

## **The complaint**

Mr D and Miss H complain that Santander UK Plc has paid ground rent for their property, plus requested legal fees, and added this to their Buy To Let mortgage. And because Santander signed a consent order, they can no longer challenge the excessive fees.

## **What happened**

Whilst this complaint is brought by both Mr D and Miss H, as the mortgage is in both their names, our dealings have been with Mr D. So I'll mainly refer to him in this decision.

Mr D told us he and Miss H had taken out a mortgage with Santander in 2007 to buy a leasehold property. This property was initially their home, but a few years after buying it, he changed the mortgage type to Buy To Let ("BTL"), and rented the property out.

Mr D said the property required regular payments of ground rent to the landlord's agent. Around seven years ago, he was late making a payment. The landlord's agent added £50 in fees to the account. Mr D said he couldn't pay that then, he offered to pay the rest of the money, but the agent wouldn't accept it.

Mr D said the agent then locked him out of the online payment system. Mr D said he sent cheques, by registered post, to cover the ground rent in the years after that, but none of them were cashed. He said the agent then handed things over to a legal firm, who I won't name here. This legal firm began to ask for payment, plus legal fees which Mr D thought were excessive.

Mr D said he and Miss H moved house again in 2020, and weren't able to update their address with the agent, because they were still locked out of the online system. Mr D then got correspondence from Santander in February 2023, telling him the property was at risk, because he owed £1,185 in ground rent. Mr D said he tried to get Santander to accept the amount that it had told him was owed, but it wouldn't. And he said the legal firm wouldn't accept the same amount from him.

Mr D said the amounts the legal firm told him he owed kept increasing. The legal firm asked for over £4,000, then shortly after that, almost £6,000. He said the underlying debt for ground rent was only £750. Santander kept asking him to pay much less, and he kept trying to make that payment through Santander, but it wouldn't do that for him.

Mr D said he then found out at very short notice that there was a court date about this debt. The legal firm hadn't sent any of the information about the hearing to his new address, although it did then have that address, and had also been emailing him regularly.

Mr D said even though he only had 24 hours' notice, he was still planning to attend the hearing, and had told the legal firm this. But just before the hearing, Santander's lawyers agreed a consent order with the legal firm, and paid £9,706. That amount has now been added to Mr D and Miss H's mortgage, pushing the property back into negative equity.

Mr D said he'd tried to challenge this, because of the huge amount of legal costs, which

were over ten times the original debt. But he said that although he'd been back to court, the original consent order couldn't be reopened. Mr D said the judge was very critical of the level of fees charged. This failed attempt to overturn the consent order cost Mr D £1,370, and he was no better off.

Santander didn't think it had done anything wrong. It said it had contacted Mr D a number of times to ask him to pay the outstanding arrears of ground rent. Santander said it alerted Mr D to this, each time the legal firm asked it for payment. Santander said it had also explained to Mr D in March 2023 that if the legal firm applied for forfeiture of the lease, it would then step in and pay the amount owing.

Santander told us that it had paid the money because of a court decision – the consent order. It said Mr D hadn't paid ground rent to the landlord's agent, which in turn puts Santander's security at risk. Santander said if there is a real risk the landlord (or an agent acting on their behalf) will void the lease and take possession of the property, then it will make payment. And that's what happened here.

Our investigator didn't think this complaint should be upheld. He said Santander forwarded correspondence to Mr D and Miss H from the legal firm in November 2018, then again more recently. It wasn't until April 2023 that Santander felt its security on the property was at risk, when legal proceedings had been started. Our investigator understood that Mr D told us he'd tried to pay the outstanding debt, but wasn't able to.

Our investigator understood Mr D then became aware of the court date, at very short notice, and intended to go along to dispute the level of fees added to the debt. But Santander signed a consent order which meant he couldn't do this.

