Neutral Citation Number: [2022] EWHC 1979 (Admin)

Case No: CO/4036/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/07/2022

Before :

Mr Justice Griffiths

- -

Between :

THE QUEEN **on the application of** **MORTGAGE AGENCY SERVICE NUMBER FIVE LIMITED**	**Claimant**
- and -	
FINANCIAL OMBUDSMAN SERVICE LIMITED	**Defendant**
-and-	
GWENDOLYN DAVIES	**Interested Party**

- -
- -

John Taylor QC and **Tom Rainsbury** (instructed by **Eversheds Sutherland (International) LLP**) for the **Claimant**
James Strachan QC (instructed by **Financial Ombudsman Service Ltd**) for the **Defendant**

Hearing date: 15th June 2022,
further written submissions 16 and 20 June 2022

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Approved Judgment

The Honourable Mr Justice Griffiths :

1. This is an application for judicial review of a decision of a Financial Ombudsman.

2. On 26 August 2021, the Ombudsman (Emma Peters) decided that the Financial Ombudsman Service was only able to investigate the complaint of the Interested Party about the interest rate that the Claimant applied to her mortgage from 31 October 2012. There is no challenge to that decision, which was in the Claimant's favour. But the Ombudsman also decided: "As part of this we will be reviewing the history of Mrs D's mortgage from the time it reverted onto the SVR", i.e. January 2009. The Claimant says that this part of the decision was an error of law and goes back further than her jurisdiction permits, more than six years before the complaint was made in 2018.

Mrs Davies' mortgage

3. In 2006, Mrs Davies took out a 10-year interest-only residential mortgage with the Claimant's predecessor, GMAC-FRC Ltd, in respect of a property in Burry Port, a waterside town on the north side of the Loughor estuary in south Carmarthenshire. The interest rate was fixed at 5.64% after which it was to revert to a Standard Variable Rate (SVR) from 1 January 2009.

4. On 8 June 2007, the mortgage was sold and transferred to the Claimant. No issue arises from this. The Claimant became Mrs Davies' counterparty in respect of the mortgage, in place of GMAC-FRC Ltd.

5. The offer letter to Mrs Davies in 2006 noted that the SVR was, at that time, 6.74%. But the contractual mortgage conditions provided that, as a variable rate, the SVR might change from time to time. Condition 3.1 said:

> "*Changes to the standard variable rate*
>
> If the interest rate is the standard variable rate we may vary it for any of 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."

Of these, it seems that the Claimant wholly or mainly relies on (b), changes in the cost of funds, to justify the increases that Mrs Davies complains about.

6. Interest was calculated and payable monthly.

7. On 1 January 2009, Mrs Davies' mortgage rate ceased to be fixed at 5.64% and moved onto the SVR. After that, the SVR went up and down as follows:

   i) A decrease to 4.99% from 1 January 2009 to 13 January 2009.

   ii) A decrease to 3.99% from 13 January 2009 to 24 February 2009.

   iii) A decrease to 3.49% from 24 February 2009 to 17 March 2009.

   iv) A decrease to 2.99% from 17 March 2009 to 1 July 2009.

   v) An increase to 3.74% from 1 July 2009 to 1 October 2009.

   vi) An increase to 4.5% from 1 October 2009 to 1 March 2011.

   vii) An increase to 5.25% from 1 March 2011 to 1 May 2012.

   viii) An increase to 5.75% from 1 May 2012 to 1 September 2016.

8. There were further changes, up and down, after that, but it is the last four increases which lay the foundation for Mrs Davies' complaint in the period which the Claimant says the Ombudsman should not include in her review.

9. At the end of the mortgage term, Mrs Davies had no money to repay the principal sum, having only paid the interest to date on this interest-only mortgage. The value of the property, which had originally comfortably exceeded the amount borrowed, had fallen below the purchase price and below the amount borrowed. In addition, market changes meant that she could not remortgage at a more favourable rate than the rates charged by the Claimant. She therefore describes herself as being trapped in this mortgage. The Claimant has brought possession proceedings but Mrs Davies has so far avoided repossession and wishes to keep the property, which is her husband's home.

Mrs Davies' complaints to the Claimant and the Financial Ombudsman Service

10. Mrs Davies wrote to the Claimant complaining about her predicament on 31 October 2018. She made a number of claims against the Claimant, and criticisms of the Claimant, not all of them still in play, but what is important for present purposes is that she was complaining about paying more on her interest-only mortgage than she expected "over the ten years since the crash", which is a reference to the financial crisis of 2008. She said "All I ask for is to be treated fairly."

11. The date of this letter has been accepted on all sides as the end-date for whatever period of time the Ombudsman counts back from in order to decide upon her jurisdiction in relation to Mrs Davies' complaint.

12. The correspondence between Mrs Davies and the Claimant did not result in agreement. On 21 December 2018, Mrs Davies made a complaint to the Financial Ombudsman Service. In the box headed "Please tell us what your complaint is about", she wrote:

> "I took a mortgage in 2007 with GMac and they have gone out of business but MAS [the Claimant] have taken over this mortgage. Not long after I took this mortgage the Banking Crisis occurred and the house went into negative equity and so I had no chance of remortgaging to another company. I have had to pay high interest rates on this interest only mortgage and now the mortgage term has come to an end. MAS are threatening to repossess the house. I have asked them to extend the mortgage term but they are not willing to do so. It is an interest only mortgage and l have no way of repaying this mortgage balance. I can afford the repayments but I feel trapped because I am paying a high interest rate and have no chance of remortgaging to another company whilst the house is in negative equity. Also as I am nearly 70 it will be difficult for me to move this mortgage. I am extremely distressed about this… I really do hope you can help."

