

## complaint

Mr and Mrs R complain that on their house move, Bigmore Associates Limited, who advised in connection with their mortgage application, failed to ascertain that selling their existing house and redeeming the mortgage would attract an early repayment charge (ERC). To resolve their complaint they want Bigmore to reimburse them.

## background

Mr and Mrs R had a mortgage with lender S. The mortgage had a two-year fixed-rate interest product expiring on 2 November 2017 with an ERC for prior redemption. They wanted to move house and consulted mortgage brokers Bigmore. They found a house to buy and Bigmore recommended a mortgage which happened to be with lender S. The purchase and mortgage were completed on 24 March 2017.

In April 2017 Mr and Mrs R contacted Bigmore. They said S had made an ERC on the redemption of their previous mortgage. They queried whether a mortgage port had been applied for. Bigmore said it hadn't been aware of an ERC.

On 7 June 2017 Mr and Mrs R made a written complaint to Bigmore seeking compensation. They said they hadn't known about the ERC, which was £5,202.44, and that Bigmore should have obtained this information from the sources available to it. Bigmore replied that in a phone conversation on 8 November 2016 Mr and Mrs R had confirmed that they weren't tied into a mortgage product, and wouldn't be subject to an ERC as they were on S's standard variable rate. Bigmore hadn't arranged that mortgage and didn't have details of it.

Mr and Mrs R then brought their complaint to this service. They said they weren't aware of the ERC and Bigmore didn't discuss it with them.

Our investigator recommended their complaint be upheld. He said Bigmore had completed a questionnaire during the call on 8 November 2016. This showed Bigmore had asked Mrs R what the 'rate type' on her current mortgage was and recorded that it was on the standard variable rate.

The investigator considered Bigmore had made the assumption no ERC would be payable, because:

- the ERC section had a slash through it, as opposed to a 'no', which was inserted in other parts of the questionnaire where Mr and Mrs R had answered 'no'.
- in the 'notes' section, Bigmore had stated:

*"They have accepted an offer of 620k on their property & will have circa 406k remaining after repaying their mortgage of 214k – no ERCs as on bank's SVR."*

The investigator said that although Bigmore had said Mr and Mrs R advised their current mortgage was on a standard variable rate, he would expect that Bigmore ought to have exercised its experience as professionals and carried out the relevant checks.

In order to give accurate advice Bigmore needed to understand what the situation was with the current mortgage. He didn't consider it an acceptable level of service that it simply asked

Mr and Mrs R what rate they were on. Bigmore should have considered the matter fully, and actually checked what the situation was with their existing mortgage.

The investigator had also considered the fact that Mr and Mrs R only had 10 months left on their existing fixed rate period. It was entirely plausible that they would have waited in order to avoid paying an ERC. The savings under the new fixed rate period weren't greater than the ERC. In addition the possibility of porting didn't appear to have been explored or discussed at any point. This option would potentially have allowed Mr and Mrs R to move without waiting and avoid the ERC.

The investigator recommended that Bigmore should:

- refund the fees paid by Mr and Mrs R;
- pay the ERC of £5,202.44 less the interest saved on the new fixed rate;
- pay 8% simple interest from the date of payment to the date of settlement;
- pay £150 to Mr and Mrs R for the trouble and upset caused in the midst of moving home, to find that they had to find an additional £5,202.44 before it could all go through.

The investigator had noted that Mr and Mrs R had moved to a fixed rate product which was a lower rate than they were paying previously. So they had made a slight saving for the ten months they would have remained on the previous fixed rate. So this amount should be deducted from the ERC refund.

Bigmore didn't agree. It said:

- the S redemption statement would have included the ERC and Mr and Mrs R could have contacted Bigmore, who could have arranged another mortgage in the light of this new information;
- it had asked Mr and Mrs R specifically: "what rate are you on?" to which they had replied "standard variable rate". Bigmore had then asked a further question "do you have an ERC?" to which Mr and Mrs R had responded "no";
- the investigator had made the incorrect assumption that a line through the ERC section meant this question wasn't asked. It was Bigmore's company policy that every question on the fact find must be asked, and if it were not answered it must be left blank. However it was in the adviser's discretion whether they completed the box with a 'no' or a line through the box or any other means which were clearly interpretable;
- Bigmore hadn't advised on the initial mortgage product. Mrs R's responses to the questions about the rate and the ERC were clear and without discrepancies. Where the client showed uncertainty, or gave conflicting information, Bigmore would seek further detail. However, as Mr and Mrs R gave clear answers, Bigmore had no cause to question the information given.

Bigmore couldn't have asked S about the existing product. It had no authority to do so.

I took a different view of the complaint to the investigator. So I decided to issue a provisional decision, setting out my view of the case and inviting further comments. Both parties have now responded and so I issue my final decision.

### **my provisional decision**

In my provisional decision, I said:

"I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so I don't consider the complaint should be upheld.

I don't agree about the effect of the ERC section of the "current mortgage details" having a slash through it, as opposed to a "no". The use of the slash in other parts of the form signifies that the question is inapplicable or that the answer to it is "no". Consistently, its use here is as likely to imply that there was no ERC as that the question wasn't asked.

