DRN-4463739

The complaint

Mr B and Miss L complain that Topaz Finance Limited (trading as Heliodor Mortgages) has treated them unfairly by overcharging them on their mortgage, during a period when it was no longer offering new mortgages. Mr B and Miss L say that because of their circumstances they've been unable to re-mortgage elsewhere and as such are considered 'mortgage prisoners'.

Mr B and Miss L also complain about how their term extension was arranged. They're unhappy that the various sub account end dates don't align with the end date of the main mortgage and that the arrangement took them into retirement.

What happened

Since 2003, Mr B and Miss L took out several secured loans with Northern Rock (the original lender). This consisted of their main mortgage and several smaller sub accounts.

The main mortgage was taken in March 2003. Mr B and Miss L borrowed around £97,000 on an interest only basis over a term of 25 years. They agreed the mortgage on a fixed interest rate of 4.09% until 1 May 2005. After which the mortgage would revert to Northern Rock's Standard Variable Rate ("SVR") for the remainder of the term of the mortgage – which at the time was 5.69%. After 7 years of the mortgage starting, and assuming payments were kept up to date, a loyalty discount of at least 0.25% would apply to the SVR.

In April 2005 Northern Rock agreed to a new product on the mortgage and four sub accounts. The regulated mortgage contract set out that these accounts were all now on a repayment basis and with various terms ranging from around 23 years to 25 years. A fixed interest rate of 5.19% was agreed until 1 June 2008, after which the mortgage (and sub accounts) would revert to the SVR – which at the time was 6.84%.

In 2008, Mr B and Miss L applied for a term extension on their mortgage and several sub accounts. This was to help make their payments more affordable for them.

During the 2008 financial crisis, Northern Rock was nationalised to avoid collapse of the bank. NRAM was later formed to manage most of the remaining Northern Rock mortgages, which included Mr B and Miss L's mortgage. In November 2019, as part of a wider transfer, this mortgage was moved to Heliodor. The same contractual terms remained applicable upon the transfer of the mortgage.

Following its collapse, Northern Rock stopped offering new borrowing, and stopped offering new interest rates to existing borrowers. NRAM and subsequently Heliodor also operated as 'closed book lenders', meaning they too did not do either of these things.

In November 2022 Mr B and Miss L raised this complaint with Heliodor. Heliodor didn't uphold the complaint and it later told our service that it didn't consent to us looking into any complaint about events that occurred more than six years before the complaint was made.

Heliodor has since also told our service that it isn't responsible for complaints about events that occurred prior to the transfer date in 2019. NRAM also contests that it is not the correct respondent and does not have any responsibility nor liability for complaints received after the transfer date.

This dispute is ongoing between the lenders and is yet to be resolved. But in the interest of resolving cases at the earliest opportunity for customers like Mr B and Miss L, our service will proceed to provide an answer on complaints brought against the current legal title holder – in this case Heliodor, where possible. I thank Mr B and Miss L for their continued patience. I appreciate they've been waiting some time for an answer on their complaint.

An investigator at our service looked into things and explained why he thought we could only consider part of this complaint, as certain parts of it had been brought too late. The investigator also provided his opinion, not upholding the merits of Mr B and Miss L's complaint. Mr B and Miss L didn't agree and asked for the case to be referred to an ombudsman.

Mr B and Miss L didn't accept that we could only consider part of their complaint. I issued a decision explaining why I only have the power to consider their complaint about their access to a new interest rate and the fairness of the interest rate they were actually charged since 10 November 2016. I'll now issue my decision on this part of 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.

When considering what is fair and reasonable in all the circumstances of this case, I'm required by DISP 3.6.4R of the FCA Handbook to take into account the relevant law, regulations, regulators' rules guidance and standards, codes of practice, and (where appropriate) what I consider to have been good industry practice at the relevant time.

I've given careful consideration to all the submissions made by the parties, but I won't address each and every point that has been raised. I'll focus on the matters that I consider most relevant to how I've reached a fair outcome – in keeping with the informal nature of our service.

Having done all that, I don't think this complaint should be upheld. I realise this will be disappointing for Mr B and Miss L. But I hope the reasons I have set out below will help them to understand why I have come to this conclusion.

Mr B and Miss L's main complaints are:

- Their inability to access a new interest rate, which they say, by definition, made them 'mortgage prisoners'; and

- The fairness of the interest rate they were actually charged.