13. In an email on Mrs Davies' behalf to the Financial Ombudsman Service on 6 November 2019, her lay representative (Dominic Lindley) set out the factors which, in his opinion, needed to be looked at. He said:

> "In my opinion, to examine the fairness of the interest rate being charged to Mrs D, you would need to look at all of the factors included in my previous email – these are:
>
> • Whether the variation term and the way in which MAS 5 and the Co-operative bank group have applied it to set the SVR in a one-sided manner is fair?
>
> • The specific reasons MAS 5 / Co-operative bank group have used to justify each increase in the rate since 2008/09?
>
> • The funding costs which relate to the mortgage and how they have changed over time?
>
> • Why the SVR being charged to Mrs D is different from the SVR of 4.99% being charged by the Co- operative bank and the specific reasons which justify the difference? (Noting the previous FOS decisions about dual SVRs)
>
> • Whether MAS 5 is taking advantage of the fact that many of its customers are 'trapped' borrowers by increasing the SVR and keeping it at a different level from the Co-operative bank and is therefore in breach of Principle 6?

> • What percentage of MAS 5 borrowers are trapped borrowers and why the Co-operative bank is not offering Mrs D access to its own mortgage products?
>
> • Why the Co-operative bank is not applying the UK Finance voluntary agreement to MAS5 borrowers and offering them new deals, particularly in the light of Caroline's comments that it represents good industry practice?"

14. Principle 6, referred to in the fifth of these bullet points, is that "A firm must pay due regard to the interests of its customers and treat them fairly." It is one of the 11 Principles set out in the FCA Handbook.

15. The Ombudsman asked for and received the Claimant's response to these points. The Ombudsman then asked the Claimant "Can I clarify – does MAS5 give consent for us to look at these issues since 2008?". The Claimant replied, by email dated 12 February 2020:

> "As the complaint about our SVR was raised on 23 July 2019, we would only grant consent to you looking at matters which occurred over the course of the previous six years, i.e. since 1 July 2013, as per DISP 2.8.2."

16. It is now common ground that the correct end-date was not 23 July 2019 but 31 October 2018, as I have said, based on the complaint of that date. Consequently, the Claimant's position is that the Ombudsman should only look at matters occurring over the course of the six years previous to that, i.e. since 31 October 2012.

The decisions of the Ombudsman

The provisional decision of 12 February 2021

17. The Ombudsman issued a provisional decision on this point on 12 February 2021. She described it as "a provisional jurisdiction decision to give the parties a chance to respond". The provisional decision was as follows:

    i) Identifying the complaint, she said "Mrs D is unhappy about the interest rate that's been applied to the mortgage by MAS5 since December 2008. Mrs D's complaint is that this rate is unfairly high."

    ii) She noted that the Claimant "has said that under our rules it thinks we can only look at Mrs D's complaint about the fairness of the interest applied to her mortgage for the six years before she raised this complaint… MAS5 won't give consent for us to look at the interest rate before 2013."

    iii) Ms Peters noted the (non-binding) view of an investigator that the Ombudsman "could look at the rate of interest that was applied from 31 October 2012". She said this date was relevant because it was six years before the first record that Mrs D made a complaint "about the interest rate that applies to her mortgage being unfairly high".

iv) She referred to DISP 2.8.2 R, i.e. Rule 2.8.2 in Chapter 2 of the "DISP Dispute Resolution: Complaints" section of the FCA Handbook, which sets out Rules and Guidance on the Ombudsman's compulsory jurisdiction (the Claimant having declined to agree to voluntary jurisdiction). I will set out and consider DISP 2.8.2 R in detail, presently.

v) She noted that there was now agreement that 31 October 2018 was the date when the Claimant "received Mrs D's complaint about the interest rate that applied to her mortgage".

vi) To the question "What is this complaint?", the Ombudsman said "the complaint is about the interest charged on the borrowing". She then said:

> "Mrs D complains that the interest charged is excessive. More recently, her representative has complained about MAS5's operation of the variation clause in the mortgage agreement, and whether it has fairly exercised its power under the mortgage contract, and has compared the rate to the SVR charged by other lenders in the same group."

18. There are then two passages which are emphasised by the Claimant when they reappear in the Ombudsman's final decision. The Claimant says that these two passages should be quashed.

i) The Ombudsman noted that interest was charged monthly, and said "Mrs D's complaint that the interest rate is unfairly high is actually a series of complaints about a series of monthly events."

ii) She elaborated on this as follows:

> "Mrs D's complaint is that each time MAS5 charges her interest, the interest it charges is excessive by reference to base rate and other rates - such as those offered by The Co-op. Each interest period leads to a separate calculation by MAS5 of what interest it thinks is applicable, and a separate charge for that interest is added to Mrs D's account. Each interest period is therefore a separate act by MAS5 and a separate event. Each gives rise to a separate complaint about the fairness of MAS5's decision to apply that interest charge. These monthly acts of MAS5 applying interest are separate "interest charging events"."

19. The Ombudsman then proceeded to her (provisional) decisions on time limits. She said "all the interest charging events in the six years leading up to when Mrs D complained in October 2018 – so from October 2012 – are in time".

20. From what she had already said, this made it clear that she was including the interest charged every month from October 2012. She was not limiting herself to interest charged after the next change in the SVR in this period, which was not until 1 September 2016. Until 1 September 2016, the SVR applied was the one set on 1 May 2012, when it had increased to 5.75%. On 1 September 2016, this rate was actually

decreased, to 5.5%. After that, there was an increase on 1 December 2017 to 5.75%, and another increase on 1 September 2018, to 6%.

21. In addition to the primary six year time limit, DISP 2.8.2 R has an alternative time limit of three years from date of knowledge, and also various exceptions, including one for exceptional circumstances. The Ombudsman decided that Mrs Davies was not, on the facts of her case, able to claim any of these more generous time limits. There is no challenge to that. She therefore concluded:

> "As a result, I think we can only consider the complaints about the interest charging events in the six years to October 2018. The complaints about the interest charging events before October 2012 are out of time."

There is no challenge to this passage.

22. There is then a section of the Ombudsman's provisional decision letter headed: "What matters can we take into account in considering the complaints about interest charging events from 31 October 2012 onwards?"

