

## complaint

Mr and Mrs B complain that Barclays Bank Plc has failed to treat them fairly in relation to the terms and conditions applied to their mortgage account and the related mortgage current account (MCA). Mrs B has dealt with the complaint throughout

## background

In 2006 Mr and Mrs B took out a mortgage for £230,000 with Barclays, through its residential mortgage lending business, Woolwich. The mortgage is over 25 years, at an initial ten-year fixed interest rate of 4.78% until 30 June 2016. It is on a repayment basis – which means that the monthly repayments would include an element of interest and an element of capital. The effect of this is that the mortgage balance reduces and, if all payments are made, is repaid at the end of the mortgage term.

Barclays did not provide mortgage advice on the sale. The mortgage came with a related Mortgage Current Account (MCA).

The Mortgage Deed says that the following conditions form part of the mortgage:

- Barclays Bank Plc Mortgage Conditions (Daily Interest) (England and Wales) – September 2001 edition  
and
- Barclays Bank Plc Openplan Flexible Mortgage Facility Conditions – December 2003 edition.

The Deed also says: *“This Mortgage incorporates both sets of the above Mortgage conditions, copies of which have been received by the Borrower”*.

The MCA is a separate facility from the mortgage. It operates as an overdraft on an interest-only basis. As with any standard overdraft, it is repayable on demand. Borrowers are free to repay the overdraft, in part or in full, if they wish to do so, at any time. The overdraft also becomes immediately repayable in full when the related mortgage account is repaid – either when the mortgage reaches the end of its term or if the mortgage is repaid sooner (for example, on sale or remortgage of the property). Interest is currently charged on the overdraft balance at Bank of England Base Rate + 4.49%.

There was no agreed reserve limit on the MCA when the mortgage completed in 2006. When the mortgage started the flexible reserve was zero. But as the mortgage progressed, the overdraft limit on the MCA flexible reserve increased as the capital balance on the mortgage decreased. This was standard practice by Barclays at the time. Mr and Mrs B used the flexible reserve over the years, but not to its full extent.

In March 2015 Barclays told Mr and Mrs B that it intended to reduce the MCA reserve from its then level of £64,160 to £35,000. At that time they'd used about £33,000 of the MCA overdraft. Mr and Mrs B were unhappy about this and complained to Barclays, and to us.

An ombudsman concluded that Barclays was entitled to reduce the overdraft limit, pursuant to the 2007 Terms and Conditions.

Mrs B says that the 2007 Conditions are not relevant to her account, which was taken out in 2006. So she brought a new complaint to us.

In particular, Mrs B says that Barclays failed to discharge its duty of care when they completed the mortgage in 2006. Mrs B believes Barclays failed to incorporate, signpost or explain the consequence of clause 33.4 of the Open Plan Flexible Mortgage Facility Conditions applicable to the MCA.

Mrs B says that this is in breach of Office of Fair Trading Guidance and the Unfair Terms in Consumer Contracts Regulations 1999. Mrs B wants the Financial Ombudsman Service to decide if it is fair to allow this clause to be considered part of the mortgage contract.

Mrs B also says that they are being charged an interest rate of 4.99% on the MCA, contrary to Clause 6 of the supplemental mortgage conditions provided in 2006 which says that the mortgage does not have a 'higher lending charge'.

Mrs B wants the Financial Ombudsman Service to decide if Barclays' terms and conditions are fair. Mrs B also wants Barclays to comply with Clause 6 of the Supplementary Mortgage Conditions, which says there is no higher lending charge applicable to the mortgage.

On 9 March 2016 I issued a provisional decision in which I reached the following conclusions:

