

## The complaint

A partnership, which I'll call S, complains that Santander UK Plc misled the partners about the interest rate on a commercial mortgage.

## What happened

In 2007, S took out a commercial mortgage with Abbey National (later to become Santander UK Plc). The partners borrowed £672,437 for 25 years, secured on the business premises and partly on a second charge on the partners' home. The partners say they understood that the interest rate would be the Bank of England base rate plus 1.5%.

In 2008 the base rate fell below 3.5% and the partners asked when their mortgage rate would be reduced, but the bank pointed to clause in the agreement saying the minimum interest rate was 5% and so the rate wouldn't fall any lower. That wasn't how the partners had expected the product to operate. There were exchanges between the parties and in 2012 they discussed restructuring the lending, but there was no new agreement. Exchanges between S and the bank continued, and a final response letter was issued in 2019.

Unhappy with the bank's response, the partners referred their complaint to this service.

Having considered the evidence and arguments, our investigator concluded that the partners had not been given clear information about the mortgage in 2007, but were offered the opportunity to move away from the product in 2012. She therefore recommended that S be put back in the position it would have been in if, from the outset of the mortgage to the end of 2012, there had been no minimum interest rate. She gave the following reasons:

- S was introduced to Abbey National in 2007 by a broker. The partners had a face-to-face meeting with an Abbey National representative, during which they asked about the basis on which the lending would be made. The mortgage wasn't sold on an advised basis, but the bank should have provided the partners with clear information to allow them to make an informed choice on whether or not to go ahead.
- The partners provided us with a faxed copy of the repayment terms from the bank, which doesn't refer to the minimum interest rate of 5%. This copy of the agreement, including its direct debit, was signed by the partners on 5 October 2007 for a loan of £674,975. There is also a later copy of the agreement, provided by the bank, dated 29 October and signed by the partners on 1 November. This was for £672,437 and it said the earlier offer was superseded. It included an additional condition – condition 9 – that the minimum interest rate would be 5%.
- The investigator didn't think the partners were aware that the minimum interest rate condition had been added. They were signing the new offer on the basis that the amount to be borrowed had changed. The information regarding the minimum interest rate should have been provided from the outset so that the partners could have made an informed decision as to whether to progress with the loan. Their later behaviour also supports their testimony that they weren't aware of the minimum interest condition until it came into effect in 2008.

- There were email exchanges between the parties in 2012 and 2013 showing that the partners had concerns about the bank's restructuring offer. But the restructure would have reduced the monthly payments. The investigator concluded that the partners were offered the opportunity to move away from the original product and they chose not to do this. So it wouldn't be reasonable to award compensation for interest that S paid after that time.

The partners largely agreed with the investigator but thought the compensation ought to include the interest paid after 2012. They gave these reasons, in summary:

- During the discussions, the bank offered a replacement mortgage but the rate was still higher than the one the partners thought had been agreed in 2007. There were other aspects of the replacement offer that were risky – for example, it would have been a shorter term and the partners were concerned that on its expiry they might have been unable to refinance. In the end the actual replacement offer wasn't produced.
- The bank didn't treat the problem as a formal complaint, so the matter wasn't resolved properly at the time.

Santander didn't agree with the investigator's conclusions. It made the following points, in summary:

- The partners were introduced to the bank by a broker. The offer letter is provided to the broker to discuss with the customer and it's expected that the broker would have a conversation with the customer to explain the terms.
- Both letters made reference to a minimum lending rate in another condition.
- The bank didn't merely reissue the offer letter to include the minimum lending rate. There were several other changes in the final offer letter, to amend the loan amount and in turn other associated amendments.
- The customer signature confirms they acknowledged and accepted "the above terms and conditions." The mortgage was sold on a non-advised basis.
- The customers have had the opportunity to refinance. The bank was prepared to lend at a reduced rate, subject to conditions. The partners have also been free to leave the deal without any large penalties and have chosen not to.

### **What I've decided – and why**

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

Having done that, I've reached the same conclusions as the investigator, and for largely the same reasons.

I agree that the partners signed the final loan offer in 2007 which contained the minimum interest rate condition. But to determine a fair and reasonable outcome of the complaint, I need to decide whether the bank had given the partners sufficiently clear and easily comprehensible information so that they could make an informed choice. I would look for the information to give a balanced view of the product offered so they could have an accurate

understanding of the financial implications. I also need to take into account all the circumstances of the events in the complaint.

The partners say that when they were introduced to Abbey National, they were seeking a business loan that simply tracked the base rate. I believe the partners when they say they were originally given comfort, in their meeting with the bank's representative, that the commercial mortgage would do just that. This was an unadvised sale, but how the interest rate would be set was a matter of information, not advice. The first loan agreement didn't have the minimum rate condition, and it therefore matched the customers' expectations.

The effect of adding the minimum interest rate condition was to make the loan a fundamentally different proposition. Instead of tracking the base rate up and down, it would track the base rate but never go below 5%. I think the bank should have brought that change to the attention of the customer.

There was another condition in both versions that made reference to a minimum rate as part of the interest calculation, but in the absence of a minimum rate in the agreement I believe it wouldn't have been clear or comprehensible.

I'm making no suggestion here that there was a deliberate intent to trick the customers into signing an agreement they didn't want. But nor do I believe that when the minimum rate condition was omitted then later inserted, the bank was mindful of the significance of the change and made it with a conscious expectation that the broker would explain it to the partners. In my view, what probably happened was just a drafting error in the first version, which was corrected with little thought. In any event, the effect of the bank omitting the condition then later adding it, without drawing attention to it, was that the partners reasonably believed the final offer loan operated in substantively the same way as their earlier understanding, except for a small reduction in the sum borrowed and some associated changes in payments. I therefore think it was an error by the bank which left the partners with a loan whose characteristics were different from those they reasonably thought they had agreed.

I agree with the investigator that things changed at the end of 2012. The partners had become aware of the minimum rate condition and the parties had discussed a replacement agreement. The bank had set out terms for a new offer, with a lower interest rate. Agreement wasn't reached on a new loan, but there was no longer any misapprehension about the terms of the existing contract, and the bank was offering an alternative. In any event, there were no substantial break costs associated with the loan, so the partners were free to end the contract and seek a better rate elsewhere. In the circumstances, I don't think it would be fair or reasonable to require the bank to compensate S for any of the minimum interest payments after the end of 2012.

### **Putting things right**

For the above reasons, I conclude that the bank should compensate S for the excess interest paid up to the end of 2012 as a result of the minimum interest rate condition.

### **My final decision**

My final decision is that I require Santander UK Plc to put S in the position it would have been in if, from the outset of the mortgage contract to the end of 2012, there had been no minimum interest rate. This should reflect the following practical considerations:

- The bank should reconstruct the mortgage as if the interest rate had been the Bank of England base rate plus 1.5%, from the outset to the end of December 2012. Thereafter the mortgage interest rate should be as specified in the existing contract.

- The bank should reimburse any difference in payments between the existing and the replacement product.
- The bank should add compensatory interest at 8% simple per annum to the reimbursed payments from the date the cost arose to the date of settlement. If Santander UK Plc considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell the partners how much and, if requested by the partners, should provide a tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I'm required to ask S to accept or reject my decision before 11 March 2022.

Colin Brown  
**Ombudsman**