23. The following passages of the Ombudsman's provisional decision under this heading are challenged. It is said that where they are repeated (as they are, word-for-word) in her final decision, they should be quashed:

> "There are many factors that lead to the decision MAS5 makes each month about how much interest to charge.
>
> There are therefore many matters relevant to each interest rate charging event – and thus matters relevant to each complaint Mrs D has made about each interest charging event."

Also:-

> "In my view, MAS5's decisions to vary the interest rate in what it considered to be the exercise of its contractual powers during the period 2008 onwards have now become the subject of Mrs D's complaint. Those decisions are relevant to what Mrs D has complained about and which has occurred within the last six years – each of the monthly charges. In considering the fairness of each of the monthly charges from 31 October 2012 onwards, we need to consider all relevant matters contributing to those events. That means we will need to consider the whole history of the interest rate, including before 31 October 2012. That is because the interest variation decisions taken by MAS5 from 2008 to 2012 are important context for the later monthly charges. MAS5 may have determined, in part, the rate that was charged during the period we can consider.
>
> If, to take an example, there was no contractual power to increase the interest rate by 0.75% in November 2011, that could

> potentially affect whether a monthly charge made in 2015 was fair and reasonable."

Also (after a sentence which is not challenged, saying "In summary, therefore, we can only consider the fairness of the interest that Mrs D was charged each month from 31 October 2012 onwards."):-

> "But in considering the fairness of those interest charges, we will need to look at the impact of what may or may not have contributed to those charges – including contributing factors that may have happened before the last six years. We will consider the whole history of the MAS5's SVR since Mrs D's mortgage reverted to it on 31 December 2008 in order to determine whether charges from 31 October 2012 onwards were fair."

The final decision on 26 August 2021

24. The provisional decision was followed, at the Ombudsman's invitation, by further representations from the parties. Having considered those, the Ombudsman issued her final decision, dated 26 August 2021, which is the one now challenged.

25. The initial pages of the final decision were substantially (and for the most part literally) identical to the provisional decision. In particular, all the passages which I have set out in paras 17 to 23 above were carried over and repeated in the final decision.

26. I have already indicated (in paras 18 and 23 above) which of those passages are now specifically challenged, and which the Claimant says should be quashed from the final decision.

27. The final decision then referred to responses to the provisional decision, and (after an explanation) reached the following final decision:

> "My decision is that we're able to investigate Mrs D's complaint about the interest rate that's applied to her mortgage from 31 October 2012. As part of this we will be reviewing the history of Mrs D's mortgage from the time it reverted onto the SVR."

28. The Claimant accepts the first sentence. It challenges and seeks the quashing of the second sentence.

The reasoning of the final decision letter

29. The Claimant also objects to (and seeks the quashing of) some passages in the reasoning of the final decision which immediately precede this conclusion, and which are new in the final decision letter, responding to the submissions received in response to the provisional decision letter.

30. The fresh reasoning before the conclusion of the final decision letter is in a section headed "my findings".

31. Some of this explains the decision, in favour of the Claimant, that the six year period applied, rather than a potentially more generous period based on such matters as date of knowledge or exceptional circumstances. I am not concerned with those passages.

32. The following part of the "my findings" reasoning for the final decision is, however, relevant:

> "I'll clarify why I have reached my decision.
>
> Both parties have highlighted that there are different issues that can be complained about in relation to the interest rate applied to Mrs D's mortgage. I completely agree. I see that there can be concerns about how an interest rate has been calculated; the level at which an interest rate has been set; or about the fairness or legality of the variation made to the underlying interest rate at a specific point in time. I also appreciate the representative's argument [on behalf of Mrs Davies] that a general complaint about interest rate is a different matter to a specific argument about a variation that is made outside of the terms and conditions of a mortgage contract.
>
> Mrs D's complaint about the interest rate that applied to her mortgage once it reverted to SVR following the expiry of her fixed rate product on 31 December 2008 raises various separate concerns. I'd like to remind all parties that the purpose of this jurisdiction decision is to define the period of time we can consider the issues raised by Mrs D (and if this complaint were to be upheld the period of redress). It is not my intention to explore the merits of the various aspects surrounding the interest rate that's been raised by Mrs D and her representative. These concerns will need proper investigation as part of our subsequent exploration of the merits of the various issues made in Mrs D's complaint.
>
> MAS5 has now accepted that we are able to investigate Mrs D's complaint about the fairness of the interest rate applied to her mortgage from 31 October 2012."

33. No challenge is made to these passages. However, the Claimant challenges, finally, the whole of the following passage, and seeks an order that, in addition to the earlier passages I have identified, it too be quashed (with the exception only of a narrative sentence which I will place in square brackets):-

> "I set out in my provisional jurisdiction decision that as part of our investigation into Mrs D's complaint, we'd need to review the history of Mrs D's mortgage from the time it reverted to the SVR on 31 December 2008.
>
> [MAS5 has made it clear that it strongly disputes whether this is something permitted under our rules, and that in doing so I would be acting outside of DISP 2.8.2 R.] I disagree with this

> interpretation of our rules. I consider that we're able to look at historic variations as part of the wider circumstances and background of Mrs D's complaint.
>
> As I explained in the provisional jurisdiction decision, I consider that historic interest rate changes which predate the six years we can look into are relevant to our investigation into Mrs D's current complaint. In considering the fairness of those interest charges from 31 October 2012, we will need to look at the impact of what may or may not have contributed to those charges – including contributing factors that may have happened before the last six years.
>
> And so I consider it appropriate and proper that we now take into account the whole history of the MAS5's SVR since Mrs D's mortgage reverted to it on 31 December 2008 in order to determine whether charges from 31 October 2012 onwards were fair. The historic changes made to the interest rate are relevant factors to the interest rate applied over the period I can consider. I believe that it's important background Mrs D's complaint about the interest rate applied to this mortgage from October 2012 onwards.
>
> I see this as being an essential part of establishing the fairness of Mrs D's interest rate from 31 October 2012 onwards. Whether historic variations have led to unfairness during the period of time we can consider Mrs D's complaint is a matter that would be explored as part of the merits investigation of this complaint. Otherwise we won't be looking at the full picture and all the circumstances of the case when we consider whether charges from 31 October 2012 were fair."

