

The complaint

This complaint follows on from a decision I issued on 8 October 2024 when I confirmed that I can only consider the following issues in relation to Mr and Mrs N's mortgage held with Topaz Finance Limited trading as Heliodor Mortgages (and referred to here as Topaz).

- Mr and Mrs N's dissatisfaction about the interest rate they've been charged since Topaz took over the mortgage in November 2019;
- their complaint that Topaz has harassed them and has unreasonably started legal action against them;
- costs and fees added to the mortgage by Topaz;
- a request to align the end date on the further advance with the main mortgage;
- that Topaz has failed to comply with a Data Subject Access Request (DSAR).

What happened

I won't set out the full background to the complaint. This is because the history of the matter is set out in the correspondence between the parties and our service, so there is no need for me to repeat all the details here. In addition, our decisions are published, so it's important I don't include any information that might lead to Mr and Mrs N being identified.

So for these reasons, I will instead concentrate on giving a brief summary of the complaint, followed by the reasons for my decision. If I don't mention something, it won't be because I've ignored it; rather, it'll be because I didn't think it was material to the outcome of the complaint.

Mr and Mrs N have an interest-only mortgage, originally taken out with another lender. It was transferred to Topaz in November 2019.

The mortgage is in two parts. The first part of the mortgage (Part 1), taken out in 2007, is for approx. £240,000 and is due to end in October 2028. The second part of the loan (Part 2) was taken out at the same time, for approx. £34,300 for a term of eight years nine months. That part of the loan expired on 1 May 2016 when the capital balance became due and payable.

Although Part 1 still has several years left to run, Topaz has started possession proceedings because Part 2 hasn't been repaid. Mr and Mrs N have vigorously defended Topaz's claim for possession. The proceedings have been adjourned generally with liberty to restore, pending our consideration of this complaint.

Mr and Mrs N raised their complaint with our service. An Investigator explained that we could only look at the issues listed above. She thought the interest rate on the account was fair and that Topaz had varied the interest rate in line with the mortgage terms and conditions.

The Investigator wasn't persuaded Topaz had harassed Mr and Mrs N. She found the contact from Topaz since 2019 was reasonable, given that Part 2 had been due for repayment since 2016.

Topaz first instructed its solicitors in February 2022. The Investigator noted that Mr and Mrs N hadn't engaged with Topaz's agents, or responded to correspondence. However, the Investigator also noted that Mr and Mrs N had actively marketed the property, told Topaz about this in December 2022 and provided authority to the estate agent to update Topaz, which it did.

Given this, the Investigator thought Topaz hadn't acted fairly in starting legal action. The Investigator thought Topaz should remove any legal fees added to the mortgage account from the date Topaz received evidence that the property was on the market and the estate agent authority was received by Topaz. The Investigator also thought Topaz should pay compensation of £500 for any distress caused to Mr and Mrs N.

In relation to Mr and Mrs N's request for a DSAR, the Investigator found Topaz hadn't (by August 2024) fully complied with this, despite being ordered by the court to do so. The Investigator asked Topaz to provide Mr and Mrs N with the outstanding information they were entitled to and pay compensation of £100 for distress and inconvenience.

The Investigator thought Topaz should consider Mr and Mrs N's request for a term extension for Part 2 of the mortgage to align it with the end date of Part 1, and reminded Topaz that regulations allowed it to dispense with affordability and interest-only repayment strategy checks. The Investigator noted that Topaz hadn't acted on Mr and Mrs N's requests for a term extension, from at least March 2023. The Investigator asked Topaz to pay an additional £200 compensation for the distress and inconvenience caused to Mr and Mrs N.

Neither party accepted the Investigator's findings and both asked for an Ombudsman to review the complaint.

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.

As I mentioned above, there are other issues Mr and Mrs N raised with us that I have decided are outside the jurisdiction of the Financial Ombudsman Service. I will therefore make no further comment on them.

Both Mr and Mrs N and Topaz made detailed responses to the Investigator's findings. I confirm I've given careful consideration to everything both parties have said. However, having done so, I've reached the same conclusion as the Investigator, for largely the same reasons.

Interest rate: Topaz has provided the Financial Ombudsman Service with detailed information about the reasons why it varied its SVR in the way that it did. The information Topaz has given us is commercially sensitive, so can be treated as confidential. The information has been reviewed in line with Topaz's mortgage documentation, relevant law and regulations.

I've considered whether Topaz acted fairly overall. Having done so, I'm satisfied Topaz varied the SVR in line with the mortgage terms and conditions and that Topaz exercised

those terms fairly. This means that I'm satisfied Topaz has not overcharged interest on the mortgage since November 2019.

One of the considerations that I am required to take into account is relevant law. I consider that the application of the Unfair Terms in Consumer Contract Regulations (UTCCR) to the relevant terms in this case falls into that category of relevant law. The way the UTCCR apply to the relevant terms of this mortgage contract is ultimately a matter for the courts. But they are a relevant consideration I must take into account when determining what is fair and reasonable in all of the circumstances of this case.

