

The complaint

Mrs G and Mr H complain that Santander UK Plc refused to allow them to port their mortgage to a new property, leading to them paying an early repayment charge (ERC) to move to another lender.

What happened

Mrs G had a mortgage with Santander, which was subject to a five year fixed rate. During the fixed rate period, an ERC would apply if the mortgage was repaid early.

In 2020 Mrs G and Mr H decided to move house. Although they had been living together, until this point the mortgage was in Mrs G's sole name. But they wanted the new house and mortgage to be in joint names. So they applied to Santander to port their mortgage to the new property, adding Mr H to it in the process. They intended to port the existing balance without taking further borrowing.

Santander assessed their application, and refused it. It said it didn't think the mortgage was affordable. So Mrs G and Mr H applied for a new mortgage with another lender, which was granted.

By this point, the mortgage was only a few months from the end of the five year fixed rate period. The monthly payments were less than £350 – but in repaying the mortgage early, Mrs G incurred an ERC of almost £9,000.

Mrs G and Mr H complained. They said Santander should have allowed them to port the mortgage, in which case the ERC would not have been payable at all. And they said that the ERC itself was unfair – since it far exceeded the payments left until the end of the fixed rate. They also complained that the ERC was fixed for the whole of the fixed rate, rather than reducing on a sliding scale. And so even if Santander was entitled to charge an ERC, the £9,000 charged was excessive.

Santander said that porting was always subject to an application being made, and was discretionary. It said Mrs G and Mr H's application did not meet its lending criteria. And it said the ERC was properly charged and not unfair in amount.

Santander said that as a new borrower was being added, it had to carry out a full affordability assessment. It said the mortgage was not affordable based on Mrs G and Mr H's income.

Mrs G and Mr H derive most of their income from rental properties, though each also has some self-employed income. Santander said that under its lending criteria it would only consider rental income from professional landlords, and as Mrs G and Mr H had other income too, they did not meet its definition of professional landlords. This meant it factored in notional running costs for each of the properties as part of the affordability assessment. And on that basis, the mortgage was not affordable.

Our investigator didn't think Santander had acted fairly. She said that Santander should

refund the ERC, and account for the difference in interest rate with the new mortgage Mrs G and Mr H had taken. And she said it should pay them £250 compensation.

Santander didn't agree to that. It said Mrs G and Mr H's new mortgage balance with their new lender was much lower than the old mortgage. So it offered to refund 50% of the ERC – on the basis that if they'd reduced the balance with Santander while porting, they'd have had to pay a partial ERC. And it didn't think it should take account of the difference in interest rate. Mrs G and Mr H didn't accept that, so the case comes to me for a decision to be made.

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.

I'm satisfied Santander didn't consider Mrs G and Mr H's application fairly, as it now seems to accept, having made an offer to refund part of the ERC.

When an existing borrower wants to add a new borrower, the lender can allow the application to proceed even if it doesn't pass an affordability assessment – provided the application is otherwise in the borrower's best interests.

It seems to me that this application failed the affordability assessment on a technicality, because of Santander's "professional landlords" policy. As landlords, Mrs G and Mr H receive rental income and have to pay the mortgages and other expenses such as maintenance and the costs of lettings. But the day to day running costs of the properties – such as utilities – are paid by the tenants.

Because Mrs G and Mr H receive other income too, they didn't come within Santander's definition of "professional landlords". Which meant that rather than look at the actual situation with their rental income profits, it assumed they were responsible for the running costs of the properties themselves. This inflated their expenditure – and meant the mortgage didn't appear affordable.

But that's a technicality because of Santander's policy. In reality, there's little doubt Mrs G and Mr H could afford the mortgage they were applying for. It would have gone from being Mrs G's alone, to a joint mortgage – adding Mr H's income too. They had substantial savings, and were significantly reducing the loan to value. It wasn't affordable because Santander discounted part of their income – not because they didn't have that income in the first place.

Setting aside an affordability assessment might not be in a borrower's best interests where it's clear that in practice they won't be able to afford the mortgage. But that's not the case here. And there were other reasons why the application was in their best interests – such as ensuring that both their incomes were taken into account. And allowing them to purchase the property and be responsible for the mortgage together, as they wanted.

In my view, taking into account the mortgage regulations and acting fairly, Santander ought to have allowed this application.

Putting things right

Had Santander allowed the porting application, Mrs G and Mr H wouldn't have had to pay an ERC. So in my view, it's fair that Santander refunds the ERC.

