

The complaint

Mr S and Mrs V are unhappy with Mortgage Agency Services Number Five Limited's (MAS5) offer in relation to excess interest charged on their mortgage. They believe they are owed a larger refund than what's been offered.

What happened

Mr S and Mrs V originally took out their mortgage with another lender, in March 2007. They borrowed around £216,000 over a 24 year term on a repayment basis. The mortgage had an initial discounted interest rate to the end of December 2008, where the amount charged would be 0.95% less than the Standard Variable Rate (SVR). From January 2009 onwards, the mortgage would revert to the SVR without a discount.

In June 2007, the mortgage was transferred to MAS5. The transaction history and contact notes show that Mr S and Mrs V encountered some financial difficulties in both 2010 and 2013. During this time, there were some missed or late payments and some of the payments made were interest only. There is no indication of any payment difficulties after 2013.

In 2019, MAS5 wrote to Mr S and Mrs V to inform them that they may be eligible for a new product from another lender in the same group. Contact notes indicate that an appointment with a mortgage adviser was arranged but then cancelled by Mrs V. The notes suggest Mrs V intended to re-arrange the appointment, but this didn't then happen.

In March 2024, MAS5 wrote to Mr S and Mrs V to say that it was conducting a review of their account to check whether it had charged them too much interest. Following on from this, Mr S and Mrs V complained to MAS5 about the interest they'd been charged on their mortgage. They said they understood that any refund would only go back six years and that this wasn't fair because the overpayments went back much further than that.

Mr S and Mrs V said they'd only recently become aware of a potential issue with the interest charged on their mortgage when they read the details on the internet. Mr S and Mrs V also asked MAS5 a number of questions, including why the SVR they had been charged was different to that charged by another lender in the same group.

MAS5 responded to the complaint with an offer of compensation. It said Mr S and Mrs V had been charged too much on their mortgage in the period November 2017 to November 2022 but would not be going back any further than 6 November 2017 because this was time-barred.

MAS5 gave Mr S and Mrs V the option of having an amount taken off of their outstanding mortgage balance or a different amount (due to a range of considerations, which it explained) paid to them directly.

Mr S and Mrs V remained unhappy and referred their complaint to the Financial Ombudsman Service. An Investigator here issued an assessment of the case. In summary, they said we could not look at the interest charged before 6 November 2017, because Mr S and Mrs V would have been aware what they were being charged on the mortgage and

ought reasonably to have become aware that the interest might be unfairly high.

The Investigator also said they thought MAS5's offer was fair and enough to put things right. Mr S and Mrs V disagreed. They said they'd experienced financial difficulties during the mortgage and this had made it difficult to understand their predicament. They also said that English wasn't their first language and they'd needed to ask their son for assistance in understanding what had happened and in raising a formal complaint.

Mr S and Mrs V also said they'd believed MAS5 wouldn't increase its rates without it being part of the terms and conditions. They said the increases to their rate had happened gradually, were relatively small and difficult to notice. And they said they were worried that if they complained when the rate rise notifications came through, it might make it more difficult for them to get a mortgage from another provider.

Mr S and Mrs V also disagreed that MAS5 not passing on Bank of England Base Rate (BoEBR) increases in 2022 removed the lasting unfairness, given the effect of the interest rate being too high from 2011.

The matter couldn't be resolved, so it was passed to me to make a decision on the extent of our jurisdiction to consider the issues raised and also to decide the outcome of the issues that can be looked into.

The issue of jurisdiction was covered in a separate decision. In that decision, I decided that I could only consider the interest charged on the account from 6 November 2017 onward.

This decision is focused on the merits of the issues that have been brought within time.

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 done so, I've reached the same overall outcome as the Investigator and for broadly the same reasons. Before I explain why, I want to set out the purpose of my role. It isn't to address every single point that's been made to date. Instead, it's to decide what's fair and reasonable given the circumstances of this complaint.

And for that reason, I'm only going to refer to what I think are the most salient points when I set out my conclusions and my reasons for reaching them. But, having considered all of the submissions from both sides in full, I will continue to keep in mind all of the points that have been made, insofar as they relate to this complaint.

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

MAS5 have made an offer to settle Mr S and Mrs V's complaint by re-working their mortgage account as if the interest rate they were charged between 6 November 2017 and 30 November 2022 was (for the most part) 1.25% lower than what MAS5 did actually charge. MAS5 says that would put right the higher rate Mr S and Mrs V paid from 6 November 2017 as a result of the increases it made to the SVR in 2011 and 2012.

MAS5 doesn't think the redress should go beyond November 2022 as from that point, Mr S and Mrs V have been charged a rate that is 1.38% less than what it would have been had it decided to pass on the full increases to the BoEBR that year. Mr S and Mrs V dispute that redress is fair, given the compounding nature of the 2011 and 2012 increases.

MAS5s SVR being different to the Co-op

Mr S and Mrs V have raised questions about MAS5's SVR being higher than the SVR charged by 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 S and Mrs V agreed to this mortgage, they agreed to pay the lender's SVR after 31 December 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 S and Mrs V its SVR in line with the agreed terms of the contract.

The SVR increases in 2009

Mr S and Mrs V'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 BoEBR.

MAS5 has referred to this as the restrictive covenant. That term did not form part of the contract between Mr S and Mrs V and the lender, it was an agreement between the two businesses and did not alter the original terms and conditions that Mr S and Mrs V agreed to when they took out his mortgage.

