

## The complaint

O, a solicitors' firm, complains on behalf of the estate of the late Mr M about Mr M's mortgage. O says that Santander UK Plc didn't properly notify Mr M about changes to the interest rate on his mortgage, which means the changes are invalid and that Mr M and later his estate were overcharged interest as a result.

## What happened

In 2007 Mr M took out an interest only mortgage over a term of 15 years. The mortgage was on a rate which tracked the Bank of England base rate for the first two years. In 2008 Mr M took out a fixed rate for three years on the expiry of the tracker rate. The fixed rate came to an end in 2011, and the mortgage was on the standard variable rate (SVR) thereafter.

Sadly Mr M passed away in 2013. For the next few years, his executors continued to make mortgage payments while trying to resolve underlying issues with the property. But when the mortgage balance wasn't repaid, Santander repossessed and sold the property in 2019.

On behalf of Mr M's estate, O complained to Santander. It said that Mr M's mortgage had included a term which limited the amount the SVR could exceed the Bank of England base rate (a cap margin term – capping the margin over base rate). O said that Santander had increased the SVR above the cap margin but had not notified Mr M or his estate that it had done so. O said that in the absence of a notification, the increase was invalid and the SVR had been overcharged as a result. And it said that had Mr M received a notification, he would have re-financed the mortgage.

Santander said that Mr M's mortgage was not subject to the cap, so in not notifying him of a change to the cap it applied to other customers' mortgages, it hadn't done anything wrong. It said Mr M's mortgage was subject to its 2007 mortgage conditions (which did not include a cap on the SVR), not the 2004 mortgage conditions (which did).

Santander said that it had first corresponded with Mr M's estate about this issue in 2014, so in any case the complaint was out of time, because the cap was varied in 2008 and 2012, and Mr M's estate knew about that in 2014 – and it had also told Mr M's executor at that time that the cap did not apply to Mr M's specific mortgage.

I've previously issued a jurisdiction decision, in which I found:

*This "is a complaint that each time Santander charged Mr M (or his estate) interest on the mortgage, it did so in breach of contract:*

- *Santander wrongly thought that the 2007 conditions not the 2004 conditions applied to Mr M's mortgage;*
- *As a result, Santander wrongly thought that Mr M's mortgage did not contain a cap provision at all;*
- *Whereas in fact, Mr M's mortgage – being on the 2004 conditions – did contain a*

*cap provision;*

- *Because Mr M was never notified of any change to the cap margin, Santander had no power to charge him interest at an SVR of more than 2.5% above base rate;*
- *And therefore Mr M (and his estate) was overcharged interest on an ongoing basis between 2011 and 2019.*

*This is therefore a complaint that Santander was in ongoing breach of contract. And that each month it charged interest and added it to Mr M's mortgage, it had no contractual basis for applying the rate that it did."*

I said that because it was clear that Mr M had not paid interest at the SVR until 2011 – before then, he was on a tracker and then a fixed rate.

I went on to note that Mr M's estate, represented by his executor, considered there were problems with Mr M's mortgage around the time of the 2014 correspondence. This ought reasonably to have given the executor (and so Mr M's estate) knowledge of cause for complaint by then at the latest. Under our rules, a complaint must be made by the later of six years from the date of the event, or three years from when the complainant knew or ought reasonably to have known of cause for complaint.

This meant that we could only consider the fairness of interest charged to the late Mr M's mortgage from 4 September 2014 onwards – which is six years before O first made this complaint on the estate's behalf. I did not consider the 2014 correspondence amounted to an earlier complaint. But in considering the fairness of interest charged since 2014, it would be necessary to take account of all the circumstances of the complaint, including where appropriate decisions Santander made before then but which impacted the rate charged during the period I can consider.

Our investigator went on to consider the merits of the complaint. He didn't uphold the complaint. He thought the mortgage was subject to the 2004 conditions, and therefore included a cap on the SVR. He said that when Santander increased the cap margin, it didn't notify Mr M (or his estate) – even though it was required to do so under the terms and conditions. But he didn't think that resulted in any detriment to Mr M's estate in the rate paid after September 2014, since by the time the revised SVR applied to the mortgage in 2011 Mr M was not subject to an early repayment charge and was free to move his mortgage elsewhere or take a fixed rate with Santander. But there was no evidence he'd tried to do so.

O didn't accept that. It said that had Santander notified Mr M of changes to the cap margin, he would have acted differently. It said he might have tried to sell the property – knowing he was seriously ill. He did try to do so in 2013, not long before he passed away, but without success. By not notifying him of a change to the cap margin, Santander deprived Mr M of the chance to try and sell his property sooner – causing loss to his estate.

