

The complaint

Mr A has complained about a mortgage he holds with Mortgage Agency Services Number Five Limited ("MAS5"). He complains that:

- An interest rate loading was charged because MAS5 said he was renting the property out without their permission
- MAS5 didn't comply with his Data Subject Access Request

What happened

Mr A took this mortgage out in May 2007, borrowing around £145,000 on an interest only basis. The mortgage was originally taken out with a different lender and was subsequently transferred to MAS5.

Mr A has explained that he hadn't let his property out until 2022 and MAS5 were unfair in adding a 1% interest loading to his mortgage.

A final response letter was issued on 31 March 2022 and MAS5 summarised the complaint as follows:

- *"you are unhappy that we have marked your account as having an unauthorised tenancy and increased your interest rate as a result.*
- *When you spoke to us on 24 February 2015 you were not asked to provide proof of residence and so our prior and subsequent requests for this are not valid".*

MAS5 didn't uphold the complaint, saying the unauthorised tenancy marker has been in place since 2014 and, when Mr A updated his correspondence address back to the property address in 2018, they asked for proof of residency so they could remove the marker. They said that evidence wasn't received and so the marker remained on the mortgage account.

A further final response letter was issued by MAS5 on 15 July 2022 which they summarised as follows:

- *"You are dissatisfied that your Data Subject Access Request ("DSAR") was sent to your property address in March 2022.*
- *You are unhappy as you did not receive the DSAR in March 2022".*

MAS5 didn't uphold that complaint either. They said the DSAR was sent to the address they had registered for Mr A, and that Royal Mail confirmed that it had been signed for on 30 March 2022. They said they only received an updated address for Mr A after the package had been sent, and a further copy was sent on 14 July 2022.

Mr A brought the complaint to the Financial Ombudsman Service where it was looked at by one of our investigators. Our investigator didn't uphold the complaint about the 1% loading and thought that it was reasonable that Mr A should provide evidence to show he wasn't renting the property out. But the investigator didn't comment on the DSAR part of the complaint.

Mr A disagreed with the investigator. In summary he made the following comments:

- He said the tariff of charges outlines the circumstances under which a lender may

charge an increased loading, and these do not apply to him so the loading charge is in breach of the agreement he has with MAS5 and not fair.

- He has not been letting the property out and that MAS5 is making a claim that it was. They have not been asked to prove that the property is let and have instead shifted the burden of evidence on him which is unfair. He has now provided sufficient documents to show that he was in fact living at the property.
- He also made some discrimination allegations against MAS5 saying that they asked him to provide evidence to disprove their allegations that he was letting the property out, and he doesn't know on what grounds they did this and wonders if it is in fact because of his race.

As Mr A disagreed with the investigator, he asked for the complaint to be reviewed by an Ombudsman, so it's been passed to me to decide.

I issued a provisional decision on 30 May 2024. I said:

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

An Ombudsman here has already decided that we are able to consider the 1% interest loading from March 2016 and the issue surrounding the DSAR.

I think it's worth pointing out here that Mr A hasn't specifically complained about the interest rate he was on, or that it was too high. His complaint is about the 1% interest loading that MAS5 added to his interest rate because they believed he was letting the property out. So this is what I have looked at when making my decision.

1% interest rate loading

Mr A has told us that he let the property out from 19 March 2022 to 19 March 2023 and 10 May 2023 to the present day. And he has never let it out prior to that so he's unhappy that the 1% loading has been applied to his mortgage from March 2016 – which is when I can consider this complaint from. I understand that the 1% loading has been applied to the mortgage since 2014 and an ombudsman here made a decision about our jurisdiction. Having reviewed what she has said, I'm satisfied she's not erred in her understanding and application of our rules. For that reason, I'll be making no further comment about the aspects she said we can't consider.

MAS5 said the mortgage terms are based on the expectation that the property will be the customer's primary residence and if it's not used in this way, then it's a breach of the mortgage conditions.

I have taken a look at the unauthorised tenancy checklist that MAS5 have sent us and it says '*we will only consider a property as unauthorised where there is evidence of letting. We need factual proof that the property is tenanted before the additional 1% rate is loaded i.e. Field Agent has confirmed the property is let, evidence from letting agent etc*'.

Having considered everything carefully, and based on the actions of MAS5, I'm not entirely sure that they had strong enough grounds to apply the 1% interest rate loading to the mortgage.

