

The complaint

This complaint is about a mortgage Mr J holds with Santander UK Plc. Mr J and his wife, Mrs J, are unhappy that Santander offered a term extension and a change to joint borrowers at a higher interest rate than they were expecting. Although the mortgage is currently still in Mr J's sole name, the application that gave rise to the complaint was in joint names, and so Mrs J has joined the complaint. However, all of our dealings have been with Mr B, a third party authorised by Mr and Mrs J to present the complaint on their behalf.

What happened

I do not need to set out the full background to the complaint. This is because the history of the matter is set out in the correspondence between the parties and our service, so there is no need for me to repeat the details here. In addition, our decisions are published, so it's important I don't include any information that might lead to Mr and Mrs J being identified.

So for these reasons, I will instead concentrate on giving a brief summary of the complaint, rounding the figures, followed by the reasons for my decision. If I don't mention something, it won't be because I've ignored it; rather, it'll be because I didn't think it was material to the outcome of the complaint.

Mr J took the mortgage out in 2008, on the advice and recommendation of Mr B. It was an interest-only mortgage of around £145,000, originally due for repayment in 2017. Mr J didn't repay the mortgage when it was due. After an extended period of engagement between the parties, which included Santander starting legal proceedings, a term extension was agreed until November 2021 with a fixed rate. However, the mortgage wasn't repaid then either and when the fixed rate expired, the mortgage went onto a follow-on variable rate. Mr J made a series of lump sum reductions which brought the balance down to around £56,000 by May 2022.

Mr J spoke to Santander in April 2022; he wanted a term extension on capital repayment terms, with Mrs J added to the mortgage as joint borrower. At this stage, a five-year fixed rate of 2.24% was available. Santander initially said the proposal was unaffordable, but corrected its position a few days later. It also raised a query over the mortgaged property being leasehold, but Mr J provided evidence the same day that it was freehold.

On 25 May 2022, Santander issued an offer for a joint mortgage of just over £56,000, repayable over 63 months, on a variable rate which at that point was 4.25%. Mr and Mrs J didn't accept the offer but continued to pursue a complaint they'd begun the previous month. Santander addressed the various elements of the complaint in a final response issued on 21 April 2022. It followed that up with a number of additional final responses, the latest of which was dated 4 October 2022. However, none of the later final responses added anything materially new to the one dated 21 April 2022; nor did Santander renew the referral rights to this service.

In the spring of 2023, Santander resumed recovery action for the overdue mortgage balance. Mr J contacted us in March 2023 to refer his 2022 complaint to us. Meanwhile he

had raised a fresh complaint about Santander's latest activity, which was addressed in a new round of final responses, issued on 10 and 16 May 2023 respectively.

When our investigator began to look into the case, Santander said the issues from 2022 were "time-barred" because Mr and Mrs J had brought them to us more than six months after the final responses. With one exception, our investigator agreed; the exception being the rate of interest on the offer issued in May 2022. Santander had addressed this in a letter of 18 July 2022, but hadn't given referral rights to this service on that specific issue.

Santander conceded the point and the investigator proceeded with his investigation, grouping the elements of the complaint as follows:

- The offer of 25 May 2022 should have been on the five-year fixed rate of 2.24% discussed in April 2022, not the variable rate of 4.25%.
- Santander agreed to put recovery action on hold on 6 March 2023, but then didn't then do so.
- Without telling Mr and Mrs J, Santander treated the third party authority allowing it to deal with Mr B on their behalf as having expired, and arranged for a field agent to visit the mortgaged property.
- Santander told Mr B in April 2023 to speak to its solicitors, a firm I'll call E. When Mr B called E, it said it would take instructions from Santander, but Santander then didn't respond.
- Santander charged £69 for the home visit, but made no attempt to call Mr B because it was treating the third party authority as having expired. Meanwhile Mr J had tried contacting Santander and E, but they continued with the legal action.

In his initial view of the case, the investigator didn't uphold the main substance of the complaint, about the interest rate on the May 2022 offer. Nor did he find Santander to have acted unfairly over the pause on recovery action or the communication with E in April 2023.

But he thought it was wrong of Santander to treat the third party authority as invalid. It had been given in 2017, and could only be revoked in writing. This had a bearing on the decision to send out a field agent; the investigator took the view that this would have been unnecessary if Santander (or E) had engaged with Mr B. He recommended Santander refund the £69 charge for the field agent visit, and pay Mr and Mrs J compensation of £200 for time, trouble and upset.

Santander accepted the investigator's initial view, but Mr B, on behalf of Mr and Mrs J, continued to press the argument for the offer of May 2022 to have included a fixed rate deal. On looking at the point again, the investigator was persuaded to change his mind.

The May 2022 offer came out of an advised interview with Santander by telephone, during which the advisor said several times that he would not be discussing a possible new rate alongside the term extension, and addition of Mrs J to the mortgage. But in the suitability letter that followed this, the advisor claimed to have made Mr J aware he was eligible for a new rate but that Mr J didn't want to consider it at that point.

The investigator issued a revised view of the complaint in February 2024. His findings on the other elements of the complaint were unchanged, but on the interest rate point, he recommended that Santander issue a fresh offer now, effective from 1 May 2022, at the five-year interest rate product that would have been applicable in April 2022.