Our investigator said Santander had acted in line with the terms of Mr D's mortgage, in making this payment. And it hadn't acted until forfeiture of the lease was a serious possibility. Our investigator said it was reasonable for Santander to intervene then. He understood Mr D was frustrated at not being able to challenge the amount paid. But he said Mr D was aware of the arrears, and that these were increasing as his cheques hadn't been cashed. And he didn't think it was unfair for Santander not to have disputed the legal fees claimed. Our investigator didn't think Santander had to remove the debt it had added to this mortgage, or pay towards the legal costs Mr D had since incurred trying to challenge the consent order.

Mr D strongly disagreed. He said Santander didn't tell him about the upcoming hearing, and he only learned Santander was going to make payment two days before the hearing. He said the legal papers for that hearing only mentioned a money debt, not possession of the property. Mr D said he wanted to know why Santander hadn't paid the much smaller amount it was apparently asked for in February 2023. Mr D said Santander would never let him speak to the department dealing with the complaint, and wouldn't let him pay the amount the landlord's legal firm wanted through it. Mr D said Santander could have challenged the legal fees, but he thought it had always wanted to just add this money to his mortgage, put the property back in negative equity, and stop him moving to another provider.

Our investigator didn't change his mind. He said he wouldn't expect Santander to make payment until its security was at risk, and it was at risk from the hearing, which included a claim for possession of the property.

Mr D still disagreed. He said Santander hadn't written to him to give him a seven day deadline to pay, as our investigator had claimed. He said the letter he received on 3 May asked for payment of a little under £700. So Mr D wanted to know how Santander could agree, 24 hours later, to pay almost £10,000. Mr D repeated he'd wanted Santander to pay

in February, when he offered it the money to do so. And Mr D was still convinced there was no actual threat to the property. Mr D felt Santander should have helped him, and it didn't.

Our investigator said he'd seen evidence that Santander did send a letter to Mr D on 27 April 2023. He couldn't say when that arrived, but it was sent to the right address. And the investigator said the wider context to this complaint showed Santander had been telling Mr D that he needed to settle this debt since 2018.

Because no agreement was reached, this case was then passed to me for a final decision. And I then reached my provisional decision on this case.

### **My provisional decision**

I issued a provisional decision on this complaint and explained why I did propose to uphold it. This is what I said then:

I think there are two points where I have concerns about what Santander has done.

The first, is that the sums Santander repeatedly told Mr D and Miss H that they were being asked to pay, were far less than the sums the legal firm was asking Mr D and Miss H to pay. In February 2023, Santander wrote to Mr D and Miss H, asking them to pay amounts that Santander had been notified of in August 2022. It seems reasonable to assume the costs would have risen by this point.

Then in April 2023, Santander wrote to Mr D and Miss H telling them the landlord's agent had demanded payment of the outstanding ground rent (then an amount of less than £700) and omitted to mention the additional costs the agent's legal firm was seeking. Santander told us that at this point it had received a 209 page document from lawyers instructed by the landlord's agent, threatening imminent legal action. It seems unlikely that this extensive document made no mention of several thousand pounds in costs that was also being requested.

I think these oversights by Santander meant Mr D and Miss H thought Santander was being asked to pay much less than they were being asked directly to pay. So I think Santander caused some confusion here. And I think it's likely this confusion is part of the reason Mr D didn't act to resolve this, and to pay the requested amounts, sooner. It appears Mr D both asked Santander to pay the smaller amounts he understood the landlord's agent had asked it to pay, and also offered the landlord's agent smaller amounts, in line with the amounts Santander had told him it was being asked to pay.

The second area where I have concerns, is with the fairness of the action Santander took, when it added the landlord's legal fees in full to Mr D and Miss H's mortgage.

The lawfulness or otherwise of Santander agreeing the consent order has been subject to legal proceedings and I do not therefore intend to address this in my decision.

But I do think it's worth noting here again that the total of £9,706.89 which Santander paid, included only £750 in ground rent. The remainder was entirely made up of *"legal costs and expenses"*.