34. The Ombudsman has provided further clarification in a witness statement dated 22 April 2022 at para 2.6:

> "Whilst I consider such historic rate variations to be important context for considering the complaint about high monthly charges, I have concluded that under DISP 2.8.2 freestanding complaints about those historic variations (as well as about monthly payments from before October 2012) are outside the ombudsman service's jurisdiction due to having not been made in time. Thus, for example, whilst I consider that I can take account of historic variations in relation to the complaint about unfairly high monthly payments from October 2012, I do not consider any complaints about those historic variations to be within my jurisdiction and I could not award any redress for any period before October 2012, even if I were to think that any such past variations were unfair."

DISP 2.8.2 R, section 228 FSMA, and the statutory regime

35. The jurisdiction provision in issue in this case is, as the Ombudsman correctly said, DISP 2.8.2 R, which is Rule 2.8.2 in Chapter 2 of the "DISP Dispute Resolution: Complaints" section of the FCA Handbook. DISP 2.1 notes that "The purpose of this chapter is to set out rules and guidance on the scope of the Compulsory Jurisdiction…" The compulsory jurisdiction is the jurisdiction being exercised against the Claimant by the Defendant in this case.

36. DISP 2.8.2 R provides (ignoring qualifications and alternative bases for jurisdiction which are not relevant for present purposes):

> "The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:
>
> (…)
>
> (2) more than:
>
> (a) six years after the event complained of; (…)
>
> unless:
>
> (3) in the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2 R or DISP 2.8.7 R was as a result of exceptional circumstances; or
>
> (…)
>
> (5) the respondent has consented to the Ombudsman considering the complaint where the time limits in DISP 2.8.2 R or DISP 2.8.7 R have expired".

37. Since the Ombudsman did not find exceptional circumstances, and the Claimant did not give consent, Mrs Davies had to bring herself within DISP 2.8.2(2)(a).

38. "Complaint" is a defined term. Ignoring those parts of the definition (in the FCA Handbook glossary) which are not relevant to this case, the definition includes:-

> "any oral or written expression of dissatisfaction, whether justified or not, from, or on behalf of, a person about the provision of, or failure to provide, a financial service, (…) or a redress determination, which:
>
> (a) alleges that the complainant has suffered (or may suffer) financial loss (…)"

39. The definition also provides that "complaint" includes "part of a complaint". The parties agree that this means that the Ombudsman was entitled to decide, as she did, that she had jurisdiction over some parts of Mrs Davies' complaint (in the period from 31 October 2012) but not other parts (in the period before that).

40. The Financial Ombudsman Scheme was set up by the Financial Services and Markets Act 2000 ("FSMA"). Section 225 describes it as "a scheme under which certain disputes may be resolved quickly and with minimum formality by an independent person."

41. Section 226 of FSMA establishes the compulsory jurisdiction. Section 226(1) refers to "A complaint which relates to an act or omission…" These words are emphasised by the Claimant. They also occur in DISP 2.3, which is entitled "To which activities does the Compulsory Jurisdiction apply?" DISP 2.3.1 R says that the Ombudsman can consider a complaint under the Compulsory Jurisdiction if it relates to "an act or omission" by a firm carrying on certain specified activities.

42. By section 228, a complaint under the compulsory jurisdiction "is to be determined by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case."

43. It is common ground that this is a jurisdiction which goes well beyond the adjudication of legal rights and remedies such as claims in contract or in tort.

44. Having decided what is, in her opinion, "fair and reasonable in all the circumstances of the case", the Ombudsman, if deciding in favour of Mrs Davies, has power to make a variety of awards, under section 229 of FSMA. These include (but are not limited to) a "money award" which "may compensate for… financial loss" (section 229(3)).

45. Time limits for complaints to the Ombudsman are mandated by Schedule 17 of FSMA. Para 17 of Schedule 17 provides (in relation to the compulsory jurisdiction):

> "The FCA must make rules providing that a complaint is not to be entertained unless –
>
> (a) the complainant has referred it under the ombudsman scheme before the applicable time limit (determined in accordance with the rules) has expired…"

46. DISP 2.8.2 R is a rule given force by this paragraph.

47. In addition, DISP 3.6 both reflects and builds upon section 228 of FSMA, and is in the following terms (R indicating a rule, and G indicating guidance):

> "**3.6 – Determination by the Ombudsman**
>
> **Fair and reasonable**
>
> 3.6.1.R The Ombudsman will determine a complaint by reference to what is, in his opinion, fair and reasonable in all the circumstances of the case.
>
> 3.6.2.G Section 228 of the Act sets the 'fair and reasonable' test for the Compulsory Jurisdiction (other than in relation to a "relevant complaint" within the meaning of section 404B(3) of the Act) and DISP 3.6.1 R extends it to the Voluntary Jurisdiction.

> (…)
>
> 3.6.4.R In considering what is fair and reasonable in all the circumstances of the case, the Ombudsman will take into account:
>
> (1) relevant:
>
> (a) law and regulations;
>
> (b) regulators' rules, guidance and standards;
>
> (c) codes of practice; and
>
> (2) (where appropriate) what he considers to have been good industry practice at the relevant time."

The Claimant's arguments

48. The Claimant argues that since, by virtue of DISP 2.8.2 R, the Ombudsman "cannot consider a complaint" which is more than six years after the event complained of, her decision to "take into account the whole history of the MAS5's SVR since… 31 December 2008 in order to determine whether charges from 31 October 2012 were fair" is to consider complaints (about the interest rate changes between 2008 and 2012) which are outside her jurisdiction. In support of this submission, the Claimant relies on the broad definition of a complaint in the FCA Handbook glossary as "any oral or written expression of dissatisfaction… which… alleges that the complainant has suffered… financial loss".