The crux of this is whether any of the terms, contrary to the requirements of good faith, cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. As part of this, relevant considerations are:

- the extent to which the terms are sufficiently clear and transparent;
- the extent to which there were any barriers to Mr and Mrs N being unable to exit the contract.

At a general level, interest variation clauses such as those that applied to this mortgage have a legitimate purpose and are common in financial services consumer contracts, particularly those of long or indeterminate duration, such as mortgage agreements. A fair variation term can benefit both consumers and lenders, by providing flexibility and a wider choice to consumers and enabling firms to provide competitively priced products, knowing they can vary the interest rates they charge to reflect changes in circumstances, particularly in their own cost of funding.

A reversion rate also permits lenders to provide for future changes that justify increases in the rate, and a lender's own costs of funds are by nature difficult to foresee.

When considering whether there was a significant barrier to exit, it is important to note that there was no early repayment charge applicable to Mr and Mrs N's mortgage at the point it was taken over by Topaz in November 2019. So, if Topaz had exercised its rights as set by the variation terms, and Mr and Mrs N were unhappy with that decision, they were free under the contract to re-mortgage to another lender.

Overall I am not persuaded there is any basis to say that the variations Topaz made to its SVR resulted in Mr and Mrs N being charged an unfairly high rate of interest on the mortgage during the period I can consider. Nor does the evidence lead me to conclude that the interest rate applied during that period was unfair for any other reason.

I don't uphold this part of the complaint.

Harassment: I've taken careful note of what Mr and Mrs N have said about this. However, after reviewing the contact notes, I'm not persuaded that Topaz has harassed Mr and Mrs N since taking over the mortgage in 2019. I can understand that Mr and Mrs N were upset at being contacted by Topaz, but by the time it took over this mortgage, Part 2 of the mortgage had been due for repayment in full for more than three years.

I'm not persuaded that the nature or tone of the contact from Topaz amounts to harassment, particularly as there were long periods when Mr and Mrs N failed to engage with Topaz. I therefore don't uphold this part of the complaint.

Possession proceedings and legal fees: Before Topaz began legal action, I can see that it tried to engage with Mr and Mrs N, but they didn't respond to letters. A field agent was instructed, and I know Mrs N disputes that she ever spoke to a field agent, saying that he must have spoken to a neighbour with a similar address.

Mr and Mrs N didn't have any payment proposals for Part 2, although they asked for a redemption statement in or about November 2021. Solicitors were instructed to start possession proceedings in February 2022.

In May 2022 Mr and Mrs N asked Topaz to align Part 2 of the mortgage with Part 1. In August 2022 Topaz submitted its claim for possession to the courts. In October 2022 Topaz was told by Mr N that he and Mrs N were having difficulty selling the property and they were trying to re-mortgage. In December 2022 they told Topaz they'd re-marketed the property, and they authorised their agent to update Topaz, which he did in January 2023. However, Topaz said that, notwithstanding the property was being sold, it intended to continue with possession action.

Mr and Mrs N submitted their concerns about Topaz's actions to the court, and the judge asked Topaz to provide information about the help it had given to Mr and Mrs N. As stated above, the proceedings have now been adjourned generally with liberty to restore.

I think that starting possession action on Part 2 of the mortgage in the circumstances of this case was somewhat heavy-handed on the part of Topaz. Part 2 of the mortgage is much smaller than Part 1, and represents only 12.5% of the total debt outstanding. Whilst possession action is always an option open to a lender, it is meant to be a last resort.

Although the Mortgage Pre-Action Protocol doesn't apply to an expired interest-only mortgage, I'm satisfied that, given Part 1 of the mortgage wasn't in arrears, it was unfair and unreasonable for Topaz to begin legal action. This is particularly so given that Mr and Mrs N were actively marketing the property and had provided Topaz with updates.

In the circumstances, I agree with the Investigator that beginning possession action was unfair, unreasonable and inappropriate given the position on Part 2 of the mortgage.

I'm satisfied that Topaz should remove the legal fees (and any interest charged on those fees) from the date it received confirmation from Mr and Mrs N that they were marketing the property and given third party authority for the estate agent. Topaz's contact notes show this was on 19 December 2022.

I'm also satisfied that Topaz's actions caused Mr and Mrs N distress and upset, for which a payment of compensation is appropriate. I agree with the Investigator that a payment of £500 is appropriate in the circumstances.

DSAR: Mr and Mrs N say that Topaz hasn't responded in full to their DSAR, despite being ordered by the court to provide call transcripts and webform submissions.

I don't believe call transcripts form part of a DSAR, because, generally, a data controller isn't required to create new data for the purposes of compliance with a DSAR. Therefore if transcripts don't already exist, only recordings, then unless there is some reason why providing a recording would be inappropriate (for example, if the person making the DSAR is deaf and therefore unable to listen to a call recording), it is usually only the recording that would be provided.

Topaz has accepted that it didn't make Mr and Mrs N aware that it wasn't required to provide call transcripts as part of a DSAR response. Topaz has agreed to pay the £100 compensation the Investigator recommended for any upset and inconvenience caused by this. I think this is fair in all the circumstances.

If Mr and Mrs N are still unhappy about Topaz's response to their DSAR, the more appropriate forum for their concerns about this is the Information Commissioner's Office.