Under clause 31.3 of the mortgage conditions, Santander is entitled –

*"to recover any other costs and expenses we reasonably incur in connection with the mortgage, including (but not limited to) the costs and expenses we incur in taking action to:*

a) preserve, protect or enforce our security

[...]

c) bring or defend any legal proceedings” [emphasis added].

I have doubts as to whether the legal costs incurred by Santander here were reasonably incurred. Almost all the money that has been added to Mr D and Miss H’s mortgage was made up of fees. And these fees seem to have caused the overall debt to multiply eightfold in eight months.

I also think it’s relevant to note comments made by the Judge in Mr D’s failed application to set aside the consent order. I have forwarded the transcript of this hearing to Santander, and I would draw its attention to comments such as the following –

*“But I have to say, I have some grave reservations about the level of [the landlord’s] costs ... And I say to Santander, I have some grave reservations about Santander just blithely signing off on those, particularly when I look at the costs schedule that I have been given for today’s hearing as well.”*

I think that further supports the provisional conclusion I have reached, that in the particular circumstances of this case, I am not able to say that it was fair and reasonable for Santander to add legal costs at this level to Mr D and Miss H’s mortgage. My conclusion on this point is not reached lightly.

Mr D has shown us he subsequently sought to have this consent order set aside. This failed, on legal grounds. Mr D said he’d had to pay for legal advice before the hearing, and then paid costs when the request to set aside the order failed. I think there must be some doubt over whether the action Mr D was advised to take at this point was appropriate, so I don’t think it would be reasonable to ask Santander to pay the legal costs for this failed action.

Having considered this case carefully, and reviewed the evidence in full, I do not think it’s fair and reasonable in the circumstances of this case for the full costs that Santander agreed to pay as part of the May 2023 consent order, to be passed on to Mr D and Miss H. On balance, I think it would be fair for a reduction to be made to those costs.

I do think Mr D and Miss H should pay the outstanding ground rent which had, for whatever reason, remained unpaid on this property for some time. And I do think, even bearing in mind the confusion over Mr D and Miss H’s address, that this matter could have been addressed more promptly by Mr D and Miss H, so I don’t think Santander simply has to remove all the costs and fees it has added to their mortgage. Nor do I think Santander has to pay compensation in this case.

I think that it would be fair and reasonable in the circumstances of this case, for Santander to have applied £750 in ground rent charges, and £3,000 in costs, to Mr D and Miss H’s mortgage on or shortly after 5 May 2023, plus the £70 administration fee it charges in these circumstances. So my provisional decision is that Santander should rework Mr D and Miss H’s mortgage, to remove any costs above this amount, and to refund any interest it has overcharged since. I think that would provide a fair and reasonable outcome to this complaint.

I invited the parties to make any final points, if they wanted, before issuing my final decision. Both sides replied.

## 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 aware I've summarised the representations received in less detail than the parties involved. No discourtesy is intended by my approach which reflects the informal nature of this service. I want to assure all parties I've read and considered everything on file. I'm satisfied I don't need to comment on every point raised to fairly reach my decision. And if I don't comment on something, it's not because I haven't considered it. It's because I've focused on what I think are the key issues.

Mr D made comments on two points. One was the absence of any award for distress and inconvenience. He said he'd been clear from the start how upsetting this had been, and felt he'd tried to engage with Santander to resolve the problem. And he said this had all taken up a considerable amount of his time. So he wanted me to take this into account.

I do appreciate that Mr D and Miss H have found this stressful. However, I think that much of the stress that has been caused here, is a result of the debt that they were being pursued for, and the actions of their landlord and his legal firm in pursuing that debt. I don't think I can fairly hold Santander responsible for those things. I still don't think it would be fair and reasonable to ask Santander to pay compensation in this case.

Mr D also said that I'd said the legal action he took was "*doubtful*". Mr D said he disagreed, he'd paid for legal advice, and then took the actions he was told to take. And he thought that meant he should be able to recover those costs.

Mr D showed us the legal advice he received about whether the consent order could be overturned. This was brief, and I note the court did not reach the same conclusions. The record of that hearing says Mr D's attempt to overturn the consent order failed, as the landlord's legal firm showed the court caselaw which meant the consent order must stand.