Bigmore's file notes say:

*"Existing clients of John, seeking assistance with a mortgage to purchase a larger home. Mrs R is a self-employed [...] and would like some private land to carry out her business and expand her company. She originally looked at purchasing a field but this was not feasible due to costs. They have had an offer of £950k accepted on a large property with a few acres of land. Based on income, maximum loan is c£350k. They will be receiving a 200k gift from Mrs R's dad ... to help with the deposit. They have accepted an offer of 620k on their property and will have circa 406k remaining after repaying their mortgage of 214k – no ERCs as on bank's SVR. Mrs R's mum will gift them funds for stamp duty, as she may move into the property in the future. Pref for short term fix rate, as they may want to [remortgage] in few years for home improvements. Max term to spread costs, plan to pay down mortgage with future inheritance. Agreed term of 25 years."*

These notes are signed (by Bigmore) and dated 8 December 2016.

The file includes separate outline notes which include:

*"PV = 650K  
o/s = 214K – ERC free  
= 436K*

*Max loan = 318K (ish)  
Dad gift = 200K  
= 954K"*

Both of these notes are consistent with Mr and Mrs R having said they were on S's standard variable rate which would likely mean there was no ERC.

But in September 2015 Mr and Mrs R had taken a new mortgage product on their existing mortgage with S. It provided a fixed interest rate until 2 November 2017. The offer from S dated 20 September 2015 said:

*"10. What happens if you do not want this mortgage any more?"*

### *Early Repayment Charges*

*Early repayment charges are payable as set out in the table below*

*This table explains which early repayment charge(s) you must pay if the relevant loan part (or where indicated with "All", the whole mortgage) is repaid on or before the stated date. Cash examples of the amount of the early repayment charge payable are provided in the table"*

There followed a table showing the basis for calculating the early repayment charge and that it was payable until 2 November 2017.

Mr and Mrs R say that Bigmore should have discovered the ERC *"from the sources available to you"*. But Bigmore had no other sources of information about the previous mortgage. Its only source of information was Mr and Mrs R. And they knew that they had taken out a two-year fixed interest product, containing an ERC, just over a year before. So moving house a year later was bound to incur an ERC.

Also, in reply to their request for a redemption statement, S wrote to Mr and Mrs R's solicitors on 3 January 2017:

*"Further to your recent request, we enclose a redemption statement for the above account...Please note that the redemption figure includes an Early Repayment Charge."*

The accompanying redemption statement showed an ERC of £6,401.73. It follows that Mr and Mrs R were on notice through their solicitors as early as 3 January 2017 that redeeming their existing mortgage would incur an ERC. Contracts on the sale and purchase weren't exchanged until 10 March 2017.

In summary, there was documentary evidence that:

- Mr and Mrs R knew that there was an ERC from September 2015; and
- their solicitors knew that there was an ERC from two months before they were committed to the sale.

In these circumstances I didn't consider it fair and reasonable to hold Bigmore to account for failing to use information which it didn't have, and which both Mr and Mrs R and their solicitors did have."

### **the responses to my provisional decision**

Both parties responded to my provisional decision. Bigmore said it had nothing to add.

Mr and Mrs R said Bigmore's account of the call on 8 November 2016, as shown in its questionnaire, that Mrs R had said they were on the standard variable rate, was a lie. The question wasn't asked, either then or at the meeting at their house.

The assumption that a slash meant "no" wasn't acceptable either. If a question is asked and it is a yes or no answer then in such an important document a yes or no answer should be used.

In relation to the two main points I appeared to have made my provisional decision on, Mr and Mrs R said:

They'd looked back through every email received from their solicitors and had no record of the letter from S of 3 January 2017 informing them of the ERC. They should have been informed directly. And Bigmore should have picked up on this or been informed by S.

To be fair it was maybe the case that as they took out the two year fixed rate they would have been aware of the ERC. But they'd engaged a professional and were both busy professionals themselves. They assumed that by answering all the questions they were asked, they would receive a professional service. It was the remit of the mortgage adviser to gather the correct relevant information.

### **my findings**

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

I accept that there's no conclusive evidence that Mr or Mrs R did, or that they didn't, tell Bigmore they were on S's standard variable rate. The parties give very conflicting accounts of the phone call, and it can't be assumed that the slash in the questionnaire, opposite the question about redemption penalties, meant "no". And the questionnaire isn't signed by Mr and Mrs R.

However Mr and Mrs R have correctly identified the main points on which I made my provisional decision. And it's not clear from where Bigmore should have picked up on S's letter to the solicitors. The letter was a response to the solicitors' request for a redemption statement. I wouldn't normally expect a lender to send this to the borrower or to his broker.

It remains the case that of the three parties involved in the period leading up to exchange of contracts, two knew about the ERC and the third (Bigmore) didn't. I don't think it's logical or fair that the party who didn't know about the ERC should be required to pay compensation for not drawing it to the attention of the parties who did know about it. I therefore confirm my provisional conclusions.

### **my final decision**

My decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs R to accept or reject my decision before 24 August 2018.

Edward Callaghan  
**ombudsman**