### **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.

There is a dispute about what terms and conditions apply to this mortgage, and so before I can consider whether Santander has acted fairly and reasonably taking into account the mortgage conditions, I need first to establish what the terms and conditions are. In particular, the dispute is over which edition of Santander's standard mortgage conditions applies.

The original 2006 mortgage offer says the mortgage offer, together with the mortgage conditions booklet and the mortgage deed all form part of the terms and conditions of the mortgage. It says:

*“Further details of how interest is charged (and other conditions applying to your mortgage) are set out in our enclosed Standard Mortgage Conditions booklet”*

However, the offer does not specify which edition of the mortgage conditions was enclosed and was applied to the mortgage.

Santander says that when Mr M took a new interest rate in December 2008, his mortgage became subject to the 2007 edition of the mortgage conditions. That edition does not contain a cap on Mr M's SVR, and so Mr M's mortgage was not subject to a cap on the SVR from then on. And therefore when Santander varied the cap margin in 2008 and 2012, there was no need to notify Mr M, since the cap – and therefore the variation – did not apply to him. That's because he was not on the SVR in 2008 and his mortgage did not include a cap in 2012.

The 2008 rate switch offer says

*“Further details of how interest is charged (and other conditions applying to your mortgage) are set out in our Standard Mortgage Conditions booklet 2004 edition”.*

The 2008 rate switch offer also says that a copy of the standard mortgage conditions was enclosed with the offer, though it doesn't say which edition was enclosed.

Santander says the reference to the 2004 edition is a mistake. The 2004 edition had been superseded by the 2007 edition which should be the edition applying to this mortgage. It says that as a result, we should consider the 2007 edition as being applicable to the mortgage.

I'm not persuaded by this. The 2006 mortgage offer is silent as to which edition applies – though clearly it could not have been the 2007 edition, which had yet to be produced. So it's likely the 2006 mortgage offer was subject to the 2004 standard conditions.

And it is clear in the 2008 rate switch offer that the applicable conditions are the 2004 edition. This might be a mistake; it might not be what Santander intended. But there's no way Mr M would have known that, and I think what's important is what the mortgage offer actually says, not what Santander intended it to say.

I also think it's relevant to note that in 2014 Santander itself was confused about whether the cap margin applied – agreeing in one letter that it did, and then saying in another letter that it didn't.

I'm therefore satisfied that the 2004 edition of the mortgage conditions applies to this mortgage. That edition does contain the cap margin term, and the relevant terms say:

**2.6 “cap” means the rate of interest found by adding the *margin* to the *reference rate***

[then in a footnote – *the “cap” is relevant where you pay interest at a “variable rate”, ie a rate which is based on our “standard variable rate”. Briefly, the effect of the cap is that our standard variable rate must not exceed the “reference rate” (initially the Bank of England’s repo rate) by more than the “margin” (initially 2.50%): see conditions 10.5 and 10.6]*

2.17 “**margin**” means 2.50% or any other percentage which we substitute as the margin under condition 10.7

[then in a footnote – we use the “margin” to work out the cap]

2.28 “**reference rate**” means (a) the Bank of England’s repo rate from time to time; or (b) any replacement rate which we specify under condition 11.1

[then in a footnote - ...where we are charging interest at a variable rate (ie a rate based on our standard variable rate) we add together the reference rate and the margin to work out the cap which applies to our standard variable rate.]

2.32 “**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 rate we change in all cases where:

(a) the mortgage is a personal mortgage loan; and

(b) the terms which for the time being apply to the loan provide that the interest rate will only change if and when we decide to change it.

We can change the standard variable rate under condition 10.2 or 10.4

10.5 If we change the standard variable rate, we will ensure that the changed standard variable rate does not exceed the cap in force at the time when we take the final decision to make the change.

[there is a footnote – suppose that the base rate (initially the Bank of England’s repo rate) is 4.00% and the margin remains at 2.50%. The cap (the base rate plus the margin) would therefore be 6.50%. This paragraph would mean that we could not increase our standard variable rate to more than 6.50%.]

10.6 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.

10.7 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.*

I've reviewed the terms and conditions. They make clear that where the mortgage is on the SVR, the SVR will be subject to the cap – being the base rate plus a margin of 2.5%. But the terms also say that Santander may increase the cap at any time.

There are separate provisions allowing Santander to change the SVR itself, but O has not complained about any changes Santander made to the SVR – only that it failed to notify Mr M of a change to the cap margin, that the change to the margin was therefore invalid, and any interest charged above the initial margin of 2.5% was therefore overcharged and should be refunded to Mr M's estate. Nor has it complained about the fairness of the terms and conditions – it has expressly limited the complaint to the failure to give notice invalidating the cap margin increase. So that's what I've focussed on in this decision.