I don't know if the legal advice Mr D has shared with us represents the full basis on which Mr D was advised to bring this action. But I cannot say that Santander is responsible for Mr D doing so, or for this action failing. I don't think Santander has to pay these costs.

Mr D also said he wanted to stress that the only notice he received of the hearing requested by the landlord's legal firm was from Santander on 3 May. He said if that was sent on 27 April as Santander said, he would have expected it to arrive on 28 April, and that didn't happen. He thought Santander should have phoned him to tell him about the hearing, and he said Santander still wouldn't help him when he did get in touch.

The main responsibility for notifying Mr D and Miss H of the hearing fell upon their landlord's legal firm, not on Santander. And that legal firm isn't party to this complaint. I also think that Santander had previously suggested Mr D and Miss H should take legal advice about this debt. It wasn't responsible for providing that advice to them. However, I do think that Santander should have paid attention to Mr D's concerns about the level of fees he was being asked to pay. I'll return to this below.

Santander wrote at length, saying it thought I had misunderstood key facts here. I will set out Santander's submissions before addressing the points raised there.

Santander said it wasn't fair to expect it to incur further legal costs in arguing about legal fees, when it was only involved at all because Mr D and Miss H had been in breach of their lease for so long.

Santander set out that under the law of forfeiture, Mr D and Miss H had forfeit their lease and the bank lost its security, once the possession claim was issued. And it said it had to pay all amounts due to the landlord in order to secure relief from this forfeiture. Santander said that included legal costs.

Santander asserted that it was only engaged at a very late stage. And it said its legal advisors had “*considered the legal fees of the landlord and concluded that these were due under the terms of the lease*”. It said if Mr D was concerned, he should have engaged earlier.

Santander said it did write to Mr D when it found out about the forfeiture proceedings, and if Mr D had been in touch to say he intended to challenge the landlord’s costs, then Santander may have delayed agreeing a consent order until at the hearing. But without any contact from Mr D, Santander said it was in the best interests of the bank and of Mr D and Miss H to secure relief from forfeiture by making payment.

Santander said it had also sought input from its solicitors. They said the landlord was entitled to recover his costs on a full indemnity basis, and it was therefore extremely difficult to challenge the sums claimed. Santander’s solicitors also said it was likely that these costs were incurred over a number of years trying to resolve this matter. Santander’s solicitors also repeated that Santander hadn’t been aware of this issue until proceedings were issued. And Santander then paid the money being claimed when Mr D didn’t pay. Santander’s solicitors said Santander was entitled to add this money to Mr D and Miss H’s mortgage.

Santander’s solicitors said if Santander hadn’t paid, it was “*almost guaranteed*” that Mr D and Miss H would have been required to pay the landlord’s costs.

I think the representations by Santander and its lawyers appear to have missed a number of points in this complaint, which are set out in my provisional decision, but I should stress have been drawn from Santander’s own evidence.

Firstly, Santander has been aware of concerns about the payment of ground rent on this property since at least 2018. It has shown us a long history of correspondence with both Mr D, and the landlord’s legal firm, about this matter.

I do think Santander caused some confusion in this case, because there is at least one point when it was asking Mr D to pay an amount which, I thought, Santander ought to have realised was considerably outdated. I thought this was part of the reason why Mr D had not paid the considerably higher sums he was being asked to pay by the legal firm.

I also note that, because Santander was sighted on this matter for some years, it clearly was aware that the overwhelming majority of the costs in this case had been run up in the last few months. My provisional decision says these costs multiplied eightfold in the last eight months before the hearing. For the avoidance of doubt, I think Santander clearly ought to have been aware of that.

And finally, Santander said that it had told Mr D about the hearing, and only acted to agree a consent order “*..absent any contact from [him]..*” Santander said that if Mr D had got in touch, it may have delayed agreeing the consent order to the hearing, so that Mr D could have made his submissions there about the landlord’s costs.