- the 2003 MCA conditions and 2001 Mortgage conditions are incorporated into the mortgage. This is explicitly stated in the Mortgage Deed.
- I've noted what Mrs B has said about Barclays' breaching OFT Guidelines and the Unfair Terms in Consumer Contract Regulations 1999. Mrs B says that Barclays has failed to show that the MCA conditions were incorporated into the mortgage. But as I've said above, the Mortgage Deed says: *"This Mortgage incorporates both sets of the above Mortgage conditions, copies of which have been received by the Borrower"*.
- Mrs B says that, by reducing the MCA limit, Barclays has breached the Unfair Terms in Consumer Contracts Regulations 1999. These regulations (which were applicable at the time) say that (subject to certain criteria being fulfilled) a term is unfair if it creates a significant imbalance in the bargaining position of the parties. I cannot see that this was the case here.
- The MCA conditions state at clause 33 that Barclays may vary or withdraw the amount of the reserve by giving notice. I acknowledge that this is about half-way through the MCA conditions but it's in clearly-worded English and would, I think, be easily understood by Mr and Mrs B if they'd read it.
- The MCA reserve limit is not a contractual term. There is nothing in the mortgage offer, mortgage conditions or mortgage deed that says Barclays is under any contractual obligation to offer a MCA overdraft equivalent to the amount of capital paid off the mortgage. The MCA conditions state that Barclays can vary the reserve limit.
- In this respect, I think Mrs B might be under the misapprehension that she is entitled to have access to a total amount of £230,000 from inception of the mortgage throughout the 25-year term. But that is not how this repayment mortgage or MCA are designed to work.

- The mortgage is meant to be repaid on the last day of the 25-year term – and if all repayments are made, that is what will happen, as it is an amortising loan.
- Any MCA overdraft balance outstanding on the day the mortgage ends will also have to be repaid - in full - at the same time the mortgage is repaid.
- That is why Barclays is entitled, under the MCA conditions, to vary the reserve. This will ensure affordability and that its lending is responsible.
- Under the scenario Mrs B says is applicable to her mortgage, the MCA reserve would increase year-on-year to match capital reductions in the mortgage, allowing total borrowing over the whole term of £230,000 at any one time – aggregated across the remaining outstanding balance of the mortgage, plus the MCA reserve. This would mean that by the end of the mortgage term, the MCA reserve would have increased to £230,000 as the mortgage is repaid
- But if Barclays was to allow that to happen, Mr and Mrs B could find that on the day they've paid off their mortgage, they might still owe Barclays an immediate repayment of £230,000 (plus MCA interest), if they've spent the full amount of their MCA reserve.
- So variation of the MCA reserve limit by Barclays, in line with the MCA conditions which form part of the mortgage, is not, in my opinion, unfair. Barclays is required to ensure its lending is prudent and responsible. Restricting the level of the MCA overdraft reserve to be sure that borrowers don't accrue a large interest-only debt equivalent to the amount of their repayment mortgage by the end of the term is, I think, responsible and reasonable.
- Mrs B says that the interest rate on the MCA is different from the mortgage interest rate. She wants Barclays to comply with Clause 6 of the Mortgage Offer, which says no higher lending charge applies to the mortgage.
- I think Mrs B might have misunderstood what a 'higher lending charge' is where it is referred to in the mortgage offer. It has nothing to do with the MCA reserve or the interest charged on the MCA reserve.
- A higher lending charge is sometimes called a 'mortgage indemnity guarantee'. If borrowers are taking on a large mortgage with a high loan-to-value (LTV) ratio, generally over 80%, lenders will sometimes require the borrowers to pay a one-off insurance premium (which Barclays called the higher lending charge) for an indemnity policy. This reflects the increased risk associated with high LTV mortgages. In the event the property is repossessed and sold, leaving a shortfall, Barclays would be able to claim the shortfall under the indemnity policy.
- But there was no higher lending charge on Mr and Mrs B's mortgage, because they were not borrowing at a high LTV.
- The interest rate charged on the MCA is unrelated to the interest rate charged on the mortgage. I've seen nothing in the mortgage documentation to suggest that the interest rate on the MCA would be the same as the mortgage interest rate.

- Barclays' MCA reserve interest rate is Bank of England Base Rate (currently 0.5%) + 4.49%.
- The MCA conditions say at Clause 34 that the interest rate on the MCA is variable. As I stated above, the MCA conditions are, by virtue of the provisions of the Mortgage Deed, incorporated into the mortgage.