Condition 10.7 says that Santander may "*increase or reduce the margin at any time.*" It goes on to say that where it does so, it should give Mr M notice of the change (30 days' notice for an increase; 7 days for a reduction).

It's not in dispute that Santander didn't give Mr M notice on either occasion it increased the cap. The question for this complaint is whether that failure invalidated the increases.

The requirement to give notice is to give notice of a decision already made. The ability to change the cap is not conditional on the giving of notice, and failure to give notice does not invalidate the change. The purpose of giving notice is not to bring the change into force; it is to give the borrower the opportunity to exit the mortgage without charge to avoid the impact of the change.

I don't therefore think that the failure to give notice means that Santander was not entitled to change the cap. But it does mean that Santander was potentially in breach of the term of the contract requiring it to give Mr M notice of the change to the cap, once it had made the decision to make those changes.

I've therefore gone on to think about what the effect of that was. The purpose of giving notice was to enable Mr M to move his mortgage elsewhere without being subject to an early repayment charge if he wasn't happy with the change to the cap.

There were two changes to the cap – the first, in 2008, when Mr M was not subject to the SVR, and again in 2012 when he was.

I cannot consider the fairness of those increases, since they are out of time as complaints in their own right. But I can consider whether those increases led to Mr M's estate being charged an unfair rate of interest from September 2014, which is the period I can consider.

Mr M reverted to the SVR in 2011. By then, the 2008 increase had taken effect and the SVR had also been changed – though the SVR was by this time lower than it was when Mr M had taken the mortgage out. This was because Santander had reduced the SVR when base rate

reduced, but it had increased the cap margin so that the SVR fell by less than base rate fell.

From reversion in 2011 onwards, Mr M's mortgage was not subject to any early repayment charge. In 2011, Mr M could have taken another fixed or tracker rate with Santander, or moved his mortgage to another lender, if he was unhappy with the SVR. Since he'd taken a new rate in 2008, I'm satisfied he was aware he could do so.

I've said that I don't think Santander's failure to give notice of the change to the cap margin means that, contractually, the change is of no effect. But I do think failing to give notice, having increased the cap margin, meant that it was likely Santander was in breach of the contractual obligation to give notice.

The purpose of giving notice is to allow Mr M to mitigate the impact of the change by ensuring he is no longer subject to it – such as by taking a new interest rate product instead of the SVR, or re-mortgaging – without being subject to an ERC.

At the time of the first increase, Mr M was not subject to the SVR. And he wouldn't have known about the change to the cap margin, or been impacted by it, at the time. But he would have known what the level of the SVR was when he reverted to it in 2011 – and (having done so before) knew he had the option of taking a new rate rather than remain on the SVR. He was not subject to an ERC at that time.

At the time of the second increase in the cap margin, Mr M was on the SVR and therefore directly impacted by it. He wasn't told about the cap margin change directly, but he was told about an increase in the SVR that happened at the same time. Again, he wasn't subject to an ERC and had the opportunity to take a new rate, re-mortgage or sell the property.

I've taken into account that O says Mr M was unwell at this time, and that he passed away in 2013. But I've not seen any evidence that he was unable to make decisions about his mortgage – indeed, he tried to sell the property in 2013.

I've taken all that into account in thinking about whether Santander applied a fair and reasonable interest rate to the mortgage by then paid by Mr M's estate after September 2014. The failure to give notice did not, for the reasons I've given, invalidate the change to the cap margin and therefore I can't say that Santander wasn't contractually entitled to charge more than 2.5% above base rate after September 2014.

And while Santander didn't explicitly draw Mr M's attention to the cap margin increases, it did make him aware of the amount of interest it was charging more generally. Mr M chose not to move off the SVR after 2011 – knowing what he was being charged (including that the rate increased in 2012), knowing there were other options open to him, and knowing he wasn't subject to an ERC if he decided to take one of those options. The purpose of giving notice was to make Mr M aware of that; but he would have been aware of that already and didn't take steps to move off the SVR. If Santander had given Mr M notice as it should have done, I don't think that would have made any difference to the decisions he took (or didn't take) in 2011 and 2012.

As a result, I don't think the interest rate charged to Mr M's estate from September 2014 was one that was not fair and reasonable in all the circumstances. And so I don't uphold this complaint.

### **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 the estate of Mr M to accept or reject my decision before 28 July 2023.

Simon Pugh  
**Ombudsman**