As part of the redress, he also recommended Santander refund the extra payments that have been made since then at the variable rate. Additionally, he recommended Santander

refund the field agent fee (as before) but also a litigation fee of £36 and solicitors' costs of £1,065.40 arising from the recovery action in early 2023. The investigator said all of these refunds should come with interest, at 8% simple, and that compensation be increased to £500.

Mr B. on behalf of Mr and Mrs J, accepted the investigator's revised recommendation, but Santander had reservations about issuing a new offer to Mr and Mrs J without a new application being made and subjected to fresh underwriting. It said it would comment on the other findings once the investigator had dealt with that point. The investigator has dealt with it – he says Santander needs to put Mr and Mrs J in the position they'd be in but for its mistakes with the May 2022 offer – but Santander hasn't said anything more on this or the other findings.

The case has come to me to decide.

What I've decided – and why

I'll start with some general observations. 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 work within the rules of the ombudsman service and the remit those rules give us. 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.

With Mr B having accepted the investigator's revised recommendation, and Santander's only apparent objection being that Mr and Mrs J should apply again for the mortgage that was offered in May 2022, it seems to me that there's now only one issue still in dispute and requiring me to determine. That is, should Santander simply be required to re-issue the mortgage offer from May 2022, on the same terms as before (other than the interest rate) or can it reasonably require Mr and Mrs J to make a fresh application for Santander to underwrite, including (presumably) an affordability assessment based on their current circumstances.

It's a finely balanced issue, and one where both arguments have merit. On the one hand, the offer from May 2022 should reasonably have included the five-year fixed interest rate product discussed in April 2022, and giving effect to the May 2022 offer with that rate but everything else unchanged would seem consistent with restoring Mr and Mrs J to the position they'd be in if the May 2022 offer had incorporated the fixed rate. On the other hand, Mr and Mrs J could have accepted the offer as it was, and continue with their complaint to secure what they saw as a fair rate.

Had they done that, then all other things being equal, they'd now be two years into a capital repayment mortgage, and well on their way to clearing it in full by around August 2027, the intended term end of the new mortgage. As things stand, if Santander agrees to give effect to that mortgage now, the 63-month term will only begin following the determination of the complaint by this service. That will mean Mr and Mrs J being committed to the mortgage payments until the autumn of 2029, by which time Mr J will be in his late 70s.

That wouldn't have been the case if Mr and Mrs J had accepted the May 2022 offer, Not doing so was their choice, and it was certainly one they were entitled to make. However, insofar as it was their choice, Mr and Mrs J must accept that the new repayment term will start, and finish, more than two years later than would have otherwise been the case.

If I set aside the remedial element for a moment, and think about how Santander might be expected to consider such an application being made now, without the background of the complaint, I have to consider the regulations in place that flow from the Mortgage Market Review (MMR) carried out by the Financial Conduct Authority (FCA) which took place after the financial crash in 2008. This 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, so is a switch from interest only to capital repayment, as indeed is the addition of a second borrower. In the circumstances, Santander would in the normal course of events be entitled to consider whether and how comfortably Mr and Mrs J would be able to afford a mortgage extension on capital repayment terms, starting from now. But it would also have to consider whether the changes to the mortgage would be in Mr and Mrs J's best interests – and if they were, then the affordability assessment could be disregarded.

Santander looked carefully at Mr and Mrs J's wider financial situation in 2022 and concluded the mortgage was affordable. I can't know if it would reach the same conclusion if Santander were to make a fresh assessment now, but I'm not convinced it needs to do that. Santander can, as I've said, allow an application to proceed without an affordability assessment if doing so would otherwise be in Mr and Mrs J's interests. In my view, that's what should happen here. Santander had already agreed to provide a mortgage that would run until Mr J was 75; based on the evidence I have available, it doesn't seem to me that agreeing to one that will run until he is 77 would be contrary to his and Mrs J's best interests.

My final decision

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

- re-work Mr J's existing mortgage account on the basis that it was switched to the 2.24% five-year fixed rate product – but remained on interest-only – on 1 May 2022 up to the date of settlement;
- refund the differential interest Mr J has incurred each month from May 2022 up to the eventual date of settlement*;
- refund the £69 field agent's fee;
- refund the £36 litigation fee;
- refund the solicitors' fee of £1065.40;
- pay interest on each refunded amount, at 8% simple per annum** from the date each refunded amount was paid by Mr J to the eventual date of settlement;
- Issue a fresh offer for a repayment mortgage for the current balance after taking into account the above rework, in joint names with Mrs J, repayable over 63 months, with the residual duration of the five-year fixed rate product; and
- pay Mr and Mrs J £500 compensation for their time, trouble and upset.

*As an alternative to having the overpayments refunded, Mr and J can instead opt to have them remain on the mortgage account, thus further reducing the balance. If they do that, then they won't attract 8% simple interest. They should let the investigator know their preference when responding to the final decision.

**If Santander deducts basic rate income tax from the interest element of this award, it should supply Mr and Mrs J with the relevant tax certificate, so that they can apply to HMRC for a refund if their wider circumstances allow.

I make no other offer or award. 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 Mr and Mrs J to accept or reject my decision before 8 July 2024.

Jeff Parrington

Ombudsman