### ***responses to my provisional decision***

Barclays had nothing further to add. Mrs B has provided several detailed responses, which I will summarise below:

- Mrs B says I am required to decide whether the law considers Clauses 33 and 34 of the MCA conditions to be fair.
- In my provisional decision I failed to mention the evidence available in the content of the KFI (Key Facts Illustration) dated March 2006 which she has sent to us.
- She and her husband were offered a flexible loan of £230,000 over 25 years. The KFI *"clearly describes the MCA as a mandatory tied product. The purpose of the mandatory tied product is to deliver Barclays' contractual obligation to provide further advances on demand"*.
- The contract to complete the MCA (which Mrs B refers to as *"the tied product"*) concluded after completion of the mortgage contract when the tied product was linked to the mortgage.
- *"When you apply the law in the form of regulations 5 & 6 of The Unfair terms In Consumer Contracts 1999 and examine the conclusion of both the mortgage contract and the contract for the tied product it is clear that the law can only consider both terms 33 & 34 of the 2003 MCA to be unfair terms, as the contract that created then did not exist when the mortgage contract was concluded."*
- Clause 33 causes detriment because Barclays is entitled to withdraw part of *"our contractually agreed loan amount on demand without reason, explanation or default on our part"*.
- Clause 34 allows Barclays to charge a variable rate of interest on part of the *"contractually agreed loan"*. As a result they have been deprived of the security of knowing what interest rate they'd be expected to pay for the term of the mortgage, and have been deprived of the interest rate illustrated when they purchased the mortgage.
- Mrs B is not sure where I get my understanding of the product from. It should come from the evidence available, the KFI she's provided, the mortgage offer, the mortgage deed and the terms and conditions.
- The evidence available in the KFI, mortgage offer and at the Land Registry supports her understanding of the product.

- Mrs B says that Barclays’ solicitors registered “*a second charge*” stating that Barclays is under an obligation to make further advances. This is because the CML handbook requires solicitors to register a second charge that provide a contractual obligation to provide further advances.
- Mrs B has seen nothing in the available evidence to indicate that the law would consider clauses 33 and 34 of the MCA conditions to be fair terms.

## my findings

I’ve considered all the available evidence and arguments to decide what’s fair and reasonable in the circumstances of this complaint. I confirm I’ve read everything Mrs B and Barclays have provided, I’ve revisited my provisional decision and I’ve looked at all the available evidence from the outset. Having done so, I don’t intend to depart from the conclusions I reached in my provisional decision.

The crux of the complaint is that Mrs B believes that the existence of the MCA reserve means that she has access to the full amount of the original £230,000 borrowed in 2006 throughout the term of the mortgage, without restriction and on demand. Mrs B believes that Barclays is acting unfairly and unlawfully in its decision to restrict the MCA reserve.

Mrs B has queried the extent of my powers and the matters I have to take into consideration. What the law governing the ombudsman service – the Financial Services and Markets Act 2000 – requires me to do is to decide what is fair and reasonable in all the circumstances of this case. In doing so, I will have regard to the law, regulations and good practice. But ultimately my overarching duty is to decide what’s fair and reasonable.

I’m also not required to address each and every point Mrs B has made. Instead I’ve concentrated on the issues which I consider to be the most relevant in the complaint. I’m aware that Mrs B is neither a lawyer nor a mortgage professional. So I’ve taken her submissions in the context that they’ve been made by someone without specialist knowledge of these areas. .

**unfair contract terms:** Mrs B says Barclays is under a contractual obligation to allow her unlimited access to the full amount of the original sum borrowed - £230,000 - whether it is on the first or the last day of the mortgage term. So she believes the clauses in the MCA terms that allow Barclays to reduce the reserve limit are detrimental and unfair. Mrs B says Barclays is in breach of the regulations that were in place in 2006, the Unfair Terms in Consumer Contracts Regulations 1999 (“the Regulations”).

The Regulations have now been replaced by the Consumer Rights Act 2015, but the Regulations still apply to this contract. Mrs B wants me to decide whether clauses 33 and 34 of the MCA conditions were incorporated into her contract with Barclays in 2006 and, if so, to state that they are unfair..

I’m required to decide what’s fair and reasonable, taking into account the Regulations, amongst other things. Under the Regulations ‘*a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer*’.

First of all, Mrs B argues that the MCA terms weren't incorporated into the mortgage contract because the MCA wasn't opened until after the mortgage had been concluded. She argues that the MCA didn't exist at the date the mortgage was completed and so can't be included in those terms. So to that extent, Mrs B believes that clauses 33 and 34 don't apply to her mortgage contract at all.

My opinion is that the MCA terms form an integral part of the mortgage contract, including the MCA itself, and can't be separated out in the way Mrs B suggests.

