

## The complaint

Mr and Mrs K have complained that Kensington Mortgage Company Limited has treated them unfairly as it won't offer them a new preferential interest rate product on their mortgage.

## What happened

Mr and Mrs K took out their mortgage in May 2005 with lender G. They borrowed around £288,000 (including fees) on an interest only basis over a term of 25 years.

The mortgage was on a fixed interest rate of 6.50% until 3 June 2007. After that, the interest rate changed to a variable rate, at 1.75% above the Barclays Bank base rate ("base rate") for the remaining term. The base rate was 4.75% when the mortgage offer was issued, so the variable rate payable at that time would have been 6.50%.

The initial fixed rate came to an end in June 2007, and since then Mr and Mrs K have been paying interest at the variable rate.

In 2015 the mortgage was transferred from lender G to Kensington.

In July 2022 Mr and Mrs K complained to Kensington about the fact they were unable to access a new rate. Kensington responded to that complaint in August 2022 saying the mortgage prisoner rates were higher than Mr and Mrs K's existing rate, and it couldn't offer them a standard retention rate because those weren't available for customers whose mortgage had originated with lender G.

As that complaint then wasn't referred to our service within six months of the final response letter, we said we were unable to consider it.

From October 2022 onwards Mr and Mrs K again told Kensington they wanted a new interest rate product on the mortgage. And then in May 2023 a further complaint was logged.

Kensington responded on 26 June 2023, saying:

- It had previously responded to the complaint in August 2022, and since then it still didn't have any products available for Mr and Mrs K.
- It recommended they speak to an independent financial adviser to explore their options, such as remortgaging to another lender.
- It had discussed forbearance options with Mr and Mrs K due to Mr K's health concerns, but they didn't want to proceed with those.
- If further options are to be discussed it will need the income and expenditure form returned, which it had sent to Mr and Mrs K in December 2022, plus the requested supporting evidence.
- A letter had been sent to Mr and Mrs K in respect of their request to let the property.

Unhappy with Kensington's response Mr and Mrs K referred their complaint to the Financial Ombudsman Service.

Our Investigator said we could only consider the period from 16 August 2022 to 26 June 2023 as a complaint about what happened before 16 August 2022 hadn't been referred to us in time. Mr and Mrs K and Kensington accepted that, so our Investigator looked at what had happened in that period.

Our Investigator asked Kensington why no new products were available. It said there were no mortgage prisoner rates available at the time in question, and they wouldn't have been eligible for the fixed rates because the fixed rates available at the time had a reversionary rate margin that was higher than that of Mr and Mrs K's current product.

Our Investigator initially concluded that Kensington hadn't done anything wrong, but after Mr and Mrs K didn't agree she looked at things again. Upon review she said that whilst she felt Kensington hadn't acted fairly when it didn't discuss a new rate with Mr and Mrs K in October 2022, she didn't think they met the eligibility criteria so wouldn't have been able to secure a new rate anyway. For the error she said Kensington should pay £150 compensation to Mr and Mrs K.

As neither side accepted our Investigator's revised opinion the case was passed to me to decide.

### **What I've decided – and why**

I asked our Investigator to obtain some further information from Kensington, and once I received and reviewed that I issued a provisional decision to set out my thoughts on the complaint, the findings of which said:

*"The terms of Mr and Mrs K's mortgage say that, once the fixed interest rate ended in 2007, interest would be charged throughout the remainder of the term at a premium above the base rate. There is nothing in their mortgage offer or terms and conditions which obliges Kensington to offer them a new rate at any time.*

*That means that Mr and Mrs K's mortgage has operated as it should have done, in line with the terms and conditions they agreed to when they took it out.*

*I recognise that it's fairly common in the mortgage market for lenders to offer existing customers new preferential interest rates at intervals during the mortgage. And that it's common for buyers to shop around – either by taking a new rate with their existing lender, or by moving to a new lender.*

*However, while – as I've said – it's common for lenders to do that, not all lenders do make new rates available to existing customers. And there's no rule – either in law, or in mortgage regulation – that says a lender has to do so.*