It's offered 50% of the ERC because the new mortgage they actually took was much lower. It

said that if they'd stayed with Santander and reduced their balance, they would have had to pay a partial ERC. And so they shouldn't have the benefit of both a lower new mortgage, and also no ERC to pay.

But I don't agree about that. Mrs G and Mr H were combining their resources, and so didn't need such a big mortgage – and applied for less to their new lender. But had they stayed with Santander, they would have ported the full balance to avoid the ERC – and then, a few months later, when the ERC expired, reviewed their mortgage arrangements at that point. In other words, had nothing gone wrong they wouldn't have paid any ERC at all. That's what ought to have happened, and so Santander ought to put them back in that position.

Given my finding that Santander should refund the full ERC, I don't need to consider the secondary complaint about the fairness of the ERC.

I agree that Santander should also pay Mrs G and Mr H £250 compensation. I think that fairly reflects the annoyance and inconvenience of having to find another lender and incur the ERC.

However, I don't agree with the investigator that Santander ought to consider what rate Mrs G and Mr H might have been offered when the existing fixed rate expired, and compare that with the rate they took from their new lender.

In putting this complaint right, I look to put Mrs G and Mr H back in the position they would have been in had Santander allowed them to port. That means they would have carried on with their existing fixed rate until it ended in September 2021. At that point, they would have been free to look for a new rate with Santander or another lender – and, indeed, could have reduced their balance.

Santander's failing in this case meant that Mrs G and Mr H were able to make that choice a few months early – but they'd always have had to make that choice at some point. And so I don't think it would be fair to expect Santander to account as part of this complaint for a rate that Mrs G and Mr H wouldn't have taken at the point of porting had nothing gone wrong.

The new mortgage Mrs G and Mr H did take from the existing lender had a very slightly lower interest rate. But it was for a much lower balance than the mortgage with Santander would have been. In the circumstances, given the differences between the two mortgages and the fact that had they ported they would have only had a few more months on the existing Santander rates, it seems to me that the simplest and fairest thing to do here is to disregard this and simply require Santander to refund the ERC.

As this was a different outcome to the one the investigator reached, I put this to both parties to allow them to comment before making a final decision. Santander had no further comment, beyond reiterating that it thought its offer of a 50% refund was fair.

Mrs G and Mr H sent me a detailed reply, which I've considered in full and taken into account. In summary, they said they couldn't go back in time and restore the position as it would have been had Santander allowed them to port. They said that Santander hadn't acted fairly, and ought to have known that from the start. Even when the investigator pointed it out, Santander still tried to get out of doing the right thing by only offering 50% of the ERC back.

Mrs G and Mr H said that they are individual consumers. Many individual consumers might be put off pursuing a complaint in their situation. But Santander is a large bank – so there is not a fair balance between them. Santander had every opportunity to get this complaint right. It knew the real position, but still tried to avoid a fair outcome. If Santander couldn't reach a

fair outcome, it shouldn't be able to rely on me doing it for it. It has tried to take advantage of the situation using its greater power, and the outcome of this case should mark that. It should not be my role to protect Santander from a harsh outcome.

I've considered what Mrs G and Mr H say carefully. But I'm afraid their argument is not one that I can accept. It's not my role to protect or punish either party to a complaint. Nor is it my role to mark that other people might be put off from complaining by making an increased award in this case.

My role is to determine, impartially and independently, what's fair and reasonable in all the circumstances of this complaint. I agree that we can't now go back in time. But I can try, as far as is possible, to put Mrs G and Mr H in the position they would have been in had nothing gone wrong. In that position, they would not have paid the ERC, and would have been free to re-mortgage and reduce their balance after a few months.

So to put matters right, I will direct Santander to refund the ERC, leaving Mrs G and Mr H having re-mortgaged and reduced their balance without having to pay an ERC to do so. I'm satisfied that gets as close as possible to restoring them to the position they would have been in. And I'm satisfied that for the distress and inconvenience caused, £250 is fair compensation.

My final decision

For the reasons I've given, my final decision is that I uphold this complaint and direct Santander UK Plc to:

- Refund the ERC, adding simple annual interest of 8% running from 16 April 2021 to the date of refund; and
- Pay Mrs G and Mr H £250 compensation.

Santander may deduct income tax from the 8% interest element of my award. But it should tell Mrs G and Mr H what it has deducted so they can reclaim the tax from HMRC if they are eligible to do so.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs G and Mr H to accept or reject my decision before 20 October 2022.

Simon Pugh
Ombudsman