

The complaint

Mrs O complains that Kensington Mortgage Company Limited wouldn't allow her access to a new fixed interest rate, and that it forced her into financial difficulties as a result. She's also concerned that it failed to account for payments she had made.

What happened

Mrs O had a mortgage with Kensington, which she took out in 2004. The mortgage offer said that the applicable interest rate was the Kensington Variable Rate (KVR) plus 3%, with a discount of 2% until May 2005. After the end of the discount period, the mortgage would remain on the KVR plus 3%.

In 2015, Mrs O wrote to Kensington saying that she was unhappy with the interest rate she'd been charged. By this time the interest rate on her mortgage was 6.5%. She said it was "exorbitant" compared to the rates offered by other lenders and that she would have expected Kensington to help her find a better rate – and to help her convert the mortgage to repayment terms. She said that she had tried to move to other lenders without success and that had the rate been lower she could have paid the mortgage off more quickly. She said she felt left with no choice but to sell her house to get out of the mortgage. Mrs O paid the mortgage off in February 2016 and moved to rented accommodation with her family.

In September 2018, Kensington wrote to Mrs O explaining that it had reviewed things and found a payment, amounting to just over £1,000, which it had received but not allocated to her mortgage account. It said it had now re-worked her mortgage to reduce interest which had been charged on the basis the payment hadn't been made when it had. It also removed arrears charges.

As Mrs O had by then redeemed her mortgage, Kensington refunded the unallocated payments and associated interest and fees directly to her, plus 8% simple interest. The total refund amounted to just over £6,000.

Mrs O brought her complaint to us. The case was looked at by one of our adjudicators. She said that she thought Kensington had calculated the refund correctly. But she said that had the payment been applied correctly at the time, the arrears would have been reduced to the extent it's likely Kensington would not have needed to send a field agent to visit Mrs O, and wouldn't have taken legal action when it did. She said it should refund a further £879.29 to cover the fees it charged for this, along with 8% simple interest. And it should pay Mrs O £750 compensation to recognise the stress and upset caused by the unnecessary legal action.

Kensington accepted that. But Mrs O didn't, and she also wanted us to look again at the interest rate issue. As by then the adjudicator had left the Financial Ombudsman Service, the case was allocated to one of our investigators for a further review.

The investigator said that had the account been managed correctly, with payments made being allocated to the loan as they should have been, Mrs O would have been out of arrears by August 2010. She said that Kensington should have allowed her access to a new interest

rate from then on, and said that it should rework the mortgage as if it had done so, and refund the resulting overpayments to Mrs O. And she said Kensington should increase the compensation to £1,500 in recognition of the years Mrs O struggled with her mortgage payments and the impact that had on her.

Kensington did not agree with this recommendation. And Mrs O didn't think compensation of £1,500 was sufficient. As no agreement could be reached, the case came to me for a decision to be made on how to resolve this complaint.

My provisional decision

After careful consideration, I reached a different conclusion to the investigator, so I issued a provisional decision setting out my thoughts. I said:

"The Financial Ombudsman Service has previously dealt with complaints from Mrs O about the interest rate on her mortgage in 2010 and 2016. However, at that time the issue with the unallocated payments wasn't known and therefore those outcomes were reached based on an incorrect understanding of what the history of the mortgage account and in particular the arrears ought to have been.

I'm therefore satisfied that there is material new evidence which has become available since we looked at the previous complaints, and that it's therefore appropriate for us to look at matters again despite those previous cases.

I'm satisfied that the redress Kensington paid in 2018 dealt with the impact of the unallocated payment. Kensington refunded both the payment and the interest charged caused by it being missed, as I'd expect. And it refunded some arrears fees charged as a consequence.

Following the involvement of our adjudicator, it also agreed to refund the legal fees and field agent's fees. Again, I'm satisfied that's fair, since if the payment had been credited at the time, in 2005, the arrears on the mortgage would have been lower and it's less likely that action would have been needed. And I note Kensington has agreed to this refund.

Mrs O says the impact of this was severe on her and her family. She says the stress of dealing with the mortgage and in particular the legal proceedings had serious repercussions for her health in particular – I won't go into detail since final decisions are published, but I've taken full account of what she says. Mrs O also says that there were serious financial consequences too, in that because of the possession order Kensington obtained she was unable to move the mortgage to another lender to get a lower interest rate, which meant she had to pay more and which lengthened her financial difficulties. And this has contributed to her having to live in unsuitable rented accommodation with her family.

