

## The complaint

This complaint is about an interest-only mortgage Ms D holds with Santander UK Plc, which was due for repayment in February 2022. The gist of Ms D's complaint is she wanted a term extension and a new fixed rate deal, but Santander told her she needed to vary the charge over her property from leasehold to freehold first. A delay followed whilst Ms D looked into arranging this. However, this then meant that any term extension necessary to accommodate a two-year fixed rate (the shortest available) would take her past her 70<sup>th</sup> birthday, which was outside Santander's lending policy.

The original mortgage term has since expired; Santander isn't pressing Ms D to execute the variation of charge any longer, but is expecting proposals from her to repay the mortgage altogether.

## What happened

By way of a provisional decision dated 1 February 2023, I set out my provisional conclusions on this complaint. The following is an extract from the provisional decision.

"The broad circumstances of this complaint are known to both parties, as they've have been set out in the response issued by our investigator. A copy of that has been sent to all parties, and so I don't need to repeat the details in full here. Our decisions are published, and it's important that I don't include any information that might result in Ms D being identified. Instead I'll focus on giving the reasons for my decision. If I don't mention something, it won't be because I've ignored it. It'll be because I didn't think it was material to the outcome of the complaint.

The investigator gave his view of the complaint in November 2022; he explained that Santander had been alerted by the solicitors doing the original conveyance in 2012 about the need for its charge to be registered over the freehold of the property, rather than the leasehold for the individual flat (Ms D owns both and lives in the latter).

Given the importance Santander attached to the issue when Ms D wanted a term extension and new fixed rate in February 2022, the investigator said it should have made sure matters were done correctly in 2012. Had Santander done that, the investigator reasoned that there would have been no delay, and there'd have been enough time for Ms D to have a two-year term extension (along with a new two-year interest rate product) that would finish before she reached age 70 in June 2024.

To resolve the complaint, the investigator recommended that, provided Ms D now executed the variation of charge at her own expense, Santander should consider providing a term extension and new rate product (both with a duration of two years) but back dated to when Ms D first wanted them. Ms D agreed with this recommendation, but at the same asked that she be compensated further for her time, trouble an upset, plus the extra cost of varying the charge now rather than in 2012.

Santander rejected the investigator's recommendation, saying, in effect, that the actions of the conveyancing solicitor in 2012 were nothing to with it, because the solicitors had been appointed by Ms D and were working in their professional capacity for her.

### **What I've provisionally decided and why**

I'll start with some general observations. Although I've read and considered the whole file, I'll keep my comments to what I think is relevant. If I don't comment on any specific point it's not because I've failed to consider it but because I don't think I need to comment on it in order to reach what I think is the right outcome in the wider context. My remit is to take an overview and decide what's fair "in the round".

We have no regulatory function; that's the role of the Financial Conduct Authority; nor are we a consumer protection body. We're an alternative dispute resolution body; an informal alternative to the courts for financial businesses and their customer to resolve their differences.

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done, these are my conclusions, and the reasons for them.

In a purchase and mortgage transaction where only one firm of solicitors are involved, the solicitors have two clients, the purchaser and the lender. There are two discrete roles the solicitors carry out.

For the purchaser, the solicitors ensure that the property has good title, and there are no restrictions or hidden claims over the title or occupiers' rights. After completion, they will register the purchaser's title to the property and ensure all fees and taxes are paid.

For the lender, the solicitors have to ensure that the title is suitable security for the mortgage. They will arrange signature of the mortgage deed, prepare the report on title for the lender, obtain any undertakings (binding promises) from the seller's solicitors to safeguard the lender's position, they'll transfer the funds over on completion *and register the lender's charge*.

Regardless of who appointed the solicitors in 2012, the solicitors acted as agent for either Ms D or Santander, depending on the specific task they were engaged in at any given moment. When it came to ensuring the charge was registered appropriately, the solicitors were acting for Santander, which would explain why they wrote to Santander in 2012 for guidance on what to do.

I agree entirely with our investigator that it was incumbent on Santander to ensure in 2012 that the correct instruction was given to the solicitor; that is, to register the charge over the freehold. Insofar as the charge was registered over the leasehold, it seems to me one of two things happened. Either:

- Santander instructed the solicitors to register the charge over the freehold and the solicitors ignored those instructions; or
- Santander gave no instructions either way, and the solicitors made their own judgement to register the charge over the leasehold.

Either way, insofar as the solicitors were acting as Santander's agent, Santander is liable for the charge being registered in 2012 in a manner that was contrary to what Santander told Ms D was required in 2022, thus creating an unnecessary barrier to her seeking a term extension and new interest rate product. It is therefore only fair and reasonable that the barrier be removed and Ms D's request for a term extension (and new interest rate product) be assessed by reference to Santander's lending policy as it would have been in February 2022 if the barrier hadn't been there in the first place.

If the term extension is approved, it should then be applied retrospectively to run for two years starting from 1 March 2022. At the same time, a new two-year interest rate product should be applied to the mortgage; the product to be chosen by Ms D from those that Santander was offering in February 2022. As part of its response to this provisional decision, Santander will need to provide details of the two-year products it had available at the relevant time, so that Ms D can pick one.

