a fit state of mind to refer his complaint to the Financial Ombudsman Service.
- He disagrees with the statement I made in my provisional decision that said if the interest rate had been 2.76% lower than it was, the monthly mortgage payments wouldn't have been affordable for him. He says the mortgage should not be re-worked as though it is a repayment mortgage and the overpayments were voluntary as they were not. The overpayments should be kept as credits on the account when the mortgage is looked at in retrospect. Had he not been making extra payments of £215 per month, the money would have been available to pay the mortgage in the months he was not able to.
- It is not for MAS5 to use the overpayments Mr J has made to reduce the balance of the mortgage and then say there were months he did not pay – they can't have the money twice. If his overpayments were kept separate and added up, the repossession attempt in 2022 should not have taken place.
- If it wasn't for the stress of having to deal with MAS5, then he would go back to work. But he can't put himself through this and a return to work at the same time.

Mr J also provided several documents such as letters he'd received from MAS5 over the years, statements, medical evidence, and MAS5's internal call notes.

### **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 the evidence again, including the additional comments made by both parties, I remain satisfied the outcome I reached in my provisional decision is a fair and reasonable way to settle this complaint, and I adopt the reasoning I set out in my provisional decision in this final decision.

I will now address the points raised by the parties in response to my provisional decision.

I appreciate the general points Mr J has made about the change in ownership of MAS5's mortgages, and that MAS5 is no longer owned by The Co-op. But whether or not that is the case, that doesn't change the way I've considered the fairness of the interest rate charged during the relevant periods.

I explained in my provisional decision that I was satisfied MAS5 did not need to make any ongoing reductions to the interest rate charged on Mr J's mortgage as a result of the way it had varied (or not varied) the rate in 2022. That was based on things as they were at that time (in 2022). I was satisfied that the rate was no longer higher than it ought to have been from November 2022 onwards, and so whether MAS5 still owns the mortgage doesn't affect my reasoning for that. Any concerns Mr J has about more recent decisions the lender has made to vary (or not vary) the interest rate charged on his mortgage, including the point he raised about the latest Bank of England base rate cut, would need to be raised as a new complaint.

I also understand Mr J disagrees with my interpretation of whether a court would find that MAS5's interest rate variation terms are unfair under the relevant law. He's said that the terms allow MAS5 to ignore reductions in the base rate, but it can increase the rate following base rate rises. There aren't separate conditions that must be met in relation to rate reductions and rate increases. Just conditions that state when the rate can be varied. Whilst the terms do allow MAS5 discretion when deciding whether to reduce the rate following base rate cuts, that same discretion is there for deciding whether to pass on base rate rises too. And MAS5 used that discretion in 2022 when it decided not to pass on all of the base rate rises that took place around that time.

Whilst I have said that I think it's unlikely a court would find that the variation terms were unfair, I went on to consider whether the way in which MAS5 varied the rate was fair and reasonable, whether or not the terms were unfair. As an ombudsman I'm required to determine complaints based on what I consider to be a fair and reasonable outcome in the circumstances. What Mr J has said about the variation terms hasn't changed my mind about that.

#### How the redress is calculated to put things right

Mr J has raised concerns about the way in which I've asked MAS5 to re-work his mortgage account. He said he doesn't think the mortgage should be treated as a repayment mortgage so MAS5 can reduce the balance. But that isn't what I proposed it should do. I said that it should re-work the account as if the interest rate was 1.25% lower than it was from time to time. And the overpayments Mr J made should be used to clear the arrears on the account as they were from time to time – and where there were no arrears – carried forward. That's essentially what Mr J has asked for. I said that once any arrears have been repaid, Mr J should have the choice of having any further overpayments used to reduce the balance, or refunded to him directly. But given the position of the mortgage account, the proposed redress would not clear the arrears that are currently outstanding on Mr J's mortgage. So there won't be any additional amounts that Mr J could use to reduce the capital balance. The arrears, however, will be significantly reduced compared to what they are now.

MAS5 has also agreed to refund any legal fees or field agent fees that have been added to

the mortgage during periods of arrears that wouldn't have otherwise been there, which is what I'd expect them to do.

Mr J has said that had the mortgage not been in arrears in 2017, he wouldn't have sold his buy-to-let property to avoid the repossession of his home. He was planning to use that property to repay his mortgage balance at the end of the term. In 2017 Mr J didn't make any payments to his mortgage for seven months. He was in hospital during that time and his friend was managing his finances for him on his behalf. Regardless of what the interest rate was during that time, Mr J wasn't able to make any payments to the account during that period. Mr J has said that had the interest rate been lower than it was, he would have had 'credit' on his account from the overpayments he'd previously made – and so the account wouldn't actually have fallen into arrears and he wouldn't have needed to sell his second property.

Whilst I appreciate the point Mr J has made, I'm not persuaded that would have been the case. It's clear from the notes I've seen during this period that Mr J's difficulties extended beyond him struggling to keep up with his mortgage payments. At the time he sold his buy-to-let property he had significant unsecured debts and had council tax arrears. Based on what I know of Mr J's circumstances at the time, I think it's unlikely that had Mr J's monthly mortgage payments been lower than they were, he would have either chosen to overpay each month and build up a 'credit' balance, or kept the money in his own account and saved it up. Based on his overall financial position, I think it's more likely he would have used that additional money for his expenditure, and staying up to date with other bills. As a result, regardless of the interest rate MAS5 was charging Mr J in 2017 – I'm persuaded the mortgage would still have fallen into arrears.