As a preliminary matter, I note that Mr B and Miss L have referred to s140A of the Consumer Credit Act 1974 and suggested that the issues they've complained about have resulted in an unfair relationship between them and the successive lenders. But I haven't taken that into account, because I don't think it's relevant law to this complaint. That's because this became a regulated mortgage contract when the interest rate was varied in 2005, and s140A(5) expressly says that these provisions don't apply to regulated mortgage contracts. However,

I have thought about whether – during the period which is in time – Mr B and Miss L have been treated fairly and reasonably in all the circumstances.

Access to interest rates

By November 2016 (the date this complaint falls into scope), following Northern Rock's collapse, Mr B and Miss L's mortgage had transferred to the government-owned vehicle which became NRAM. In 2019, Mr B and Miss L's mortgage was sold to Heliodor as part of a wider transfer.

Following its collapse, Northern Rock stopped offering new borrowing, and stopped offering new interest rates to existing lenders. And when NRAM took over, it too did not do either of those things. NRAM's purpose was not to gain new borrowers, but to gradually wind down or sell off existing loans. And as a government-owned body there are rules in place about it competing with lenders on the open market.

For all those reasons, Northern Rock and then NRAM did not offer new interest rates to any of its customers, including Mr B and Miss L, during the period in question. When Mr B and Miss L's fixed rate expired in 2008, there was no option but to remain on the SVR thereafter – or to move to another lender.

In 2019, Mr B and Miss L's mortgage was sold to Heliodor as part of a wider transfer. Heliodor also operated as a 'closed book lender'.

I do understand that Mr B and Miss L might have expected that their lender would continue to offer them new interest rates – as most active mortgage lenders do offer rates to existing customers. But there was nothing in the terms of the mortgage contract that said either lender had to do so. So there has been no breach of the mortgage terms and conditions by either Northern Rock, NRAM or Heliodor.

That said, in these circumstances I think it would be fair – and in line with the good practice offered by other lenders dealing with closed and nationalised loan books – for Heliodor to direct its customers to seek independent mortgage advice so they can explore whether it's possible to switch their mortgage to a different lender with more preferential interest rates. Heliodor provides helpful information to support its customers with finding a better deal on its website to make it easy for customers to compare deals and switch to another lender if they wish to do so.

And throughout the period I can consider there was no early repayment charge applicable to Mr B and Miss L's mortgage. So NRAM and then Heliodor didn't put barriers in the way of them moving to another lender to get a better deal.

All other Northern Rock, NRAM and Heliodor customers were in the same position as Mr B and Miss L, so I don't think I can say they were treated unfairly or differently to other customers.

It's for all these reasons that I don't uphold this part of the complaint.

The fairness of the interest rate charged

To assess the fairness of the interest rate terms, it is helpful to first set out the relevant terms themselves.

The relevant section of the mortgage offers issued by Northern Rock to Mr B and Miss L over the years, set out that their mortgage was on a fixed interest rate until the given dates.

After which the mortgage(s) would revert to Northern Rock's SVR for the remainder of the term of the mortgage.

Clause 7 of the Mortgage Offer General Conditions gives details of when the SVR may change in the following circumstances:

"Changing the interest rate

(a) there has been, or we reasonably expect there to be in the near future, a general trend to increase interest rates on mortgages generally or mortgages similar to yours;

(b) for good commercial reasons we need to fund an increase in the interest rates we pay our own funders;

(c) we wish to adjust our interest rate structure to maintain a prudent level of profitability;

(d) there has been, or we reasonably expect there to be in the near future, a general increase in the risk of shortfall on the account of mortgage borrowers...whose accounts are similar to yours;

(e) our administrative costs have increased or are likely to do so in the future.

We will tell you of any change in the Standard Variable Rate and the Interest Rate in one of the following ways:

(a) by posting or delivering a notice to you in accordance with condition 24; or

(b) by publicising the change as follows:

(i) by displaying a notice of the change at our registered office and all our branch offices (if any); and/or

(ii) by advertising the notice in two or more national daily newspapers chosen by our board of directors (which will keep a list of the newspapers currently chosen by it for this purpose).