I'm satisfied that the mortgage offer and relevant terms and conditions were provided by Barclays to Mr and Mrs B before they entered into the mortgage agreement. Clauses 33 and 34 are, as I said in my provisional decision, clearly worded. I'm satisfied Mr and Mrs B would have understood those provisions if they'd read them.

**the KFI:** The document Mrs B's provided from March 2006 isn't a KFI. It's the mortgage application form. I don't criticise Mrs B for not knowing that this isn't a KFI – which is a separate document set out in a form prescribed by the regulator. Generally a KFI looks very similar to the mortgage offer, setting out in numbered sections relevant information about the mortgage. It doesn't have to contain everything that's in the mortgage offer, only the information the regulator considers relevant.

A mortgage application form is simply a request to the lender to consider whether it is prepared to lend money to potential borrowers on the basis of the information they've put in the application. It contains no contractual terms, nor anything that can be said to create any binding obligation on the lender.

For the sake of clarity, a KFI (in its prescribed form) also contains no contractual terms and creates no binding obligations on the lender.

So although I've noted what Mrs B has said about the document she calls the KFI but which is in fact the mortgage application form, it has no significance in determining whether or not Barclays is entitled to reduce the MCA reserve. But, crucially, I note that there was no request for any mortgage reserve when the application was made. It was set at zero in the application. The mortgage offer also makes no mention of any agreed reserve.

**MCA reserve:** Mrs B has questioned my understanding of the product. The MCA reserve is an interest-only overdraft on the mortgage current account. As with any overdraft, it is granted at Barclays' discretion, and is repayable on demand.

Customers can pay money into the MCA if they want to, and operate it in credit. If there is a credit balance, interest accruing on that balance can, if the customer requests it, be offset against the mortgage interest. But Mr and Mrs B's MCA isn't in credit and so it operates as an overdraft facility with debit interest accruing on the outstanding balance.

The debit balance on the MCA is secured by the mortgage granted to Barclays by Mr and Mrs B. So when their repayment mortgage comes to an end, for example, if Mr and Mrs B sell or remortgage their property, or (if the mortgage runs to its full term) when the final payment is made, any debit balance on the MCA is repayable in full at that time.

I've seen nothing to persuade me that Barclays is under any contractual obligation to offer an overdraft – either at all or to the full extent of the mortgage borrowing. In fact, the MCA conditions are quite explicit in explaining the discretionary nature of the MCA reserve.

Clause 33.1 says: *"We reserve the right to decline any request from you to borrow using a Current Account Reserve"*.

I'm satisfied clause 33 is incorporated into the contract, as this is provided for in the mortgage deed. I'm also not persuaded that clause 33 is ambiguous or misleading.

The extension of the MCA reserve to Mr and Mrs B by Barclays in accordance with clause 33 has not, in my opinion, resulted in any detriment to Mr and Mrs B, nor any imbalance in the rights and obligations between them and Barclays. Mr and Mrs B have spent some of the MCA reserve, about £34,000. As Mr and Mrs B wanted an MCA reserve, it is difficult to see what detriment they've suffered by using part of the amount Barclays is willing to let them borrow on the terms set out in the MCA conditions.

**Land Registry and further advances:** Mrs B says that in 2006 Barclays registered "a second charge" obliging it to make further advances. Mrs B says that this is evidence that Barclays has a contractual obligation to maintain the *"flexible loan amount of £230K over the term of the mortgage"*.

I'm sorry to disappoint Mrs B, but the entry at the Land Registry doesn't mean what Mrs B thinks it means. It relates to protecting Barclays' interests in the event of registration of subsequent third party charges.

The reason the "further advances" clause is on the register is this; if Barclays grants a further advance, this restriction means it will be secured as part of the original charge. So it maintains the original priority as against other second or third charge lenders who enter their charges on the register between the date of Barclays' original mortgage and the date of the further advance.

As an example of what this means in practice:

January 2005	Barclays lends £100,000
July 2006	Second charge lender lends £50,000
August 2008	Barclays grants a further advance of £25,000

The "further advances" clause means that, on sale of the property, Barclays would be entitled to be paid the full £125,000 first, ahead of the second charge lender.

But the MCA reserve isn't a further advance on the mortgage. So this entry at the Land Registry has no significance to the MCA reserve or the MCA terms and conditions. It has no effect on the way in which the MCA reserve operates as an overdraft repayable on demand.