Where I disagree with our investigator is where he says it's up to Ms D to execute the variation now before Santander must put a term extension and new interest rate product in place. It was Santander's responsibility to register the charge correctly in 2012; it's still Santander's responsibility to do so now.

Santander will need to issue the necessary instructions to a firm of solicitors of its choosing; all Ms D will be expected to do is to respond fully and promptly to any requests for information and/or action she receives from the solicitors in order to expedite the process. Also, Santander should do so at no charge to Ms D. It would have cost no more to register the charge correctly in 2012 than it cost to register it incorrectly. Ms D paid for that to happen in 2012; she should not have to pay a second time.

The steps I'm intending ordering Santander to take to resolve this matter will take some time, and assuming the complaint is ultimately resolved along the lines I'm proposing, the extended term will then run until the end of February 2024, at which point the mortgage debt will fall due for repayment. That being the case, to be clear, nothing I say here obliges Santander to agree to a future request for another term extension change, and nothing of that nature should be inferred.

Any future request for a long-term change to the mortgage, will be subject to Santander's lending criteria at the relevant time, and Ms D should be thinking now about how she will repay the balance of the mortgage in 2024 if no further extension is available.

There's another thing. An effect of backdating an interest rate product to 1 March 2022 will be that once it has been done, Ms D will have overpaid during the period between the expiry of the previous rate and the date the substitution takes place. It will be for her to choose whether to have those overpayments returned to her or have them remain on the mortgage account, thus reducing the outstanding balance.

In the event she chooses the former – and I'd ask that Ms D express her preference when replying to this provisional decision – then Santander will have to pay her interest at 8% simple, less income tax if relevant, on each refunded amount, from the date the overpayment was made up to the eventual date of settlement.

Lastly, I consider the whole experience of fighting for a fair outcome will have caused Ms D a lot of worry and stress that could have been avoided. This was an entirely unnecessary sequence of events that *would* have been avoided if Santander has recognised – as it really should have done right away – that it bore the responsibility for ensuring the charge was correctly registered. She’s due compensation for that, and in my view, more than the £250 Santander paid into Ms D’s bank account without first waiting to see if she accepted it. I’m minded to order Santander to pay Ms D a further £250, making £500 in all.”

I gave the parties two weeks two weeks to reply to the provisional decision; both have done so.

Santander agreed to take the steps I set out in the provisional decision, at the same time explaining why it didn’t agree with my reasoning. Ms D welcomed my provisional decision, albeit with reservations. She said she’d applied for the term extension and interest product in September 2021, so that should be the representative date for the re-assessment. Ms D was also concerned by the possibility that Santander might find a new reason to turn down the application, and wasn’t convinced £500 was enough compensation for the stress she has encountered.

### **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’ve considered afresh everything that both parties have said and provided.

I’ve noted what Santander has said about why it doesn’t agree with me on the role of the solicitor in the 2012 transaction. It’s moot, insofar as Santander has agreed to carry out the redress I recommended, but for completeness, I’m satisfied that the dual role of a solicitor does mean Santander was responsible for the solicitor registering the charge in the way it did.

I appreciate why Ms D might feel uneasy about her application having to be re-assessed, but it wouldn’t be right for me simply to order Santander to grant the term extension. It’s a matter for Santander’s commercial judgement whether to grant it or not, and my role is not to exercise that judgement in Santander’s place. My role is to ensure Santander exercises its judgement fairly, and where I find that it has made a mistake in doing so, to order it to go back and exercise its judgement again, without the effect of the mistake. That said, Ms D is right to say that the effective date for the re-assessment should be September 2021, as that is when she made the request, and not February 2022 when the original term was due to end.

That leaves the level of compensation. This isn’t an exact science, it’s very much a subjective area; everyone reacts to and perceives things differently, especially “in the moment”. Having considered everything, I consider the award I’ve made to be proportionate, fair, and consistent with the level of award our service typically awards in broadly similar circumstances.

### **My final decision**

My final decision is that I uphold this complaint by ordering Santander UK Plc to do the following:

- arrange, at its own cost, for the charge over Ms D’s property to be amended to cover the freehold of the building;

- assess, in accordance with its lending policy, Ms D's request for a term extension to run for two years from 1 October 2021 and, if approved, apply a two-year interest rate product of Ms D's choosing from those that would have been available;
- in the event that the term extension is approved and the product switch applied alongside it, refund to Ms D directly the resultant overpayments with interest, less tax if applicable\*, as set out above; and
- pay a further Ms D £250 compensation for her time, trouble and upset, making £500 in all.

\*If Santander UK Plc considers it should deduct basic rate income tax from the interest element of the award, it should then issue the relevant tax certificate to Ms D.

My final decision concludes this service's consideration of this complaint, which means I'll not be engaging in any further consideration or discussion of the merits of it.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms D to accept or reject my decision before 27 March 2023.

Jeff Parrington

**Ombudsman**