MAS5 have said that Mr A was in breach of the mortgage terms and conditions and it seems as though they had suspicions that the property was being let out. But I am not persuaded that suspicion is grounds to apply an additional 1% to the mortgage.

Their own unauthorised tenancy checklist says that they will only consider applying the charge where there is evidence of letting – and I haven't seen anything that would suggest that Mr A was in fact letting his property out from March 2016 until March 2022 – when he said he wasn't.

I can see that MAS5 have written to Mr A a number of times over the years to say that they believed his property was being let out and they asked him to provide proof of residency to confirm he was living there. They asked for things such as utility bills dated within the last three months which were addressed to him, together with written confirmation of his address.

Mr A has explained to MAS5 that he travels back and forth to Ireland for work and although he works away, his wife and child live at the property address. But MAS5 continued to ask for the relevant documentation to confirm that he was living at the address and because he hasn't sent them anything yet, they will not remove the 1% interest rate loading.

While MAS5' terms and conditions allow them to apply a 1% loading to the mortgage if a property is being let, this doesn't appear to be what happened here. It seems that MAS5 were of the belief that Mr A was letting the property out because his correspondence address had changed – but he did explain that he was away for work.

It's not clear to me that other than assuming that Mr A is letting the property out, that MAS5 had reasonable grounds to apply the 1% interest rate loading. They have told us that with regards to electoral or other searches, this doesn't form part of their process and searches were not carried out. They said they asked for Mr A to send in evidence to show proof of residency and as he didn't send this – they continued to apply the loading.

Since our investigator sent out his opinion, Mr A has sent in various utility bills and bank statements to show that he was living at his property address. They are addressed to him and also have the correct address showing. The earliest date I have been provided with is from 14 April 2017.

Mr A has explained that he didn't feel he should have to prove to MAS5 that he was living at that address and feels very strongly that they have continued to charge a higher rate of interest, because they suspected he was renting it out. While I appreciate Mr A providing these statements and utility bills, I don't think it was unreasonable of MAS5 to want to check this.

If I go back to their own unauthorised tenancy checklist, they make it clear they require evidence to show that the property is being let – and I can't see that they had this. Being suspicious that Mr A was letting the property out is not evidence as such – so I don't think they've acted reasonably. I am minded to uphold this part of the complaint and order MAS5 to rework the mortgage account as if this charge hadn't been applied – since 30 March 2016, other than for the periods when Mr A has confirmed the property was let as set out above.

The information I've seen from MAS5 from October 2022 suggests that Mr A's mortgage account is in arrears. It's not clear at the moment if this is still the case, but if it is, it will be reasonable for MAS5 to rework the mortgage account and adjust it, rather than refund the money back to Mr A directly. But if the mortgage account is up to date, then Mr A will be entitled to this money as a refund to him – if that is what he wants, rather than an overpayment on his mortgage. It will be up to him to decide. However, I expect MAS5 in their response to this provisional decision, to let me know the current status of Mr A's mortgage.

DSAR

Mr A has complained that he requested a DSAR and that MAS5 failed to provide him with this information.

I have seen a letter from MAS5 to Mr A dated 11 October 2018 confirming that his address has changed and they have updated their records. From having reviewed

everything, Mr A requested three DSAR's in total. MAS5 said they actioned the first one on 22 March 2022, the second one on 5 July 2022 and the third one was actioned on 19 August 2022.

I note that the first one was sent to an address that Mr A was no longer living at. MAS5 received a letter from Mr A dated 25 March 2022 confirming his new address so it seems that MAS5 sent out the first DSAR based on the address they had on file – which isn't incorrect.

Each DSAR was sent by recorded delivery and I have seen evidence of this. I can see that one of them was signed for by someone who wasn't Mr A on 30 March 2022 and I appreciate that Mr A has said that's not his signature. But I can't hold MAS5 responsible for that. They have sent out the DSAR's as requested to the addresses they had on file at that time and I cannot see that they have done anything wrong in this regard.

Mr A has also said he's not happy because a CD was sent to him as part of the DSAR which he was unable to listen to. And when he raised this with MAS5 they said they checked it at their end before it was sent out and there were no issues. Mr A doesn't think they have done enough to try and help with this matter.

