

The complaint

Mr and Mrs K, who are represented by their solicitors who I'll call O, complain that Santander UK Plc didn't notify them about changes to the interest rate on their mortgage, which means the changes are invalid – and they've been overcharged interest as a result.

What happened

Mr and Mrs K took out their mortgage in 2003. It's an interest only mortgage, with the term expiring in 2024. They were on a discount rate for the first three years, reverting to the standard variable rate (SVR) from 2006. They borrowed around £220,000.

Mr and Mrs K's mortgage terms and conditions included a cap margin term – that is, a term limiting the SVR (a cap) to no more than 2.5% above Bank of England base rate (a margin). The terms and conditions allowed Santander to vary the cap margin from time to time, and it did so in 2008 and again in 2012. In 2008, although it increased the cap margin, Santander reduced the SVR – the margin increased because the SVR did not reduce to the same extent base rate reduced, though the SVR did reduce overall. In 2012, Santander increased both the SVR and the cap margin.

The terms and conditions also required Santander to give notice of any changes to the cap margin. On Mr and Mrs K's behalf, O has argued that Santander failed to give them notice of increases to the cap margin, that as a result the increases are not valid – and so Santander was not entitled to charge them an SVR which was more than 2.5% above base rate from time to time. To resolve this complaint, they want interest they've paid above that returned to them.

Santander said that the complaint was out of time, because it had increased the margin more than six years ago and Mr and Mrs K would have been aware of what they were paying at the time. It also said that in any case Mr and Mrs K would not have been able to move their mortgage elsewhere when the margin increased, because of the history of arrears on the mortgage.

Our investigator said that we could only consider the fairness of interest charged during the six years leading up to Mr and Mrs K's complaint – though in considering that, he would need to take into account all the circumstances of the case, including things that happened more than six years ago if they were relevant to the fairness of interest charged within the last six years. He said that there was no evidence that Santander had notified Mr and Mrs K of the increases to the cap margin, as it was required to do under the terms and conditions. However, he said that if it had notified them, it wouldn't have made any difference, since Mr and Mrs K weren't in a position to move their mortgage elsewhere if they weren't happy with the changes.

Mr and Mrs K didn't agree. They said that because Santander didn't notify them of the cap margin increase, they were denied the chance to review their arrangements and redeem the mortgage without an ERC. They said there was plenty of equity in the property so they would have been able to re-finance. They said Santander had acted in breach of contract and breach of the mortgage rules, taken advantage of them, and should refund any interest

charged over the original 2.5% margin.

Santander said it had nothing further to add.

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 first of all what parts of this complaint fall within my jurisdiction. The relevant time limit rules say that – unless the firm complained about consents (which Santander doesn't) – we can't consider a complaint about events that happened later than:

- Six years before the date of the complaint; or
- Three years before Mr and Mrs K knew, or ought reasonably to have known, of cause for complaint (if this limit gives more time than the six year limit).

There's no evidence of an earlier complaint, and no evidence of exceptional circumstances which prevented Mr and Mrs K making a complaint earlier than they did. I'm satisfied they would have known of the interest rate they were being charged – including that it fell by less than base rate in 2008, and that it increased in 2012 – at the time. So the three year rule does not give them more time and we can only consider the fairness of interest charged in the six years leading up to this complaint – that is, from September 2014.

However, in considering the fairness of interest charged over the last six years, it's necessary to consider all the circumstances of the complaint. This includes matters which happened more than six years before (and which would therefore be out of time as complaints in their own right), but which may have had an impact on the fairness of interest charged during the relevant period. For example, if Santander had no contractual basis for increasing the cap margin when it did in 2008 or 2012, it might not be fair to charge an SVR set at more than 2.5% above base rate in the last six years.

In order to consider the fairness of the interest charged in the last six years, therefore, I'll start by looking at the mortgage terms and conditions.

I note that O has made clear this complaint is solely about the failure to notify Mr and Mrs K of the increase to the cap margin – saying that as a result Santander is not entitled to charge them more than 2.5% above base rate. And so it is on that issue I will focus.

The terms and conditions say

2.4 base rate means the Bank of England's repo rate from time to time...

2.5 "cap" means the rate of interest found by adding the margin to the reference rate

2.16 "margin means 2.50% or any other percentage which we substitute as the margin under condition 9.6

2.30 "standard variable rate" or "SVR" means the rate of interest which we publish as our standard variable rate. We use our standard variable rate as the basis for setting the interest rate on all loans which we make on terms where we are free to vary the whole of the interest rate charged. We can change the standard variable rate under condition 9.1 or 9.3.

...

9.5 This paragraph applies where the standard variable rate comes to exceed the cap as a result of:

- (a) a reduction in the base rate;*
- (b) a reduction in the base rate combined with a change in the standard variable rate of which we have previously given notice; or*
- (c) a reduction in the margin.*

Where this paragraph applies, we will change the standard variable rate within 60 days from the date ("the start date") on which it comes to exceed the cap. We will ensure that the changed standard variable rate does not exceed the cap in force on the start date.