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

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

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

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

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

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

Mr S and Mrs V's mortgage offer stated that the interest rate that applied to the mortgage would be the SVR less a discounted rate until 31 December 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 BoEBR.

The BoEBR 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 BoEBR ended in 2009, and that is when it started to increase the SVR. Those increases did impact

Mr S and Mrs V's mortgage, as the increases resulted in the rate they've been charged on their mortgage since.

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. MAS5 has 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, I also have to consider what is fair and reasonable in all the circumstances. And having done so, I'm not satisfied it would be fair and reasonable for MAS5 to reduce Mr S and Mrs V'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 BoEBR. 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 BoEBR 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 S and Mrs V's mortgage that linked the SVR to the base rate, and whilst the terms allowed MAS5 to vary the SVR following changes to BoEBR, they didn't say it must do so.

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.

Whilst MAS5 may have increased the SVR when the covenant ended for reasons that weren't permitted under the terms and conditions of Mr S and Mrs V'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 to determine whether the rate Mr S and Mrs V have been charged since 6 November 2017 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 6 November 2017 onwards would provide Mr S and Mrs V 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 S and Mrs V agreed to without the covenant in place.

To do so would result in the interest rate after 6 November 2017 being lower than Mr S and Mrs V could have expected it to be by operation of the mortgage terms and conditions alone, and would result in over-compensation.

The SVR increases in 2011 and 2012

MAS5 increased the SVR charged on Mr S and Mrs V'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 has now offered to re-work Mr S and Mrs V's mortgage account from 6 November 2017 (up until November 2022) as if those increases never took place. So I won't consider this point any further, as the offer puts Mr S and Mrs V back in the position they would have been in had the increases not been made (for the time period that is in scope of this complaint).

Should the redress go beyond November 2022?

MAS5 has offered to re-work Mr S and Mrs V's mortgage account as though the interest rate they've been charged since 6 November 2017 was (for the most part) 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. MAS5 has said this is because it made the decision in 2022 not to pass on the full BoEBR rises to customers when it could have done. That resulted in the SVR being 1.38% lower than it would have been had they passed on the full extent of the increases.

MAS5 has 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 its market position, and to minimise customer stress.

While that wasn't the case specifically for Mr S and Mrs V'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 S and Mrs V'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 has charged Mr S and Mrs V, and the impact that's had on them.

MAS5 has provided evidence of the risk profile of the mortgages it holds in comparison with the banking group's 'prime' mortgages. I'm satisfied that information shows that there is a greater cost to the group when a MAS5 mortgage defaults, and there is also a much higher risk of those mortgages defaulting. I don't think it's unreasonable that MAS5 considered that risk when deciding where 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.

Under the terms and conditions of Mr S and Mrs V's mortgage MAS5 was entitled to increase the SVR to reflect changes in the BoEBR. 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 S and Mrs V has been charged since 6 November 2017 in the round, and the impact of the previous unfair increases that resulted in that rate, I'm persuaded on balance that any previous unfairness was essentially 'put right' by the decisions MAS5 made when it varied the rate in the way that it did in 2022. And so, to instruct MAS5 to make an ongoing reduction to Mr S and Mrs V's interest rate when that rate would be much lower than the rate they would actually have been on had MAS5 not done anything wrong, would be putting them in a better position than they ought to have been.

To continue the redress beyond November 2022 means that Mr S and Mrs V 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 BoEBR increases. I don't think it's likely Mr S and Mrs V's mortgage would ever have been in a situation where both those things happened, and therefore to require MAS5 to reduce their interest rate as if both had happened would be over-compensation.

Mr S and Mrs V feel this doesn't represent fair compensation because of the compounding effect of the higher interest charged from when the rates were increased in 2011/2012. I appreciate the point they make, however in terms of considering financial loss, I am only looking at the actual interest charged from 6 November 2017 onwards. If I were to factor in the 'compounding effect' they refer to, I would in effect be considering the interest charged before what is 'in scope' from a time perspective. This is not something I can do.

Putting things right

MAS5 has offered to re-work Mr S and Mrs V's mortgage account by reducing the rate on their mortgage by:

- 1.25% from 6 November 2017 to 31 August 2022;
- 0.75% from 1 September 2022 to 31 October 2022;
- 0.25% from 1 November 2022 to 30 November 2022.

The gradual change in the rate is a result of the timings of the changes MAS5 said they would have made had the rate been 1.25% lower before 2022. This reflects the fact that the BoEBR increased by 0.5% in August and September 2022 – neither of which were passed on but would have been had the rate been lower.

As I've explained, I'm satisfied that this is what MAS5 would have done, had they not been charging Mr S and Mrs V an unfairly high rate prior to 2022. And so I'm satisfied the offer it has now made puts Mr S and Mrs V back in the position they would have been in, had MAS5 applied a fair rate of interest from 6 November 2017 onwards.

If Mr S and Mrs V would like the overpayments from the above calculation to be paid to them directly and not taken off the mortgage, MAS5 should refund the amount directly to Mr S and Mrs V. In this case, MAS5 should also add 8% simple annual interest* running from the date of each overpayment to the date of settlement.

*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 S and Mrs V how much it's taken off. It should also give them a certificate showing this if they ask for one, so they can reclaim the tax from HM Revenue & Customs if appropriate.

My final decision

My final decision is that I direct Mortgage Agency Services Number Five Limited to do what I've set out above under 'putting things right'.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S and Mrs V to accept or reject my decision before 08 January 2025.

Ben Brewer
Ombudsman