*Prior to 2017, Kensington did not make new rates available to any of its customers. It was not required to do so. Mr and Mrs K's mortgage continued to operate on its existing terms and conditions, as they'd been told it would. And they were in the same situation as all other Kensington customers. In those circumstances, I don't think it was unfair that Kensington didn't make new rates available to Mr and Mrs K.*

*In 2017, Kensington did start to make new interest rates available to some existing customers. As I say, it wasn't obliged to do so – but from 2017, it chose to do so.*

*Where a lender chooses to make new interest rates available, it should treat any application for a new rate fairly. It's not unreasonable to have eligibility criteria – meaning that not all customers get the same rate, and even that some customers are not eligible for rates at all – but this should be done on a fair basis.*

*I understand Kensington has eligibility criteria for new preferential interest rates in that it only offers new rates to customers that meet the following criteria:*

- *The mortgage originated with Kensington.*
- *The reversion margin on any potential new product isn't higher than the reversion margin of their current product.*
- *Not currently in arrears.*
- *No arrears equivalent to one month's payment or more in the last twelve months.*
- *No other amounts outstanding.*

*Kensington's policy in 2022 meant that Mr and Mrs K had to stay on their existing variable interest rate, move their mortgage to another lender, or re-apply to Kensington as new borrowers and take a new mortgage with it.*

*Mr and Mrs K have said that their personal and financial situation means that they're unable to find an alternative mortgage lender.*

*I need to decide whether, in all the circumstances, the reasons Kensington gave were a fair and reasonable basis on which to refuse Mr and Mrs K a new interest rate product.*

*In thinking about this, I've taken account of the rules, provisions and guidelines of mortgage regulation, known as MCOB. MCOB 11.8.1 E says:*

*'When a customer is unable to:*

- (1) enter into a new regulated mortgage contract or home purchase plan or vary the terms of an existing regulated mortgage contract or home purchase plan with the existing mortgage lender or home purchase provider; or*
- (2) enter into a new regulated mortgage contract or home purchase plan with a new mortgage lender or home purchase provider;*

*the existing mortgage lender or home purchase provider should not (for example, by offering less favourable interest rates or other terms) take advantage of the customer's situation or treat the customer any less favourably than it would treat other customers with similar characteristics. To do so may be relied on as tending to show contravention of Principle 6 (Customer's interests).'*

*Principle 6 says*

*'A firm must pay due regard to the interests of its customers and treat them fairly.'*

*In MCOB 11.8.1 E, the suffix "E" means that this is an evidential provision, not a rule.*

*Conduct of the sort set out in the provision may tend to show unfairness – but equally it may not, depending on the individual circumstances. The provision is clearly intended to ensure that borrowers who can't shop around for a better deal aren't taken advantage of or treated less favourably than those who can.*

*Kensington says it wasn't offering new interest rate products to any customers whose*

*mortgages didn't originate with it, and for those where the reversionary rate would be higher on the new mortgage product. In effect, it is saying it treated Mr and Mrs K the same as all its other customers who were in their position – that is, those who took out their mortgage originally with lender G and were on a variable rate that was lower than the reversionary variable rate on any potential new product.*

*I don't consider this was a fair and reasonable approach for Kensington to have taken.*

*MCOB 11.8.1 E is intended to ensure that customers who have similar characteristics aren't treated differently – and I don't think that who the original mortgage was with is a characteristic of a customer on which it's reasonable to rely in deciding which customers will be offered another preferential rate many years later.*

*I'm also not persuaded by Kensington's argument about the new product's reversionary rate being higher than the variable rate Mr and Mrs K are currently on. That's because, under 11.8.1 E, there should be no reason for Mr and Mrs K to move to that reversionary rate because it follows that if it would have been fair to give Mr and Mrs K a new rate in the period in question then it would likely also be fair for Mr and Mrs K to get another new rate when any new preferential rate ends.*

*As I don't think either of the first two reasons should have been a barrier to Mr and Mrs K obtaining a new rate in the period in question I now turn to the remaining reasons, that is that Mr and Mrs K weren't in arrears, had no arrears equivalent to one month's payment or more in the last twelve months, and had no other amounts outstanding.*

*Mr and Mrs K weren't in arrears at the time of the conversation on 11 October 2022, and I've not seen anything to suggest they either had arrears equivalent to one month's payment or more in the last twelve months or had any other amounts outstanding.*