49. The Claimant also relies on the statement in DISP 2.3.1 R that complaints which may be considered under the Ombudsman's compulsory jurisdiction relate to "an act or omission", which echoes (the Claimant emphasises) the statutory regime in section 226(1) of FSMA about "A complaint which relates to an act or omission…"

50. The Claimant relies on the strictness of para 17 of Schedule 17 of FSMA, requiring the FCA to make rules (of which DISP 2.8.2 is one) providing that a complaint is "not to be entertained" unless it has been referred before the applicable time limit has expired.

51. The Claimant argues that, although the interest charged to Mrs Davies after 31 October 2012 (which is when both sides agree with the Ombudsman that the relevant six year period began, after which Mrs Davies' complaints are admissible) was based on SVR increases implemented on 1 July 2009, 1 October 2009, 1 March 2011 and 1 May 2012, the Ombudsman was wrong to consider herself entitled to scrutinise those rates, because any complaint about them would be outside her jurisdiction.

52. The Claimant rejects the Ombudsman's analysis that "Mrs D's complaint that the interest rate is unfairly high is actually a series of complaints about a series of monthly events", namely, each separate interest monthly charge. The Claimant argues that the monthly interest payments after 31 October 2012 were calculated mathematically, according to a settled and contractual formula based upon the prevailing SVR, and that it is not open to the Ombudsman to examine the fairness of the SVR itself if it was set before 31 October 2012. The Claimant argues that there is no relevant "act or omission"

to found a complaint after 31 October 2012 if interest is being charged according to the correct formula and at a prevailing rate set before 31 October 2012.

53. Consequently, the Claimant seeks to quash the passages set out in para 23 above.

54. Based on these arguments, the Claimant then seeks to quash the Ombudsman's decision that, when investigating Mrs Davies' complaint about the interest rate charged from 31 October 2012, "As part of this we will be reviewing the history of Mrs D's mortgage from the time it reverted onto the SVR" (para 27 above), and, consequently, to quash also the reasoning and decision making about the scope of the Ombudsman's enquiry which I have quoted in para 33 above.

55. The Claimant submits that its arguments are consistent with a purposive construction of DISP 2.8.2 R, which is (it argues) to impose temporal limitations and consistent, also, with the wider purpose of the Ombudsman scheme, which by section 225 of FSMA is to resolve disputes "quickly and with minimum formality".

56. The Claimant invokes in support of this analysis principles of statutory interpretation considered in *Bennion on Statutory Interpretation* (8th edition, 2020), namely, a presumption against circumvention or evasion of the parliamentary intent (*Bennion* para 12.10) and a presumption against absurdity (*Bennion* para 13.1).

57. The Claimant also argues that the Ombudsman's interpretation is to be rejected because it is a construction which leads to injustice or unfairness in allowing consideration of events so far back that documentary evidence will have been destroyed and memories will have faded. The Financial Ombudsman Service upheld SVR increases between July 2009 and May 2012 in adjudications between 2011 and 2013 and in a final decision on 1 May 2015 The final decision of that ombudsman, in a complaint by Mrs B rather than the Defendant, accepted the Claimant's justification for the SVR increases based on Condition 3(b), the cost of funds. The final decision was based upon information submitted by the Claimant which the Ombudsman accepted was "of a commercially sensitive nature" and which was allowed to remain confidential, but which is no longer available. Therefore, the Claimant submits, it is unfair for it to have to justify the same point so long after the event that relevant evidence is no longer available because of the Claimant's document retention policy. The Claimant says that it was up to Mrs Davies to be vigilant and bring her complaint about SVR increases no later than six years after they arose and that the Ombudsman was wrong to adopt an interpretation and to follow a course which brought complaints about historic SVR increases in, as it were, by the back door, as part of complaints about interest charges after 31 October 2012.

58. The Claimant recognises that the Ombudsman has a broad discretion under section 228(2) of FSMA to determine a complaint under the compulsory jurisdiction "by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case". It argues, however, that this is a discretion which is exercisable only when the jurisdiction exists, and is not relevant to whether it exists in the first place.

59. In *R (Chancery (UK) LLP) v The Financial Ombudsman Service Ltd* [2015] EWHC 407 (Admin), Ouseley J considered the decisions of Sales J in *R (Bankole) v The Financial Ombudsman Service Ltd* [2012] EWHC 3555 (Admin) and Wilkie J in *R (Bluefin Insurance Services Ltd) v The Financial Ombudsman Service Ltd* [2014]

EWHC 3413 (Admin). Ouseley J said, at para 66 of *Chancery*, that it is for the Court, and not the Ombudsman, to decide if an Ombudsman has acted without jurisdiction. On the other hand, he noted, at para 70, that the Ombudsman is the fact finder, and his or her findings of fact are reviewable only on traditional judicial review grounds. He went on to say, at para 71, that, while the FOS should expect that a reviewing Court would regard its assessment of the way in which the law applied to the facts as persuasive, if the Court is nevertheless persuaded that, on the facts found by the FOS, the correctly understood law had been applied wrongly, the Court must rule that the FOS had no jurisdiction. The Claimant argues that the facts in this case, about the dates of the SVR changes before 31 October 2012, and the mathematically correct application of the SVR to the monthly charges after 31 October 2012, are not in dispute.