**interest rate on MCA:** Interest on the MCA reserve is not charged at the mortgage rate and there is nothing in the documentation provided by Barclays that suggests it is. Interest on the MCA reserve is at a variable rate. This is explained in Clause 34 of the MCA conditions.

I understand Mrs B doesn't believe this clause is incorporated into her mortgage contract, or that if it is, it's unfair and so isn't binding on her and Mr B. I'm satisfied the clause is incorporated, because the mortgage deed says that it is.

I can't see that clause 34 results in any imbalance or detriment to Mr and Mrs B. It seems to me to be fair and reasonable that they pay interest on the money they've borrowed through the MCA reserve at the rate specified by Barclays.

The "higher lending charge" referred to in the mortgage offer doesn't relate to the interest rate on the MCA reserve. It doesn't apply to Mr and Mrs B's particular mortgage either.

**additional borrowing:** I appreciate Mrs B wants Barclays to allow her and Mr B to have access to £230,000 aggregated across the mortgage balance and the MCA reserve, on demand and at any time during the mortgage term. Mrs B has told us she and Mr B had made this part of their retirement planning and had counted on being able to use the full £230,000 for this purpose.

After reducing the MCA limit to £35,000, Barclays has reinstated it for Mr and Mrs B back to its previous limit of £68,290. Mr and Mrs B have been told by Barclays that they will need to make sure they have a plan in place to repay the MCA reserve by the time the main mortgage is repaid.

Barclays no longer offers an MCA reserve. If Mr and Mrs B use up the full amount of their available MCA reserve but want to increase their borrowing they can ask Barclays for a further advance on the mortgage. Or they can leave the MCA reserve at its current limit, and request a further advance for any additional borrowing.

When assessing any request for borrowing, Barclays is under a regulatory obligation to consider whether it's affordable. So if Mr and Mrs B do decide to ask Barclays for a further advance, Barclays will need to consider what repayment strategy Mr and Mrs B have put in place to repay their existing MCA reserve.

**current mortgage:** Mr and Mrs B are approaching the end of their ten-year fixed rate term and have a further 15 years left to run on the mortgage. Interest rates have fallen since they took out their fixed rate of 4.78%.

If Mr and Mrs B are thinking about moving to another Barclays' product (for example, another fixed rate), I would suggest they discuss this with Barclays so they can ascertain whether or not switching to a new product might affect their entitlement to retain the existing MCA reserve.

Barclays will be able to tell Mr and Mrs B if they'd need to repay the MCA reserve if they move to a different Barclays' product. I think it's right for me to raise this point, as the end of the fixed-rate term is so close and Mr and Mrs B might be considering what options are available to them for another mortgage product.

If Mr and Mrs B decide to move to another lender for a more attractive interest rate, they will need to factor into their calculations the cost of repaying the MCA reserve when they pay off their Barclays mortgage.

**conclusions:**

- The evidence (in particular the mortgage deed) shows that the MCA conditions were incorporated into the mortgage in 2006.



- Having regard to the Unfair Terms in Consumer Contracts Regulations 1999 – applying what I consider to be fair and reasonable in all the circumstances – I’m satisfied that clauses 33 and 34 are not unfair, ambiguous or misleading. They set out clearly how the MCA reserve operates and how interest is applied to it.
- I don’t consider there’s anything detrimental to Mr and Mrs B in Barclays’ inclusion of clauses 33 and 34 in the MCA conditions. Nor have I seen anything to persuade me that Barclays hasn’t acted in good faith in including these clauses in the MCA conditions.
- Barclays is under no contractual obligation to offer an interest-only overdraft through the MCA reserve equivalent to the amount of the paid-off capital of the repayment mortgage over the term of the mortgage;
- The MCA conditions, in particular clause 33, allow Barclays to exercise its discretion in the amount of borrowing it will allow under the MCA reserve. This is in line with its regulatory obligations.

I appreciate Mr and Mrs B will be disappointed with my findings. But if they reject my decision, they still have the option of pursuing their grievances against Barclays through the courts. But before they decide to take that course of action, I would strongly suggest they take some advice from a solicitor.

### **my final decision**

My decision is that I don’t uphold this complaint.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr and Mrs B to accept or reject my decision before 10 June 2016.

Jan O’Leary  
**ombudsman**