*I've therefore looked at Mr and Mrs K's mortgage to see if I think they would have been eligible for a new interest rate in October 2022. And I think they would. Kensington has estimated their loan to value at the time as being just over 50%, which would have qualified them for a rate.*

*I'm therefore satisfied that Mr and Mrs K would have qualified for a new interest rate when they asked about one in October 2022. And for the reasons I've explained, I don't think it was fair and reasonable (taking into account MCOB 11.8.1 E) to treat them less favourably based on which lender their mortgage was taken out with, or the reversionary rate, since I don't think that amounts to a characteristic at the time they made the application. In all the circumstances, therefore, I'm satisfied that in refusing them a new rate at this time, Kensington didn't act fairly and reasonably.*

*However, that isn't the end of things. At the time of the conversation in October 2022 Kensington only offered one interest rate band, which was for all mortgages up to 95% loan to value and on 11 October 2022 the interest rates available were between 8.15% and 8.45%. Having considered everything very carefully I'm not persuaded Mr and Mrs K would have opted for a rate at that time due to the rates being so high compared to their interest rate which, at that time, was 4%.*

*But I do think that, once Mr and Mrs K knew a new rate was an option, they would have kept in touch with Kensington on a regular basis to see what new rates had become available. To that end I've obtained from Kensington details of the rates it had available at various times (between 11 October 2022 and 26 June 2023), along with Mr and Mrs K's transaction history and contact notes (to ensure they remained eligible for a new rate at the various times).*

*Having done so I think it is more likely than not that Mr and Mrs K would have taken a new rate from the rates available from what Kensington has described as the mailing month of 31 January 2023 which I understand were available from 1 February 2023 (if that understanding is incorrect I'd ask Kensington to let our Investigator know immediately so I can review this redress).*

*I think it is likely Mr and Mrs K would have applied for that rate on 1 February 2023, in the knowledge the Monetary Policy Committee at the Bank of England would be meeting the following day to decide on any changes to the base rate. At that time Mr and Mrs K's interest rate was 5.25%, with further increases in the base rate expected, so I think it most likely (which is the test I must use) that Mr and Mrs K would have opted, on 1 February 2023, to apply for the rate of 5.45% fixed for two years.*

*I don't think Mr and Mrs K would have applied for any of the earlier rates that Kensington had available due to the fact they were significantly higher than the interest rate they were paying."*

I invited Mr and Mrs K and Kensington to provide any final submissions they wanted me to consider.

Mr and Mrs K were happy with my proposed resolution and had no more to add. Kensington didn't agree with my provisional decision, but it didn't raise anything new that I hadn't already considered when reaching my provisional findings.

In its response to my provisional decision Kensington has said the account was transferred to it for servicing. But Kensington is an active mortgage lender, offering mortgage products to customers. Its role isn't just to service the mortgage, it has a regulatory responsibility to treat Mr and Mrs K fairly and in line with the provisions set out in MCOB and 'The Principles' in the FCA's handbook.

An assessment of the fairness of Mr and Mrs K's treatment in comparison to the treatment of other borrowers is to be based on their situation at the time of the assessment, not their situation when the mortgage was taken out. I understand Kensington considers the circumstances in which the mortgage was taken out to be relevant – but, as I explain below, that's not relevant to the question of whether it treated Mr and Mrs K fairly in their particular circumstances.

Taking into account Kensington's rate switch criteria I think Mr and Mrs K's mortgage met some of them in the period in question. Therefore, based on their circumstances and the circumstances of their mortgage at the time, I don't have any evidence for concluding that Mr and Mrs K failed Kensington's criteria in respect of their current circumstances. And so it follows that I think it's more likely than not that they met these criteria.

Rather, it seems that the reason Kensington says no new rate was available to Mr and Mrs K was because they did not meet the rest of its criteria, relating to the fact the mortgage was taken with lender G and later transferred to Kensington.

At the time of the discussion about a new rate in October 2022, Mr and Mrs K shared similar characteristics with other customers who were eligible for a new rate on their existing mortgage – but Mr and Mrs K were not eligible.

In my provisional decision I referred to MCOB 11.8.1 E, and I noted its content and effect. I was satisfied that Mr and Mrs K were unable to move their mortgage to another lender, and that therefore MCOB 11.8.1 E was relevant to their situation.