60. In *Patel v Patel* [2009] EWHC 3264 (QB), the defendant shopkeeper borrowed money from the claimant chartered accountant between 1979 and 1983, which was allegedly consolidated into an oral loan agreement in 1992 for the outstanding £207,465 on terms that interest would accrue at a rate of 20% compounded monthly from July 1992. Very few repayments were made or required before, in 2008, the claimant brought proceedings under the 1992 loan agreement for repayment of the total outstanding sum, by then calculated as in excess of £4.5 million. The defendant sought relief under section 140B of the Consumer Credit Act 1974, which empowers the court to make orders pursuant to section 140A in connection with a credit agreement "if it determines that the relationship between the creditor and the debtor arising out of the agreement… is unfair to the debtor…" The claimant argued that this was a time-barred challenge to the agreement of 1992, to which a 12 year limitation period applied which had expired by 2008. The Deputy High Court Judge (George Leggatt QC) held that the issue for him under sections 140A and 140B was whether the relationship was unfair and this provided the shopkeeper with a continuing cause of action until the relationship ended, with the result that he was not time barred. Moreover, Mr Leggatt QC held that, in order to decide whether the relationship was, at the time of his determination, unfair:

> "…it is both permissible and necessary to have regard to the whole history of that relationship. This history includes not only the 1992 agreement but also the earlier loan agreements…"

61. He went on to find that the terms of the 1992 agreement, and the way in which it had been operated since 1992, had created a relationship which was indeed unfair within the meaning of section 140B and relief was granted to the defendant accordingly.

62. *Patel* was approved in *Scotland v British Credit Trust Ltd* [2014] Bus LR 1079 CA and in *Smith v Royal Bank of Scotland* [2021] EWCA Civ 1832.

63. The Claimant distinguishes those cases on the basis that the régime established by sections 140A and 140B of the Consumer Credit Act, examining whether a "relationship" is "unfair", and mandating consideration of "the terms of the agreement or any related agreement", and the way in which the creditor "has exercised or enforced" any of these terms, and "any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement)" (quoting section 140A(1)(a)-(c)) and having regard to "all matters it thinks relevant" (quoting section 140A(2)) is different from the jurisdiction limited by DISP 2.8.2 which is based on a "complaint" which has to be referred no more than "six years

after the event complained of". The Claimant also relies on DISP 2.3.1 saying that a complaint "relates to an act or omission", rather than a relationship.

The Defendant's arguments

64. The Defendant says that the Claimant has mischaracterised the decision of the Ombudsman. The Ombudsman has decided:

> "…we can only consider the complaints about the interest charging events in the six years to October 2018. The complaints about the interest charging events before October 2012 are out of time" (see para 21 above).

Therefore, no jurisdiction is being claimed over interest charging events before 31 October 2012 and the Claimant's objections are misconceived.

65. The Defendant says that the Ombudsman's proposal to consider and take into account variations in the interest rate from 2008 onwards is in the section headed "What matters can we take into account in considering the complaints about interest charging events from 31 October 2012 onwards?" (para 22 above). This is not an assumption of jurisdiction over a complaint, but an application of the power and duty of the Ombudsman under section 228 of FSMA to consider what is "fair and reasonable in all the circumstances of the case" when adjudicating complaints about interest charges after 31 October 2012 which are, as both parties agree, properly within her jurisdiction.

66. The Defendant relies on the evidence in paras 2.4 – 2.5 of the Ombudsman's witness statement to show that she has a proper regard for what is, and what is not, within her jurisdiction, and how she might consider events before 31 October 2012 as relevant, without treating them as complaints, which would be contrary to her clear decision that, treated as complaints, they are outside her jurisdiction:

> "2.4 In the jurisdiction decision I concluded that I do not have jurisdiction to consider complaints about charging events that took place more than six years before the complainant made her complaint, but I do have jurisdiction to consider complaints about charging events made within six years (i.e. from October 2012 onwards), since each time the Claimant charges interest, there is an act that has the potential to cause a consumer financial loss. I concluded (for the reasons set out in my jurisdiction decision) that those complaints about the interest charging events before October 2012 are out of time, whereas those complaints about interest charging events from October 2012 onwards are in time and will have to be determined. I understand that the Claimant is not challenging that determination.
>
> 2.5 My jurisdiction decision also went on to explain what matters that I could take into account when considering the complaints about interest charging events from October 2012. I explained that when considering what is fair and reasonable in all the circumstances of the case (as will be required when determining that part of the complaint that is within jurisdiction)

> it may be appropriate to look at historic interest rate variations as part of the wider circumstances and background of the complaint. As I explained in the jurisdiction decision, there can be many factors that lead to the decision the Defendant takes each month about how much interest to charge, and the interest variation decisions the Defendant took from 2008 to October 2012 (the historic variations) are important context for the later monthly charges. I was articulating in my decision that I considered it would be difficult to consider 'all the circumstances of the case' if I was required to ignore matters such as historic rate variations when these continue to have an effect on the interest rate charged."

67. Section 228 provides that a complaint under the compulsory jurisdiction is to be determined by reference to what is "in the opinion of the ombudsman" fair and reasonable in all the circumstances of the case" (para 42 above). The Defendant submits that there is no proper basis for the Claimant to challenge the opinion of the Ombudsman in this respect, or to invite the court to substitute another assessment of what is "fair and reasonable in all the circumstances of the case" for hers. Per Ouseley J in *R (Norwich and Peterborough Building Society) v The Financial Ombudsman Service Ltd* [2002] EWHC 2379 (Admin) at paras 77-78:

> "The very concept of 'unfairness' is very wide, and permits reasonable people to disagree. But its very width serves as a caution against over-active judicial intervention in the approach adopted by the Ombudsman, in the criteria which he develops or in the application of those criteria or of the concept of unfairness to the circumstances of the case.
>
> It is only if the Ombudsman has committed such errors of reasoning as to deprive his decision of logic that it can be said to be legally irrational. The court should be very wary of reaching such a conclusion. Its own views as to what would be fair are not to be substituted for the Ombudsman's views when what is at issue is a question of the substantive merits of a decision as to unfairness."

68. The Defendant points out that the Ombudsman deals with "complaints, and not legal causes of action" *R (Heather Moor and Edgecomb) v The Financial Ombudsman Service Ltd* [2008] EWCA Civ 642 at para 80, and her jurisdiction is "inquisitorial not adversarial" *R (Williams) v The Financial Ombudsman Service Ltd* [2008] EWHC 2142 (Admin) at para 26.