9.6 We may increase or reduce the margin at any time. The following terms will apply to any increase or reduction which we make under this paragraph:

- (a) we will give you not less than 30 days' notice of an increase in the margin and not less than seven days' notice of a reduction;*
- (b) if we are increasing the margin, then:*
 - If the increase applies to the whole of the capital, you will be entitled to repay all the money you owe us within three months from the date on which the increase takes effect, without paying any early repayment charge that would otherwise apply;*
 - If the increase applies only to part of the capital ("the affected part"), you will be entitled to repay the money you owe us, or (if you choose) the affected part, within three months from the date on which the increase takes effect, without paying any early repayment charge that would otherwise apply to the affected part.*

Condition 9.6 says Santander may increase or reduce the margin at any time. Although there is a requirement to give notice, the change to the margin is not conditional on the giving of notice. Rather, once it has made the decision to change the margin, Santander is then required to notify its customers. This is a separate obligation to the discretion to change the margin, and consequent on it – not the other way round. I'm therefore satisfied that in failing to give notice Santander may have been in breach of the contractual requirement to give notice – but that failure did not invalidate the change to the margin.

The purpose of the requirement to give notice is to enable customers to redeem their mortgage without paying an early repayment charge – ERC – if they are unhappy with the change to the margin. If a customer is otherwise subject to an ERC, giving of notice under this condition means Santander would waive the ERC for three months after the increase takes effect.

Mr and Mrs K had been on the SVR since 2006. Therefore, there was no ERC applicable to their mortgage in either 2008 or 2012, and so no contractual barrier to them re-mortgaging or switching off the SVR onto another rate with Santander. And even if they didn't know of the change to the cap margin, they would have known about the changes to the SVR which happened at the same time – and were not subject to an ERC if they were unhappy with

those changes.

However, I don't think it would have been possible for Mr and Mrs K to re-mortgage. I can see from the history of this mortgage that they missed some payments in 2006, took out a second charge loan in 2007 and were subject to possession proceedings in 2008 by the second charge lender. They missed further payments to Santander in 2010, and were consistently in arrears between 2012 and 2015, and again from late 2016 to early 2018.

I'm aware from my knowledge of the mortgage market that it's very difficult to move mortgage lender with a recent history of arrears – particularly after the end of the “sub-prime” mortgage market following the financial crisis of 2007 to 2009. Mr and Mrs K have pointed to the equity they had in the property. I don't know what their equity position was in 2008 or 2012 (bearing in mind they also appear to have had a second charge loan). But I'm aware that lenders were unlikely to lend to a borrower in arrears or with a significant recent history of arrears – regardless of equity in the property.

Mr and Mrs K might alternatively have been able to take a new preferential interest rate with Santander, moving them off the SVR and therefore avoiding the impact of changes to the cap margin. Mr and Mrs K are experienced mortgage borrowers – I don't agree that having multiple buy to let mortgages is irrelevant to whether they'd understand how a residential mortgage works – and in any case Santander would have notified them when their previous rate ended in 2006. But there's no evidence they asked Santander about taking a new interest rate – and, in any case, for much of the time they were unlikely to have been eligible for a new rate because of the arrears.

If Santander had notified Mr and Mrs K of the changes to the cap margin, then, I think it's unlikely to have made a difference. As I've said, the purpose of notifying of a change is to enable the borrower to move their mortgage elsewhere without ERC to avoid the impact of the change. But Mr and Mrs K were already not subject to an ERC at the time of the changes in 2008 and 2012, and given their circumstances were unlikely to have been able to move their mortgage elsewhere. They could also have mitigated the impact of changes to the cap margin by asking Santander for a new interest rate in place of the SVR – at least at times when they weren't in arrears. But there's no evidence they did so.

I'm therefore satisfied that Mr and Mrs K would have known about changes to the interest rate they were paying, even if they hadn't been notified of changes to the cap margin. They weren't subject to an ERC, so didn't need to be told that Santander would waive an ERC that would otherwise apply. And I'm satisfied that even if a notification from Santander would have prompted them to explore moving their mortgage elsewhere, it's unlikely they would have been able to do so.

Taking all that into account, I don't think Santander charged an unfair rate of interest during the period I can consider. Any failure to give notice doesn't mean the change to the margin is invalid, so Santander was not obliged to charge no more than 2.5% above base rate in the six years before this complaint. And the failure to give notice of the change to the cap margin was not the cause of Mr and Mrs K not moving their mortgage elsewhere, so – bearing in mind the changes were respectively two years and six years before the period I can consider – I don't think that resulted in Mr and Mrs K being charged an unfair rate of interest after September 2014.

My final decision

For the reasons I've given, my final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs K and Mr K to

accept or reject my decision before 1 August 2023.

Simon Pugh
Ombudsman