Kensington, in its response to my provisional decision, said that it can't offer a new rate as the mortgage originated with lender G. But what is relevant is Mr and Mrs K's characteristics at the time they discussed a new rate – not the circumstances in which they'd taken their mortgage out over fifteen years earlier. Their circumstances may well have changed significantly since then. And other customers who were eligible for a rate may well also have faced changed circumstances since taking their loans out – which wouldn't affect their eligibility.

In my view, the question to be asked is whether, in 2022, Mr and Mrs K's characteristics at that time were similar to the then current characteristics of customers who would be eligible for a rate. And if they were similar, it wouldn't be fair to offer them a rate less favourable than those other customers.

Therefore, in my view, the circumstances in which Mr and Mrs K took their mortgage out, such as which lender it was taken out with, are not relevant to the question of whether in 2022 they had similar characteristics to, and were being treated less favourably than, customers who would be eligible for a rate.

I think it's clear from the wording of MCOB 11.8.1 E that the comparison envisaged is between customers of a firm taken as a whole. What matters is whether Mr and Mrs K, as individual mortgage customers of Kensington, have similar characteristics to other individual customers of Kensington. And if they have similar characteristics to those other customers but are being treated less favourably than those other customers, that may tend to show a breach of Principle 6 and unfair treatment in the individual case. The fact Mr and Mrs K's mortgage originated with a different lender over 15 years ago, isn't a characteristic of Mr and Mrs K now. Kensington is Mr and Mrs K's lender and, as I've explained, its obligations to treat them fairly flow from the fact that it is their lender. It isn't just servicing this mortgage for a different lender.

In its response to my provisional decision Kensington also said "*The rates that were available in 2022 were for customers taking out a new mortgage with Kensington via a financial advisor and were not available for existing customers*" but the information it had previously provided about these were all entitled "*retentions*" or "*retention rates*" and the Kensington case handler confirmed they were the retention rates that were available at the time. As retention rates are only available to existing customers I'm more persuaded by Kensington's earlier submissions on this point and so I'm satisfied the rates I'd been provided with were the rates that were available at that time to Kensington's existing customers who wanted to take a new interest rate product.

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

Having done so, and having considered the full file afresh including Kensington's response to my provisional decision, I see no reason to depart from my provisional findings.

### **Putting things right**

In order to put things right, Kensington should put Mr and Mrs K in the position they would have been in had they, on 1 February 2023, applied for the two-year fixed rate of 5.45%.

This means Kensington will need to re-calculate their mortgage on that basis – treating payments to date as overpayments and ensuring that it does not charge them more than that fixed rate until the end of that product term. Mr and Mrs K will then be able to apply for a new rate at the time that product ends – and Kensington should give any application fair consideration according to its criteria at the time, taking into account MCOB 11.8.1 E if it is

still relevant to their situation at that time.

Finally, I'm satisfied that having to keep asking about getting a new rate and having to pay more interest as a result of the request not being fairly considered, has caused Mr and Mrs K upset and inconvenience. I'm satisfied that £300 is fair compensation for that.

### **My final decision**

For the reasons I've given, I uphold this complaint and direct Kensington Mortgage Company Limited as follows:

- It should re-work Mr and Mrs K's mortgage so that it is as if it had offered them the two-year fixed rate of 5.45% on 1 February 2023.
- In respect of payments made since that rate would have taken effect and the date this matter is settled, it should offer Mr and Mrs K the choice of (once any arrears are cleared – as I understand arrears have built up since the time in question - if any remain once the account has been reworked onto the fixed rate product):
  - Having the additional amount they've paid each month refunded to them, adding simple annual interest of 8%\* running from the date of payment to date of refund; or
  - Having the additional amount they've paid each month treated as an overpayment, reducing their mortgage balance and thus the interest in subsequent months accordingly.
- It should pay Mr and Mrs K £300 compensation

\* If there is an 8% interest element to any payment to Mr and Mrs K, Kensington may deduct income tax from the 8% interest element as required by HMRC. But it should tell them what it has deducted so they can reclaim the tax from HMRC if they're entitled to do so.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs K to accept or reject my decision before 16 August 2024.

Julia Meadows  
**Ombudsman**