69. The Defendant adopts the observation of Ouseley J in *R (TenetConnect Services Ltd) v The Financial Ombudsman Service Ltd* [2018] EWHC 459 (Admin) at para 47 that the Ombudsman "is ideally placed to reach a judgment on what the complaint is about and whether it falls within the scope of his jurisdiction."

70. The Defendant relies on Principle 6 (see para 14 above), requiring the Claimant to pay "due regard to the interests of its customers and treat them fairly." This principle of fairness entitles the Ombudsman, the Defendant argues, to judge the Claimant's interest

charges from and after 31 October 2012 by a standard of fairness, and not merely by reference to a contractual entitlement or a mathematical formula. This is in addition to her general power to do so pursuant to section 228 of FSMA and DISP 3.6.1 (determining complaints "by reference to what is, in [her] opinion, fair and reasonable in all the circumstances of the case").

71. The Defendant submits that, if the Claimant no longer has relevant records about the cost of funds or other reasons underpinning interest rate variations before 2012, that is a matter for the Ombudsman to take into account in due course, rather than something which precludes her from at least making enquiries about them as part of her consideration of the background to the interest charging events after 31 October 2012.

72. The Defendant does not accept that prior decisions of the Defendant have determined Mrs Davies' complaint about (as it is put in her representative's email of 6 November 2019) "the fairness of the interest rate being charged to Mrs D". It suggests that the previous decisions relied upon by the Claimant (see para 57 above) were about the lawfulness of the SVR clause and not about the fairness of the rates, or about whether claiming those rates after 31 October 2012 would be fair. But the Defendant argues that, in any case, the Claimant cannot take any point about inconsistency at this stage because the Ombudsman has not yet made a decision in Mrs Davies' case.

73. The Defendant cites the well-known dictum of Laws LJ in *R (Khatun) v Newham London Borough Council)* [2004] EWCA Civ 55 at para 35:

> "…where a statute conferring discretionary power provide no lexicon of the matters to be treated as relevant by the decision-maker, then it is for the decision-maker and not the court to conclude what is relevant subject only to *Wednesbury* review."

74. The Defendant argues that, since the Ombudsman must consider what is "fair and reasonable in all the circumstances of the case" under section 228 of FSMA, and under DISP 3.6, she is entitled to have regard, when considering a complaint about interest charges after 31 October 2012, to whether it was fair and reasonable to continue to charge interest at the SVR in force at that time, although it had been set earlier and, in doing so, to examine the history of and rationale for the interest rate itself.

Decision and conclusion

75. I prefer the submissions of the Defendant to those of the Claimant. I agree with the analysis at paras 64 to 71 above and with the conclusion at para 74 above.

76. It is, at least in the first place, for the Ombudsman to decide what the complaint is and whether she will accept jurisdiction over it.

77. She has, to my mind, clearly both identified the complaint as she understands it and stated which parts she will, and which parts she will not, accept jurisdiction over. The jurisdiction she accepts is, exclusively, to consider complaints about interest charged after 31 October 2012.

78. Relatively late in the hearing before me, the Claimant indicated that it did not accept the Ombudsman's statement that "Mrs D's complaint that the interest rate is unfairly

high is actually a series of complaints about a series of monthly events" (para 18 above). This is not entirely consistent with the Claimant's acceptance without challenge of the passages in her decision saying "all the interest charging events in the six years leading up to when Mrs D complaints in October 2018 – are in time"; and "we can… consider the complaints about the interest charging events in the six years to October 2018" (paras 19 and 21 above).

79. It is also not a challenge clearly apparent from the Statement of Facts and Grounds in paras 90-91, which was the passage to which I was referred by the Claimant in oral argument in support of this point, or in paras 84-86, which were relied on by the Claimant in a written submission after the hearing.

80. It is, however, right to say that both the Statement of Facts and Grounds (at para 91) and the Claimant's oral argument insisted that the SVR variations were the events complained of and it was on this basis that it was argued that they constituted complaints pre-dating 31 October 2012 and the Ombudsman was wrong to entertain them.

81. Leaving aside the question of whether this point is open to the Claimant on the basis of its pleading, I do not think the point is a good one. It was up to the Ombudsman to decide how the complaint should be understood and analysed and her approach, that it was a complaint about the fairness of the interest charges, and consequently about every interest charge within the jurisdiction accepted by the Ombudsman after 31 October 2012, was not only open to her but on the face of it correct.

82. Mrs Davies was asking, in terms, "to be treated fairly" (para 10 above). This was how she put her complaint when she made it to the Claimant, on 31 October 2012 (the date on which the complaint is accepted as having been made for jurisdiction purposes). When she pursued the complaint with the Defendant, she said "I have had to pay high interest rates" (para 12 above). The follow up email from her representative was asking the Defendant "to examine the fairness of the interest rate being charged to Mrs D" (para 13 above). I can see no valid objection to the Ombudsman's interpretation of this as a challenge to the monthly interest repayments claimed from Mrs Davies on this interest-only mortgage.

83. It is true that Mrs Davies complained of other matters. To the extent that the Ombudsman has found those other matters to be substantive complaints of loss before 31 October 2012, she has decided she has no jurisdiction over them.

84. Every charge to interest is an act. Every failure to alter the SVR when a monthly charge is coming up is an omission. The Ombudsman was entitled to identify those as acts and omissions complained of and to proceed accordingly. This is what she has done in her final decision.