Mr B and Miss L believe that their mortgage offer contained an implied term that the SVR was set at a particular margin over the Bank of England base rate. I don't agree. There's nothing in the mortgage offer which says that the SVR is set at a particular margin above the Bank of England base rate. There's nothing in the mortgage terms and conditions which says that either. And I don't think such a term can reasonably be implied into the mortgage offer either. Mr B and Miss L's mortgage offers explicitly say that the interest rate is fixed for a set period of time, after which it reverts to a variable rate. There is no reference to the follow-on rate tracking the Bank of England base rate – which is evidence that it was *not* linked to base rate – not a reason for implying a term that it was.

Mr B and Miss L argue that their contract with Northern Rock contained unfair contract terms pursuant to The Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR). The law on unfair terms is an important part of consumer protection measures and prevents businesses from taking advantage – whether consciously or otherwise – of their customers, who have limited bargaining power.

As a strict matter of law, if the relevant clauses in this case are unfair under UTCCR, they would not be binding on Mr B and Miss L (Regulation 8 UTCCR). And neither

Northern Rock, NRAM or Heliodor would have been permitted under the terms and conditions to vary the SVR in the way that they did.

In considering this point I've looked at (i) whether the terms in the agreement between Mr B and Miss L and Northern Rock go further than reasonably necessary to protect Northern Rock (and its successors') legitimate interests, (ii) whether the variation clauses are sufficiently transparent and (iii) whether there was a significant barrier to exit.

In respect of the last point, the contract confirms that an early repayment charge would cease to apply once Mr B and Miss L's mortgage reverted to the SVR and I'm not aware of any other significant barrier to them being able to exit the contract, that was foreseeable at the stage the contract was entered into. And in respect of the first two considerations, I do accept there is a possibility that a court might conclude that parts of the clause are overly broad and could be more transparent.

By the time Mr B and Miss L's mortgage reverted to the SVR, it was significantly lower than it was at the time they took their fixed rate in 2005. I think Mr B and Miss L's complaint is not that the lender had no power to reduce the SVR, it's that when it did so it didn't go far enough, or that it didn't reduce the SVR at other times. That's really a complaint about how the term was exercised (or chosen not to be exercised) as much as or more than a complaint about the term itself.

So, I think it's important to be clear here that the presence of any unfair contract terms alone is not enough to uphold Mr B and Miss L's complaint. The central issue I need to decide in this case is whether there was any unfairness caused to Mr B and Miss L from 10 November 2016 onwards. The fairness of the underlying variation clause alone will not itself properly answer that question.

Our service is required to consider what is fair and reasonable in all the circumstances. That includes, but is not limited to, relevant law. So, while I've taken account of the relevant law regarding unfair contract terms, 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 B and Miss L. That is the ultimate question I need to answer in deciding whether to uphold this case.

Has Northern Rock, NRAM and Heliodor exercised the terms fairly?

In answering this question, I have explained that although I'm only able to consider the fairness of interest charged to Mr B and Miss L's mortgage since 10 November 2016, why it's necessary for me to consider historic changes to Northern Rock and then NRAM's SVR.

I've considered all the available evidence and all of the changes Northern Rock, NRAM and Heliodor have made to the SVR since Mr B and Miss L took their mortgage. Having done so, I am not persuaded that anything either one of them has done in varying the rate has led to Mr B and Miss L being treated unfairly in the period I can consider. I have set out why below.

This service asked NRAM and Heliodor to provide evidence to support its decision making in varying its SVR across the period Mr B and Miss L held their mortgage. For reasons of commercial confidentiality, I haven't set out in detail the evidence NRAM or Heliodor has been able to provide in full. Nor has our service provided copies of it to Mr B and Miss L. Our rules allow me to accept information in confidence, so that only a description of it is disclosed, where I consider it appropriate to do so. In this case, I do consider it appropriate to accept the information and evidence provided in confidence, subject to the summary of it I have set out in this decision.

Between 2007 and 2009, the mortgage market was going through a period of significant change as a result of the global financial crisis. This impacted the funding costs of businesses, including Northern Rock/NRAM and was reflected in changes to a number of lenders' interest rates charged across the market at the time. This was clear at the time and has been the subject of analysis by both the Bank of England[1] and the FCA[2] since. Whilst the base rate did reduce significantly during this period, the cost to lenders of funding their businesses changed, as did their prudential and regulatory requirements. These were made up of several factors that are not directly linked to base rate. So, I'm satisfied there are justifiable reasons why Northern Rock/NRAM did not reduce its SVR at the same level as the reduction in the Bank of England Base Rate.