I've thought very carefully about this. I'm very sorry to hear of the health difficulties Mrs O faced at the time. But I've not seen any medical evidence. The issues she talks about can have many causes, and on the evidence available it's not possible for me to say that they were directly caused by the failure of Kensington to allocate the payment properly, or that they wouldn't have happened but for this mistake. I don't therefore think I can fairly hold Kensington responsible for this.

On the financial impact, I do think it's less likely possession proceedings would have been justified had the payment been recorded correctly, and Kensington has now agreed to refund the legal fees charged as a result. But even had the payment been

recorded correctly, and the legal proceedings had never happened, the mortgage would still have been in arrears – albeit by not as much.

Even with the missed payment allocated, the mortgage would have been in arrears continually until Kensington agreed to capitalise the arrears in 2008. And so Mrs O would still not have been able to move the mortgage to another lender, since it's very unlikely another mortgage lender would have been willing to offer a mortgage while her existing mortgage was still in, or had recently been in, arrears. I don't agree with Mrs O that but for the possession order she would have been able to re-mortgage – the ongoing arrears would also have been likely to be a barrier. Therefore I don't think the mis-allocated payment and possession order was the reason Mrs O was unable to move to another lender, and so I can't hold Kensington responsible for Mrs O not being able to do so.

Once the arrears were capitalised in 2008, Mrs O stayed out of arrears for some time, though arrears began to build up again in early 2010. The arrears were cleared in August 2010, and thereafter Mrs O stayed out of arrears until 2016, when the mortgage was repaid. During this time she did miss a few monthly payments, but as these were at times when the mortgage was in credit she never fell behind overall.

However, after 2010 it would still have been difficult for Mrs O to move her mortgage elsewhere – even with the corrected arrears position had the missing payment been allocated to the mortgage. By this point, following the global financial crisis, the sub-prime market and availability of the sorts of mortgages aimed at borrowers with a history of financial difficulty had largely dried up. And so there would have been little available on the market to Mrs O.

Taking all that into account, therefore, I'm satisfied that had Kensington applied the missed payment correctly, Mrs O's mortgage would still have been in arrears, albeit to a lesser extent. And while possession proceedings might not have been necessary, it would still have been very difficult if not impossible for her to move the mortgage to another lender.

So it's fair that Kensington compensates her for the upset and difficulties the missed payment caused, including the impact of unnecessary possession proceedings. But that impact does not extend to compensating her for being unable to re-mortgage elsewhere, since it's likely she would still not have been able to do that. And it doesn't extend to compensating her for the particular health difficulties she faced either, since I'm not persuaded they were caused by Kensington's failures. Nevertheless, having to go through possession proceedings, particularly at what was already a difficult time, would have been very upsetting and stressful. I agree that £750 compensation is fair for this part of the complaint.

I've then thought about the interest rate part of the complaint. Our investigator said that Kensington should have made a new interest rate available to Mrs O once she was out of arrears, from August 2010. This would have reduced her monthly payments, and so the additional amounts should be refunded to her.

I do recognise that it's a common feature of the mortgage market that at the end of an initial preferential rate (or later) a borrower will shop around for a new rate, either with their existing lender or a new lender. I've explained why I don't think it would ever have been likely that Mrs O could have moved to a new lender given the arrears history. So that only leaves taking a new rate with her existing lender, Kensington.

There's no obligation, either in the mortgage terms and conditions or in mortgage

regulation, for Kensington to offer new interest rates to existing customers. When Mrs O's mortgage reverted to the variable rate plus 3%, at the end of the initial discount period, it was operating as it was supposed to and as the mortgage offer said it would.

Kensington has explained that it didn't offer Mrs O a new interest rate because her mortgage had been securitised – which means that the beneficial interest in it had been sold to investors as part of a package of loans, enabling Kensington to raise funds to finance further lending. Once securitised, it could not make changes to the mortgage because of its agreement with the securitisation vehicle.

Securitisation is a legitimate business model, and not uncommon in the mortgage industry. There's nothing inherently wrong with Kensington managing its mortgage book in this way. So I've gone on to think about whether doing so resulted in unfairness in Mrs O's particular circumstances.

There's a provision in the rules of mortgage regulation which says that where a borrower is unable to move their mortgage to another lender, it might be unfair for their existing lender to treat them less favourably – for example, by offering less favourable interest rates – than it would treat other borrowers with similar characteristics.

Strictly speaking, that doesn't apply in Mrs O's case. Mortgage regulation was introduced in October 2004. As her mortgage was taken out in April 2004, it's not a regulated mortgage and so the rules of mortgage regulation don't apply. However, despite that I've taken into account the provision I've mentioned because even though this is an unregulated mortgage I think it nevertheless represents good industry practice for the fair treatment of borrowers unable to move elsewhere, and is therefore a relevant consideration.