85. Much of the Claimant's case rests on the argument that the real nature of Mrs Davies' complaint was the "act" of setting a new SVR from time to time, from which the Claimant argues that any SVR set before 31 October 2012 is out of bounds so far as consideration by the Ombudsman is concerned, because it has to be characterised as a "complaint", which she "cannot consider" under DISP 2.8.2 and which "is not to be entertained" following para 17 of Schedule 17 of FSMA (para 45 above). However, it is not for the Claimant to re-cast the complaint actually made by Mrs Davies or, more

to the point, to impose upon the Ombudsman the Claimant's analysis of it. What the Claimant is doing here is playing a game of Aunt Sally – setting up a target of its own devising which is easier to knock down – but, in doing that, it misses the point of the decision actually made by the Ombudsman, which is in different terms. When the Ombudsman's actual decision is examined, there is nothing wrong with it so far as the claim to jurisdiction is concerned. She accepts complaints about interest charging events after 31 October 2012 and she rejects complaints about interest charging events (or, indeed, any losses) before 31 October 2012.

86. The Ombudsman's proposed consideration of interest variations before 31 October 2012 is firmly set as background, or context, for the complaints under consideration about interest rate charges from 31 October 2012 only. This is a point made repeatedly in the last three paragraphs of my quotation from the final decision letter in para 33 above. The Ombudsman is not considering them as free standing complaints or as complaints at all, within the meaning of DISP 2.8.2 R. There is, therefore, no basis for challenging her final decision on the basis that it accepts jurisdiction over complaints which are out of time.

87. This is clear from the passages which the Claimant seeks to quash. In the passages quoted in para 23 above, the Ombudsman said that decisions about SVR changes during the period 2008 onwards "are relevant to what Mrs D has complained about and which has occurred within the last six years". They are "important context for the later monthly charges". In the new passages in the final decision quoted in para 33 above, the Ombudsman says "The historic changes made to the interest rate are relevant factors to the interest rate applied over the period I can consider". It is "important background". "I see this as being an essential part of establishing the fairness of Mrs D's interest rate from 31 October 2012 onwards."

88. These are not jurisdiction findings in relation to events before 31 October 2012. In these passages, the Ombudsman is exercising her discretion under section 228 of FSMA and DISP 3.6.1 R to decide what she ought to look into before determining "what is, in [her] opinion, fair and reasonable in all the circumstances of the case" in respect of interest charges after 31 October 2012 and not before. This discretion is broad, and it is not limited to the sort of narrow analysis that might be appropriate to a jurisdiction founded (as hers is not) only upon legal causes of action which, once accrued, cannot be revived for limitation purposes by reference to the working out of their consequences. The Ombudsman is entitled to form the opinion that she has expressed about what she will take into account when deciding what is "fair and reasonable in all the circumstances of the case". The passages which I have quoted appear to me to be neither irrational nor unlawful, and I see no reason why they should be quashed.

89. The Ombudsman has ruled out "complaints" before 2012. The interest rates increases before 2012 have not been accepted as "complaints" and no financial or other redress will be considered in respect of them or in respect of monthly interest charges based on them which were required before 31 October 2012. But that does not mean that they cannot be considered (as the Ombudsman proposes) as part of the background to the complaints that are admittedly within her jurisdiction. It is a matter for her to decide whether it is "fair and reasonable" to impose those charges, and she is entitled to consider the background, including the setting of the prevailing rate, when doing so. It would be absurd to exclude the whole background before 31 October 2012 from her consideration. Indeed, it seems to be accepted that she has to take account, for example,

of the original contract, and mortgage conditions, although they date from 2006, and to acknowledge the transfer from the original mortgagor to the Claimant, although this took place in 2007.

90. Any earlier determination by the Defendant (such as referred to in para 57 above) that cost of funds justified the Claimant's SVR increases after 2008 may well be relevant, but that does not go to the Ombudsman's jurisdiction. It would be a matter for her to consider when reaching her final determination. If she falls into error in that respect, this might be a basis (I know not) for future action. But since she has not made a final determination on the merits or substance of the complaint, that is for another day.

91. Similarly, the suggestion that relevant records are no longer available to the Claimant is a matter that might be taken into account, but it does not justify a challenge to jurisdiction, or to the Ombudsman's identification of matters to be considered as relevant to what is fair and reasonable "in all the circumstances of the case".

92. The Ombudsman's proposed consideration of SVR changes before 31 October 2012 as part of the background to the complaints about the situation afterwards is, in my judgment, analogous to the legitimate consideration of the whole history which was allowed in *Patel* and *Smith.* The definition of a "complaint" is not so strictly confined to "events" as the Claimant's efforts to distinguish *Patel* requires. It is about "the provision of… a financial service". However, I have already decided that the monthly interest charges after 31 October 2012 were correctly characterised by the Ombudsman as events forming the subject matter of the complaint.

93. Complaint is made in this case about interest charges from 31 October 2012. Those charges were made at a rate set on 1 May 2012. The Ombudsman accepts that no complaint can be made about charges made before 31 October 2012. It is in my judgment wrong to say that it is *Wednesbury* unreasonable, or otherwise unlawful, for her to consider, when deciding "what is, in [her] opinion…, fair and reasonable in all the circumstances of the case" that the prevailing rate itself should be examined, from the outset, and also that the prior history should investigated to see what impact, if any, it had on the rates applied on and after 31 October 2012. As the Ombudsman herself puts it in her final decision, "In considering the fairness of those interest charges from 31 October 2012, we will need to look at the impact of what may or may not have contributed to those charges – including contributing factors that may have happened before the last six years."

94. The relevance of the rate prevailing and charged on and after 31 October 2012 is obvious. It is a little harder to see what assistance the Ombudsman will gain from looking at the rate setting as far back as 2008, but what she makes of that remains to be seen. For example, she might find it instructive to learn what the pattern of interest rate setting is, how closely it aligns to the cost of funds, or other prevailing rates, or how quickly it adjusts to changes in circumstances, and she might find a longer history useful in this respect. I do not suggest that she will, or should; nor do I limit her room for manoeuvre. All I have to decide is whether the course she proposes in her final decision, including those passages affirmed and repeated from her provisional decision, as explained in her witness statement, demonstrate an irrational, unlawful or otherwise judicially reviewable error. I have concluded that they do not.

95. The application for judicial review is, therefore, dismissed.