I said in my provisional decision that I didn't think MAS5 was threatening to take repossession action whilst Mr J was in hospital. I'm not persuaded it would be reasonable to conclude that MAS5 forced Mr J to sell his second property. MAS5 put a hold on collections activity whilst Mr J was in hospital, and Mr J's friend was aware of that. There were arrears building up on the account, but Mr J was in arrears with other creditors too. I'm still satisfied that Mr J chose to sell his second property in order to alleviate his overall financial situation – rather than because of anything MAS5 had done unfairly at the time. I don't think it would be reasonable to conclude that MAS5 charging 1.25% more interest than it should have done directly resulted in Mr J having to sell his buy-to-let property. And so I can't fairly hold MAS5 liable for any losses Mr J feels have flowed from that decision that he took. Whilst I understand Mr J's point that he wasn't in the right mental state to make those decisions at that time, I'm not persuaded MAS5 forced him to make that decision.

#### How MAS5 treated Mr J whilst he was in financial difficulties

MAS5 has disagreed that it acted inappropriately by asking Mr J's friend to complete an income and expenditure assessment on Mr J's behalf whilst he was in hospital in 2017. It said that it needed to ensure it was offering appropriate forbearance, and taking account of what Mr J could afford was a key element of that. Whilst in most circumstances, I would agree with MAS5 in that it's important for a lender to get a clear understanding of what a borrower can afford before deciding appropriate forbearance, I'm not satisfied that was the case for Mr J's particular circumstances at that time.

Mr J was in hospital and unable to engage with MAS5 himself. There's no dispute he was extremely unwell at the time. He wasn't making any payments to the mortgage, and MAS5 had told Mr J's representative that it would put a hold on collections activity whilst Mr J remained in hospital. Mr J's representative had told MAS5 that Mr J had a plan to clear his arrears (selling his buy-to-let property), and would be able to resume payments once he was back at work.

As MAS5 was aware, Mr J wasn't able to make any payments to the mortgage whilst he was in hospital, and so I find it was unnecessary to ask Mr J's representative to complete an income and expenditure assessment on Mr J's behalf. It had said it would hold collections activity, which I consider was the fair thing to do at the time, so I'm not persuaded it was reasonable to ask Mr J's friend to complete an income and expenditure assessment for Mr J. Had that assessment been completed, it's unclear what MAS5 would have gained by it confirming Mr J could not afford to pay anything to his mortgage – which his friend had already told it. I consider it caused unnecessary distress and inconvenience to Mr J and I remain satisfied it wasn't appropriate based on the circumstances at the time.

MAS5 also says it's satisfied it was acting appropriately when it started legal action to repossess Mr J's property in 2019. Whilst I've considered what it's said, I disagree. In February Mr J had told MAS5 he was starting his new job, and had made his monthly payment for that month. I appreciate there were already some arrears on the account, and Mr J did need to agree with MAS5 how they would be repaid. But he had made his monthly payment, and so the arrears were not growing. MAS5 referred Mr J's mortgage account to its solicitors to start litigation in March 2019. I do appreciate it had been trying to contact Mr J in the meantime, but I still consider taking legal action only a month after it had spoken to Mr J, and he had made his monthly payment, was unfair. That's particularly the case here where MAS5 was aware of Mr J's vulnerabilities, and how his conditions affected him.

Whilst MAS5 may not have felt Mr J was unwell during the phone call it had with him in February, it was aware of the nature of Mr J's ongoing conditions and that they could be triggered at any time. And that wasn't a judgement for MAS5 to make as a mortgage lender rather than a medical expert. So I don't think it's reasonable to say that just because Mr J didn't seem vulnerable or unwell in the call it had with him in February 2019, it was reasonable to start legal action. MAS5 didn't know this at the time, but Mr J was in fact very unwell and ended up back in hospital. Overall, whilst I appreciate what MAS5 has said, I remain satisfied that in the particular circumstances of this case, it acted unfairly when it took legal action in 2019.

I concluded in my provisional decision that I think overall, there were significant periods where I'm satisfied MAS5 did offer Mr J appropriate forbearance and treated him fairly given his circumstances at the relevant times. But there were also certain periods where I didn't think that was the case. And what MAS5 has now said hasn't changed my mind about that.

### **Putting things right**

I remain satisfied the redress I awarded in my provisional decision is a fair and reasonable way to settle this complaint.

MAS5 should:

- Re-calculate Mr J's mortgage using the payments he actually made, but with revised monthly payments based on what they would have been if the interest rate had been 1.25% lower than it was from time to time between 18 December 2013 and 30 November 2022.
- This will result in changes to the arrears balance from time to time, and so MAS5 should also amend Mr J's credit file to reflect the revised position. Any overpayments each month should be used to reduce the arrears balance at that time, and if there was no arrears balance, carried forward. If there are any overpayments left after repaying the arrears (which I don't consider it's likely there will be), Mr J should be given the choice of either having those repayments refunded to him, with simple

annual interest of 8% running from the date of each payment to date of refund\*; or having the overpayments treated as periodic overpayments to reduce the mortgage balance.

- Refund any arrears fees or legal fees that were added during any periods the mortgage would not have been in arrears after the re-work has been calculated above.
- Refund any legal fees added to Mr J's mortgage during the period it unfairly took legal action in 2019. It should also refund any interest charged on the fees set out above.
- Pay Mr J £1,500 for the distress and inconvenience it caused, for the reasons I explained in my provisional decision.

\*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 J how much it's taken off. It should also give him a certificate showing this if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

Once the above has been done, both parties will need to engage and discuss the next steps for Mr J's mortgage. This will likely need to involve an updated review of Mr J's circumstances, and what is going to be affordable for him both now and in the long term. I'd expect MAS5 to consider any reasonable proposals Mr J makes before starting legal action to repossess the property.

### **My final decision**

I uphold this complaint and instruct Mortgage Agency Services Number Five Limited to put things right as I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J to accept or reject my decision before 14 October 2024.

Kathryn Billings  
**Ombudsman**