Northern Rock received a government loan in September 2007 to try to avert its collapse. There were conditions attached to the loan which impacted Northern Rock's wider strategy and cost of funds. Then in February 2008, Northern Rock was nationalised and restructured.

Following the nationalisation, as part of state aid rules, there were limits placed on the size and scope of the business. Assets – such as parts of its loan book – perceived to be higher quality (in risk and prudential terms) were transferred to the private sector and those perceived to be lower quality retained in the nationalised vehicle that became NRAM. This process increased the overall credit risk of the retained book – which also impacted cost of funding.

As with any lender, NRAM was required to balance the needs of servicing its funding streams (notably the government loan) with the interests of its customers. During this period, it reduced its SVR on several occasions. Although it didn't reduce the SVR to the same extent that base rate reduced, I've explained that its costs were not directly linked to, and were increasingly separate from, base rate at this time.

I have not seen any evidence to suggest the changes Northern Rock or NRAM made to the SVR were arbitrary, excessive, or unfair. Rather, the evidence I've seen satisfies me that Northern Rock/NRAM acted to protect its legitimate interests while balancing its obligation to treat Mr B and Miss L fairly.

While NRAM's SVR was at the higher end of mortgage SVRs across the industry at this time, it was not an outlier. Many lenders charged lower SVRs – but many lenders charged higher SVRs, including mainstream lenders. Whilst the SVR was higher than those charged by some of the mainstream high street lenders at the time, the rate still remained broadly in line with those charged across the industry and was not an obvious outlier

Taking all that into account, I am not persuaded that Northern Rock and then NRAM operated the SVR variation clause in setting and varying the interest rate applied to Mr B and Miss L's mortgage in a way that resulted in an unfair SVR payable by them from November 2016.

From 2010 up to November 2019 the only changes made to the SVR were in line with changes made to the base rate, and so the margin between the SVR and the base rate during that period has remained the same. That said, NRAM has shown that the SVR was continuously reviewed during that time and it had regard to changes being made by other lenders and their continuing obligations under the government loan. I've not seen anything

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[1] Quarterly Bulletin, Q4 2014, Bank of England – Bank funding costs: what are they, what determines them and why do they matter?

[2] May 2018 Guidance Consultation GC18/2 Fairness of Variation terms in financial services consumer contacts under the Consumer Rights Act paragraphs 2.8 to 2.10

that would lead me to think that NRAM varied the SVR in a way that was not fair and reasonable in this period

In November 2019 Heliodor took over Mr B and Miss L's mortgage and the managing of the SVR from NRAM. Heliodor reduced its SVR in line with the Bank of England base rate changes in March 2020, to maintain the margin of 4.29%.

From December 2021 when the Bank of England base rate started to increase, Heliodor didn't apply the full increases to its SVR, and by the end of 2022 by the point Mr B and Miss L made their complaint, the margin between the two reduced to 3.49% - which more closely reflects the position pre-financial crisis. I'm satisfied from the evidence I've seen that Heliodor wrote to Mr B and Miss L to notify them of any rate changes in accordance with the contractual terms.

Taking everything into account even if I were to conclude that the relevant terms were unfair pursuant to UTCCR, I am not persuaded that Norther Rock, NRAM or Heliodor operated them in an unfair manner when setting and varying the interest rate that applied to Mr B and Miss L's mortgage. While the terms do provide Heliodor with a significant amount of discretion in regard to when or whether to vary the SVR on Mr B and Miss L's mortgage – I don't think overall this has resulted in them being treated unfairly for the reasons I've explained.

I appreciate that Mr B and Miss L have raised other complaint points with Heliodor. These have not been raised with our service – although for completion our investigator addressed these in his view. I've focused my decision on Mr B and Miss L's complaint as presented to our service and because they've not said that these issues are still contested. In doing so I've explained why this complaint has not been upheld.

My final decision

My final decision is that I don't uphold Mr B and Miss L's complaint against Topaz Finance Limited (trading as Heliodor Mortgages).

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B and Miss L to accept or reject my decision before 13 March 2024.

Arazu Eid
Ombudsman