I have listened to a telephone call between someone at MAS5 and Mr A where he explains that he is unable to listen to the CD – and the adviser explains that they have listened to it and it was working fine. While I appreciate it may have been accessible when MAS5 listened to it, I think if Mr A has said it doesn't work, then another one should have been sent out to him. It's not clear if this has been done. Any information that is sent out as part of a DSAR needs to be clear and understood – and it's clear that Mr A had some difficulty with this CD.

If Mr A still doesn't have access to this, then MAS5 should re-send the CD in a format that will enable Mr A to listen to it.

Discrimination

Mr A has recently made some discrimination allegations against MAS5 – because they have been asking him to prove he was living at his address.

It's not the role of the Financial Ombudsman Service to say whether a business has acted unlawfully or not – that's a matter for the courts. Our role is to decide what's fair and reasonable in all the circumstances. In order to decide that, however, we have to take a number of things into account including relevant law, the financial regulator's rules, and what we consider to have been good industry practice at the time.

So although it's for the courts to say whether or not MAS5 breached the Equality Act 2010, I'm required to take the Equality Act 2010 into account, if it's relevant, amongst other things when deciding what's fair and reasonable in the circumstances of the complaint. I think the Equality Act is potentially relevant law to this allegation because Mr A says MAS5 has discriminated against him on the grounds of his race, which is a protected characteristic.

Having considered what has happened here, I'm not persuaded that MAS5' actions have been discriminatory. I note how Mr A has been made to feel and I've already explained above that I think MAS5 have acted unreasonably in applying the 1% interest loading. However, I haven't seen anything that shows me that it was MAS5' intention to make Mr A feel this way but I accept this has caused him some upset, distress and inconvenience.

I think that MAS5 should pay Mr A £250 for the distress and inconvenience he has been caused. He has explained in detail how this situation has made him feel and I think this needs to be recognised by MAS5.

So based on everything that I have reviewed, I do think that MAS5 have charged the 1% interest loading unfairly over the years and they need to put things right for Mr A.

Developments

Further to the provisional decision being sent out, MAS5 responded and said they didn't have any further comments to make.

Mr A responded and in summary, he said he partially disagreed with the provisional decision on the basis that he doesn't agree that MAS5 should charge him a 1% loading when the property was let out.

He confirmed that the property was let from 19 March 2022 to 19 March 2023 and then again from 10 May 2023 to the 10 May 2024. He said the property is no longer let out.

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.

Mr A has given a number of reasons why he doesn't think he should be charged an additional interest rate during the periods that he was letting the property out. However, this isn't the basis of the complaint I have looked at. This decision has solely focussed on the period of time where Mr A was being charged a 1% loading because MAS5 were under the impression that the property was being let – when in fact it wasn't.

MAS5 haven't investigated the complaint that Mr A now makes in what he was charged when the property was in fact let – and our service has not investigated this either. While it isn't unusual for a lender to charge an additional interest rate when a property has been let out, this hasn't been looked into to see if it's fair and reasonable.

Mr A will need to raise this specific point as a new complaint with MAS5 so that they can look into the matter first. And if he disagrees with what they have said, then he has the right to bring that complaint to us if he wants us to look into what he was charged during the periods that the property was let for the dates he has provided us.

Because of this, I am unable to comment on this aspect any further.

The only thing to point out here is that I asked MAS5 to respond to let us know if Mr A's mortgage account is now up to date, but they have not provided any further information regarding this and wished to make no further comment. I therefore see no reason to depart from my provisional decision.

My final decision

Based on what I said above and in my provisional decision, I uphold this complaint and direct Mortgage Agency Services Number Five Limited to:

- remove the 1% loading interest rate from Mr A's mortgage from 30 March 2016 and rework the interest up until the time that Mr A did let the property out. If there are any months where there are any overpayments made (over and above the amount it should have been without the 1% loading) then refund this amount plus 8% simple annual interest from the date the payment was made to the date of settlement.

- Send Mr A another copy of the CD which formed part off the DSAR request in a format that is accessible to him.
- Pay Mr A £250 for the distress and inconvenience caused.

If MAS5 considers that it's required by HM Revenue & Customs (HMRC) to deduct tax from the interest refund, it should tell Mr A how much it has taken off. It should also give Mr A a tax deduction certificate if he asks for one, so he can reclaim the tax from HMRC if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 15 July 2024.

Maria Drury
Ombudsman