Term alignment/extension: I can see that Mr and Mrs N have repeatedly asked Topaz to consider extending the term of Part 2 to align with Part 1 of the mortgage. This is a reasonable request, given that Part 2 represents such a small percentage of the borrowing.

Topaz has said it will consider this, subject to Mr and Mrs N passing an affordability assessment. However, I think Topaz might not need to do this, for the reasons given below.

There are regulations in place that have flowed from the Mortgage Market Review (MMR) carried out by the Financial Conduct Authority (FCA) which took place after the financial crash in 2008. This has led to a series of major changes, effective since 2014, in the way residential mortgages are regulated. MMR regulations have brought about requirements for stricter lending assessments, aimed at protecting consumers and encouraging mortgage lenders to act more responsibly.

The FCA recognised though that existing borrowers who wanted to make changes to their mortgages might have difficulties with this if they had passed tests under the old rules but wouldn't under the new ones. So, it introduced certain rules to address this. The rules are contained in the Mortgages and Home Finance: Conduct of Business Sourcebook (MCOB).

MCOB says a lender doesn't have to carry out an affordability assessment if a borrower wants to vary or replace an existing mortgage and there is no additional borrowing (other than for product fees) and no change to the terms of the mortgage that is material to affordability

There are also transitional arrangements which say that a lender need not carry out an affordability assessment if:

- the borrower has an existing mortgage taken out before 26 April 2014, and is applying to vary that mortgage or replace it with a new one;
- the application wouldn't involve any additional borrowing except for essential repairs to the property, or to add product fees to the balance;
- there's been no further borrowing (with some exceptions) since 26 April 2014; and
- the proposed transaction is in the borrower's best interests.

So, under this rule, even where a change material to the affordability of the mortgage takes place, the lender can, *if it chooses*, waive an affordability assessment. If the lender decides to carry out an affordability assessment, it shouldn't use that as a reason to decline an application if allowing the application would otherwise be in the customer's best interests. But the lender can take the assessment into account as part of its consideration of best interests.

This means there are two routes that an application for an existing borrower can go down. If there's no change to the terms of the mortgage contract material to affordability, there's no obligation to carry out an affordability assessment at all. And if there is a change to the terms of the mortgage contract material to affordability, a lender could still decide to allow an

application without an affordability assessment if doing so would otherwise be in the borrower's best interests.

A term extension is a material change to the mortgage, but, as stated above, if Topaz believes it is in Mr and Mrs N's best interests, it can dispense with an affordability assessment when considering a request to align the end date of Part 2 with Part 1. I've looked at what Mr and Mrs N have said about their circumstances, and I think it would be harsh for Topaz to insist on an affordability assessment in all the circumstances, given that it is clearly in Mr and Mrs N's best interests to have Part 2 of the mortgage aligned with Part 1. It is difficult to see why Topaz failed to take this into consideration at the point it took over the mortgage in 2019, or at any time since when it was asked to do so.

Topaz has agreed to consider a term extension on Part 2, but says this is subject to an affordability assessment. I hope I have made it clear that Topaz can (and in my view, should) dispense with this if it fairly applies the provisions of MCOB 11.7 to Mr and Mrs N's circumstances.

I'm satisfied that the delay in considering Mr and Mrs N's request has caused them distress and inconvenience. I'm satisfied a payment of £200 compensation for this is appropriate.

Putting things right

I'm satisfied that this complaint should be partly upheld, and that Topaz Mortgages Limited trading as Heliodor Mortgages must do the following:

- Remove all legal fees (and interest on those fees) added to the mortgage account from 19 December 2022 to date.
- Provide Mr and Mrs N with any outstanding information from their DSAR. However, if call transcripts do not already exist, Topaz is not required to create them.
- Consider Mr and Mrs N's request for a term extension on Part 2 of the mortgage, in line with the provisions of MCOB, and with particular regard for MCOB 11.7 (taking into account whether an affordability assessment can be dispensed with if it is considered to be in Mr and Mrs N's best interests to do so).
- Pay total compensation for distress and inconvenience of £800.

Other matters

Topaz has made reference in its response to the Investigator's findings about future legal costs should it obtain a possession order. I can't prevent Topaz from taking legal action, as it's outside my powers to do so. However, I hope I have made it very clear that, in all the circumstances of this case, I don't think Topaz has acted fairly or reasonably in seeking to repossess Mr and Mrs N's home for a debt they have repeatedly asked to be consolidated into the main mortgage – a debt which represents only 12.5% of the total borrowing.

I would therefore ask Topaz to give very careful consideration to any decision to continue with legal action, in all the circumstances of this case. I must also emphasise that it is

important, if Mr and Mrs N decide to sell or re-mortgage, that they keep Topaz updated about this.

My final decision

My decision is that I partly uphold this complaint. I direct Topaz Mortgages Limited trading as Heliodor Mortgages to settle the complaint as directed above.

This final decision concludes the Financial Ombudsman Service's review of this complaint. This means that we are unable to consider the complaint any further, nor enter into any discussion about it.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs N to accept or reject my decision before 19 November 2024.

Jan O'Leary
Ombudsman