So Santander appears to be saying that it didn’t have to agree a consent order on 4 May. It could have waited until the actual hearing, and given Mr D a chance to protest against the costs in this case. It says it didn’t do that, because Mr D hadn’t spoken to it at all.

But we know from Santander's own evidence, that Mr D had responded when he was told about the hearing by Santander. Mr D had indicated to Santander on 3 May that he did want to pay the ground rent, but the problem was the extent of the costs the landlord's lawyers were requesting. So he did want to challenge these legal fees, and Santander knew that, before it acted in a way which effectively removed Mr D's ability to challenge the fees here.

I should also note that Santander's legal firm's assertion that Mr D and Miss H would almost certainly have had to pay these fees, does not fit well with the comments of the judge in the later case to consider the consent order. I think it's worth repeating those comments here –

*“But I have to say, I have some grave reservations about the level of [the landlord's] costs ... And I say to Santander, I have some grave reservations about Santander just blithely signing off on those, particularly when I look at the costs schedule that I have been given for today's hearing as well.”*

Because Santander's solicitors said they had considered the landlord's costs, I asked Santander to confirm whether it or its solicitors had considered this before making payment. And I also asked Santander to forward all the details it had of the costs claimed.

Santander said it didn't think it had received a full costs statement before the hearing. It wanted to stress that costs were payable, and on a full indemnity basis. It said these costs would have covered actions taken over a long period of time, and could only really be challenged if they were unreasonable. Despite the lack of information on costs, Santander's solicitors said they had assessed the chances of challenging the costs, and asserted that the chances of Mr D being able to successfully challenge these were nil.

Further questioning showed that Santander had originally proposed a consent order without costs, but this was returned by the landlord's legal firm with just under £9,000 of costs added. Santander then agreed the order.

In summary, I can only say that Santander's timeline of events, and rationale for action, simply doesn't fit with the evidence in this case. I think it's worth once again briefly summarising the circumstances here, in that Santander was aware of the long history of the dispute between Mr D and his landlord; it also ought to have been aware that the very high level of costs in this case had not, as it asserted, been incurred over many years but rather had increased eightfold in the last eight months; and it was further aware of Mr D's concerns over those costs.

I do not think it's fair and reasonable in the circumstances of this case for the full costs that Santander agreed to pay as part of the May 2023 consent order, to be passed on to Mr D and Miss H.

In order to discharge my duty to determine this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case, I draw on my own experience in other, similar cases, as well as the experience of my colleagues. And I do think it would be reasonable to expect the landlord to have incurred some legal costs here, which they would then have sought to recover from Mr D and Miss H. But I've pointed to the judge's comments about the amount claimed here, which suggest it is not reasonable for Santander to have added £9,000 in legal fees and costs to Mr D and Miss H's mortgage. And I have to bear in mind that Santander's actions removed Mr D's opportunity to challenge that amount. In the particular circumstances of this case, my provisional decision was that £3,000 in landlord's fees and costs would be a reasonable figure for Santander to add to the mortgage of Mr D and Miss H.

I have considered the representations of both sides in full, but nothing either party has said in response to my provisional decision has led me to reach a different conclusion. So it remains my view that a fair and reasonable outcome in this case, would be for Santander to reduce the costs element of the debt it added to the mortgage of Mr D and Miss H, to £3,000 inclusive of VAT. For the avoidance of doubt, my decision does not affect Santander's ability to add to this mortgage, the £70 administration fee it charges in these circumstances

For the above reasons, I haven't changed my mind. I'll now make the decision I originally proposed.

### **My final decision**

My final decision is that Santander UK Plc to rework Mr D and Miss H's mortgage, so that instead of the sum of £9,706.89 being added to their mortgage in respect of ground rent and legal costs in May 2023, the sum of £3,750 was added instead.

Santander UK Plc must rework Mr D and Miss H's mortgage accordingly, and refund any overpaid interest.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D and Miss H to accept or reject my decision before 26 October 2024.

Esther Absalom-Gough

**Ombudsman**