However, even taking that into account I don't think I can safely find that Kensington has treated Mrs O unfairly. The crucial part of the provision is that borrowers unable to move elsewhere – such as Mrs O – shouldn't be treated less favourably than other borrowers with similar characteristics.

In other words, if Kensington offered new interest rates to some existing borrowers who were similar to Mrs O, but not to Mrs O, that might be unfair.

However, that's not what happened. Kensington didn't offer new interest rates to any existing borrower until 2017 – after Mrs O had redeemed her mortgage. And therefore in not offering one to her, it was not treating her less favourably than other similar customers. All other customers were in the same position. It follows that even if – as a matter of good industry practice rather than regulation – I apply the provision I've referred to in this case, Mrs O was not treated unfairly in comparison to other customers of Kensington.

I've said that there was no obligation on Kensington to offer existing customers new rates, and that it's not unfair that it chose not to do so. And since that applied to all customers, Mrs O was not being treated less favourably than others because she couldn't shop around. It follows that I can't uphold this part of Mrs O's complaint."

The response to my provisional decision

Kensington accepted my provisional decision. But Mrs O didn't agree. She said:

- It's not right that it took Kensington so long to identify the issue with the unallocated payment;
- As a result, it claimed Mrs O was in arrears that never in fact existed;
- The court hearing was particularly difficult as Mrs O was about to give birth at the time, so her husband had to attend on her behalf. The level of compensation I proposed is not acceptable;
- Mrs O has repeatedly complained about the high interest rate throughout the term. Because of this, Mrs O believes she was a mortgage prisoner and the unfairly high payments had a significant impact on her family and the lifestyle she was able to offer her children – and ended up with them having to sell their home.

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 sorry to hear that Mrs O has suffered a recent bereavement and I hope she'll accept my condolences. I'm grateful that she was nevertheless able to respond to my provisional decision and I'd like to assure her that I've taken everything she's said into account.

I agree it's most unfortunate that Kensington didn't identify the payment at the time, and that it only came to light many years later. Mrs O is compensated for this by the interest included in the refund – which covers all the years the payment remained unallocated. But nonetheless it shouldn't have happened in the first place. And, having happened, it should have been put right much sooner.

However, I'm afraid I don't agree that this was the only reason Kensington treated Mrs O as being in arrears. The missed payment was in March 2005. Kensington capitalised the arrears (including what was then thought to be the missed payment) in 2008. So at that point, the mortgage was up to date. But Mrs O went on to miss payments several times in the years after that – including in February May, July, October and December 2009; November 2012; June 2013 and August 2014 .

And had the March 2005 payment been credited to the account, Mrs O would still have been in arrears before the 2008 capitalisation too. There were other months where she had missed payments, or not made payment in full. However, with this payment taken into account, Mrs O would never have been more than three months in arrears at any one time – and therefore, had it been taken into account at the time, I don't think it would have been fair for Kensington to take possession proceedings. That's why I said in my provisional decision that it should refund the associated legal costs.

I've taken into account what Mrs O has said about the great difficulties court proceedings at that time caused her. And my proposed award of compensation – which is a substantial award based on the guidelines available on our website – reflects that.

I appreciate Mrs O feels that the interest rate on her mortgage was unfairly high. But, as I explained, the mortgage operated in line with the terms and conditions at the interest rate set out in the offer. Kensington did not offer new fixed rates to its customers and was not obliged to. It did not offer new rates to any customers until 2017, by which time Mrs O had paid back her mortgage. And so she was not treated any less favourably than any other Kensington customer at the time. In those circumstances, I don't think I can fairly uphold a complaint that it should have offered her a new rate.

My final decision

For the reasons I've given, my final decision is that I uphold this complaint, in part, and direct Kensington Mortgage Company Limited to:

- Refund £879.29 in legal fees and field agent fees, together with all interest charged on those fees during the life of the mortgage. Kensington should then add simple annual interest of 8%* on the total of the fees plus mortgage interest, running from the date the mortgage was redeemed to the date of refund:
- Pay Mrs O £750 compensation for the distress and inconvenience caused by the unnecessary possession proceedings and related matters.

This is in addition to the redress offered for the unallocated payment.

** Kensington may deduct income tax from the 8% interest element of my award, as required by HMRC. But it should tell Mrs O what it has deducted so she can reclaim the tax from HMRC if she is entitled to do so.*

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs O to accept or reject my decision before 16 February 2023.

Simon Pugh
Ombudsman