

## **The complaint**

This complaint's about a mortgage that Mr E holds with Santander UK Plc. The mortgage, which was predominantly interest-only, expired in October 2022, and the outstanding balance on the interest-only part is now overdue for repayment. The fixed interest rate on the mortgage expired at the same time, and the mortgage reverted to a follow-on standard variable rate (SVR). Mr E says that's unfair.

## **What happened**

The broad circumstances of this complaint are known to Mr E and Santander. I'm also aware that the investigator issued a comprehensive response to the complaint, which has been shared with all parties, and so I don't need to repeat all of the details here.

Our decisions are published, and it's important that I don't include any information that might result in Mr E 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 main thrust of Mr E's complaint is that Santander went back on a promise he says it made in or around September 2021 to extend the mortgage term and put it on a five-year fixed rate of 3.99%. He says Santander is estopped from refusing to do this because in reliance on that promise, he didn't look for an alternative mortgage elsewhere. He says he now can't do that because of arrears that accrued on the Santander mortgage after it went onto the SVR.

Santander hasn't pursued action to recover the overdue debt whilst we've been considering the complaint.

## **What I've decided – and why**

I'll make some general observations before dealing with the substance of the complaint. We're not the regulator of financial businesses, and we don't "police" their internal processes or how they operate generally. That's the job of the Financial Conduct Authority (FCA).

We deal with individual disputes between businesses and their customers. In doing that, we don't replicate the work of the courts. We're impartial, and we don't take either side's instructions on how we investigate a complaint. We conduct our investigations and reach our conclusions without interference from anyone else.

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

Where the evidence is incomplete and/or contradictory, I'm required to reach my decision on the basis of what I consider is most likely to have happened, on the balance of probabilities. That's broadly the same test used by the courts in civil cases.

My starting point here is that Mr E borrowed money from Santander, and under the terms of the original agreement, was due to repay the money in October 2022. No-one is entitled to borrow money; and even when they've borrowed before, they're not automatically entitled to more time to repay the debt after it has fallen due. But a lender must treat customers fairly. In the context of an application for a term extension, that means assessing it fairly in accordance with the bank's lending criteria and being mindful of what mortgage regulation requires of it. Lenders' criteria are commercially sensitive and not typically made public.

There are regulations in place that have flowed from the Mortgage Market Review (MMR) carried out by the Financial Conduct Authority (FCA) which took place after the financial crash in 2008. This has led to a series of major changes, effective since 2014, in the way residential mortgages are regulated. MMR regulations have brought about requirements for stricter lending assessments, aimed at protecting consumers and encouraging mortgage lenders to act more responsibly.

The FCA recognised though that existing borrowers who wanted to make changes to their mortgages might have difficulties with this if they had passed tests under the old rules but wouldn't under the new ones. So, it introduced certain rules to address this. The rules are contained in the Mortgages and Home Finance: Conduct of Business Sourcebook (MCOB).

MCOB says a lender doesn't have to carry out an affordability assessment if a borrower wants to vary or replace an existing mortgage and there is no additional borrowing (other than for product fees) and no change to the terms of the mortgage that is material to affordability

There are also transitional arrangements which say that a lender need not carry out an affordability assessment if:

- the borrower has an existing mortgage taken out before 26 April 2014, and is applying to vary that mortgage or replace it with a new one;
- the application wouldn't involve any additional borrowing except for essential repairs to the property, or to add product fees to the balance;
- there's been no further borrowing (with some exceptions) since 26 April 2014; and
- the proposed transaction is in the borrower's best interests.

So, under this rule, even where a change material to the affordability of the mortgage takes place, the lender can, *if it chooses*, waive an affordability assessment. If the lender decides to carry out an affordability assessment, it shouldn't use that as a reason to decline an application if allowing the application would otherwise be in the customer's best interests. But the lender can take the assessment into account as part of its consideration of best interests.

This means there are two routes that an application for an existing borrower can go down. If there's no change to the terms of the mortgage contract material to affordability, there's no obligation to carry out an affordability assessment at all. And if there is a change to the terms of the mortgage contract material to affordability, a lender could still decide to allow an application without an affordability assessment if doing so would otherwise be in the borrower's best interests.

A term extension *is* a material change to the mortgage contract. In the circumstances, Santander was, I find, entitled to consider affordability. But it also had to consider whether the change to the mortgage would be in Mr E's best interests – and if it was, then the affordability assessment could be disregarded.

Santander will only consider granting a term extension where the borrower can evidence a suitable repayment strategy for the entire balance. It seems that the only provision Mr E had for repaying the full balance, other than re-financing to another lender, was the sale of a property he owns overseas.

Considering all of the circumstances, I think Santander did assess the term extension request fairly. It looked carefully at Mr E's wider financial situation and the reasons he gave for not being able to sell the overseas property immediately.

If someone cannot repay an interest-only mortgage when it's due, then we'd expect the lender to have a conversation with the borrower about their circumstances, and try to work out a plan for repaying the mortgage. If that means providing more time, then fairness requires a lender to consider doing so. But Mr E wasn't someone who couldn't repay his interest-only mortgage when the term ended. The available evidence indicates that he had the means to do so, but faced administrative difficulties transferring funds into the UK from abroad.

In my view, that wasn't a reason for Santander to agree a five-year term extension as being in Mr E's best interests. Whatever issues Mr E has with moving funds into the UK aren't likely to change in the foreseeable future. All a term extension would do is "kick the can" further down the road to a point where Mr E would still have to face and overcome the same problems.

In summary, not being willing to extend the term of the interest-only mortgage is a commercial judgement for Santander to make. It wasn't inconsistent with the bank's lending policy and current regulatory requirements. I fully understand that Mr E has found the position unwelcome, but it wasn't unfair, and that is the test I have to apply.

Mr E's mortgage has been on SVR since his previous fixed rate expired in October 2022, alongside the expiry of the mortgage itself. His sense of grievance is that he believes he was told in September 2021 that he could be put on five-year fixed rate. Santander denies that this happened, which is where the balance of probabilities test I referred to earlier comes into play. There's nothing in Santander's contemporaneous contact history to indicate such a promise was made, and whilst Mr E's statement that it happened is evidence in its own right, it's uncorroborated.

That leaves me to decide how likely it is that someone from Santander would have agreed a five-year fixed rate deal on a mortgage that at the time only had about thirteen months left to run. As the party making the claim it falls to Mr E to show that his version of events is more likely than Santander's. Equally as likely is not enough for me to find in his favour. With only Mr E's recollection to rely on, without in any way implying anything other than good faith on his part, I'm not persuaded the "more likely than not" test has been satisfied.

I say that not least because anyone speaking to Mr E in September 2021 would have been aware (as would he have been because Santander's term-end team had been writing to him about it) that his mortgage was due to be repaid in little more than a year. Also, what Santander's notes do show is that in August 2021, it agreed to apply a fixed rate of 2.99% to run specifically until the mortgage term end in October 2022.

Just as no one is entitled to extend their mortgage term beyond the original repayment date, no borrower is entitled to a lower interest rate; lenders have to consider context and individual circumstances in all cases. They also have their individual lending criteria and appetite for risk. It's not the role of the Financial Ombudsman Service to say what those criteria should be, or to second-guess lenders' judgement on risk.

The difficulty Mr E will have faced is that it's normal for fixed rate deals to come with an early repayment charge (ERC) in the event the mortgage is repaid during the product term. So it wouldn't have been right for Santander to give Mr E a new deal knowing he'd be forced to incur an ERC on repaying the mortgage when it became due. That is consistent with Santander applying a fixed rate tailored to the remaining term in August 2021. It of course begs the question of whether Santander should have been willing to extend the mortgage term in order to facilitate the provision of a longer fixed rate, but I've already dealt with that.

It's a matter of record that Santander has allowed Mr E more time to repay the mortgage, but that has been in the form of forbearance whilst we considered the complaint. It wasn't a formal term extension. If Mr E had been in a position to sell his overseas property at any time during the forbearance period, he'd have been expected to do so and repay the mortgage immediately, thus incurring an ERC if he'd been given a new rate. So I can't fairly say that Santander should have been willing to offer Mr E a better rate on the mortgage before the term expired or that it's likely that it promised to do so.

I said at the outset that I wouldn't be commenting on every single point, and I haven't. I have, as I said I would, confined myself to those matters that I consider have a material effect on the outcome. I can see from his response to the investigator's view how strongly Mr E feels. That's a natural reaction, and entirely understandable when you're as close to a situation as he is here. The prospect of having to sell one's home must be deeply distressing, and I am not unsympathetic towards Mr E's circumstances.

But my remit requires me to be objective, impartial, and to decide what is fair, reasonable and pragmatic in all the overall circumstances of the case. It also means that I'm not required to provide answers to every specific question that comes up if I don't consider doing so will affect the overall outcome.

In his submissions, Mr E has made several references to the law. There's a possibility that this case may go to court if Mr E rejects my final decision. If that happens, then subject to any time limits or other restrictions a court might impose, Mr E's recourse to a legal remedy of his own against Santander over the subject matter of this complaint won't have been prejudiced by our consideration of it. But of course he will need to weigh up the likelihood of a successful outcome and the potential costs he'll face if not successful.

That begs the question of what happens next. Santander hasn't taken any recovery action whilst the case has been with us, which is close to a year. I think it is also important to explain here that whilst lenders will generally agree to put recovery action on hold whilst we look at a complaint, they don't have to and we can't force them to.

If the Financial Ombudsman Service had that power it would undermine our impartiality between the parties to a complaint. It would also create the potential for consumers to use our service to bring complaints with the intention of having any legal action put on hold, thereby obstructing businesses that were trying to take action through the courts to recover money legitimately owed by the consumers.

I do not wish to alarm Mr E but I would not want him to be under any misunderstanding that we would tell Santander that it must delay recovery action afresh in the event of any new complaint being raised about the mortgage. It is a matter for a court to decide whether it is appropriate to adjourn or suspend any legal action, not this service.

## **My final decision**

Your text here

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr E to accept or reject my decision before 25 March 2024.

Jeff Parrington

**Ombudsman**