

The complaint

Mr and Mrs P complain about their mortgage with Kensington Mortgage Company Limited. They're unhappy with the interest they've been charged, how Kensington has treated them in arrears – including reporting to the credit reference agencies – and they say it went back on an agreement to write off part of their arrears.

What happened

Mr and Mrs P took out a mortgage with another lender in 2007. They borrowed around £155,000 on repayment terms over 25 years. For the first three years there was a fixed rate of 8.49%, after which they would be charged 3.59% above the Barclays Bank base rate. Although technically they're different interest rates, in practice the Barclays Bank base rate has been the same as the Bank of England base rate.

In May 2016, Mr and Mrs P's mortgage was transferred to Kensington. Mr and Mrs P have been in and out of arrears for many years, and Mrs P in particular has had health problems. These issues relate to both before and after the transfer to Kensington.

Another ombudsman has already issued a decision setting out the scope of Mr and Mrs P's complaint and our ability to consider it – taking into account the time limit rules that apply to complaints. He said that Mr and Mrs P's complaint concerned four key issues:

- Fees and charges added to their mortgage balance
- How their mortgage has been reported to the credit reference agencies
- Whether interest has been applied correctly to their mortgage
- Whether Kensington agreed that it would write off part of their arrears in 2018 if given sufficient information about Mrs P's condition.

The ombudsman said that we could consider:

- The fairness of any fees and charges added to the balance – but only since 29 January 2021
- The way the account has been reported to credit reference agencies for the last six years leading up to their complaint – since November 2016
- The fairness of interest charged for the last six years leading up to their complaint – since November 2016
- What Mr and Mrs P were told in 2018 and whether part of their arrears should have been written off. Although Kensington said it had dealt with a complaint about this at the time, it wasn't able to provide a copy of the final response letter showing that Mr and Mrs P had been given a six month deadline to refer their complaint to us. The

final response letter it had only referred to a complaint about not being given a copy or transcript of the call, not about whether or not it would waive the arrears.

Our investigator went on to consider the merits of those issues. He said:

- There were no fees and charges added to the mortgage since January 2021, so Kensington hadn't acted unfairly in this respect.
- The mortgage had been reported accurately to the credit reference agencies. Where a credit record showed that the mortgage was in arrears even though Mr and Mrs P had made their monthly payment or paid more than the monthly payment, that didn't mean Kensington had wrongly reported they'd missed the payment. It meant that even though they'd made a payment their mortgage was still in arrears overall.
- Kensington had charged interest in line with the mortgage offer and terms and conditions. It had charged interest at 3.59% above base rate throughout. So it hadn't charged interest unfairly.
- He didn't think that Kensington had agreed to write off part of the arrears in 2018. He said there seemed to have been some confusion about what it had said on one phone call, but that had been clarified on another phone call. Kensington had agreed to waive its expectation that Mr and Mrs P would contribute to their arrears as well as pay their regular monthly payment, but it hadn't agreed to write off any of the arrears.

Mr and Mrs P accepted the investigator's conclusions on the first three matters, but not the last. Mr P said his recollection of the relevant phone calls with Kensington in 2018 was very clear and he was certain it had agreed to write off around £4,000 of arrears – so it wasn't fair that it hadn't done so. Mr and Mrs P asked for an ombudsman to review this part of their complaint.

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.

Following the involvement of the other ombudsman and then our investigator, the issues in this case have narrowed. The main focus of Mr and Mrs P's complaint is now on whether Kensington agreed to write off arrears in 2018 as part of a discussion with Mr P about Mrs P's health and the impact of that on their finances and wider circumstances.

In the rest of this decision, I'll therefore focus on that part of their complaint. But before I do so, I just want to confirm for completeness that I agree with the previous ombudsman about what parts of this complaint we can consider. And I agree with the investigator that there have been no fees or charges since January 2021 – Mr and Mrs P have been paying in full since then, plus contributing to past arrears. I also agree that interest has been charged at 3.59% above base rate throughout as it should have been, and that Kensington has been reporting the mortgage to the credit reference agencies fairly.

Turning to the key matter still in dispute, then, it's important first of all to understand that this part of the complaint turns on what was said between Mr P and Kensington in 2018. The recordings of these calls do not survive. That's unfortunate, because it means I can't listen to the calls for myself and understand exactly what was said. But it's not surprising given the calls were over five years ago – there's no requirement for Kensington to retain call recordings for that long and I make no criticism of it for not doing so.

What this does mean, however, is that the evidence is incomplete. While I don't have the call recordings, I have Mr P's testimony based on his recollection on the one hand, and I have the notes Kensington's staff members made at the time on the other hand.

There are problems with both of those sources of evidence. The notes are contemporaneous – they were made at the time by the staff members Mr P spoke to. But they are relatively brief and only intended to capture the essence of the conversation – they are not a full transcript of everything that was said.

And while I have no doubt that Mr P's recollection of what was said on the call is honest, genuine, and deeply held, I also have to bear in mind that it was five years ago. Human memory is fallible – in general, the longer ago an event is, the less reliable the recollection of it. Even at the time, Mr P's understanding of the conversation might not have been the same as Kensington's understanding. And memory is not the same as a recording or photograph – it's not fixed but changes over time. The act of remembering things can change what is remembered. Memories can change or fade over time, and what is remembered can be influenced by later emotions and beliefs. In other words, it's possible that what Mr P remembers is an accurate record of what was said. But it's also possible that it's not. That is not to suggest that what Mr P has told us is not his genuine recollection – I'm sure it is. These things are subconscious, not conscious. But all the same I have to bear in mind that, however genuine his recollection and however certain he is about it, his memory might not be accurate.

With that in mind, I've looked at what is recorded in Kensington's notes from the time.

On 21 June 2018, there's a record of a call from Mr P. He described their circumstances, including Mrs P's health. It was agreed that Mr P would call back with details of their income and expenditure to discuss whether a payment arrangement could be agreed.

On 25 June 2018 Mr P called back. He went through their income and expenditure. Kensington asked Mr P to send in evidence of Mrs P's medical conditions. A payment arrangement was declined because Kensington wanted Mr and Mrs P to make an initial payment before the arrangement started, which Mr P said he couldn't afford. Kensington said it would consider whether it could assist with the initial payment requirement once it had seen medical evidence.

On 4 July Mr P called to ask to what address he should ask their GP to send evidence of Mrs P's conditions.

On 26 July Kensington recorded that it had received the medical evidence. It noted a decision that it would agree to a payment arrangement waiving the need for an initial payment first. It called Mr P to discuss that with him but was unable to contact him and left a message on his voicemail.

On 31 July 2018, there is a note that Mr P called back and was transferred to the relevant team. There is no note of his conversation with that team on that day, but there is a note dated 1 August which records the conversation "yesterday" – so this note is not quite contemporaneous. The 1 August note of the 31 July conversation records that Mr P believed he had been told that Kensington would waive the arrears. Kensington said it could not waive the arrears, it had been talking about waiving the requirement for an initial payment arrangement. Kensington said it would listen to the 25 June call recording to check what was said and call Mr P back.

On 16 August, Kensington called Mr P without success, leaving a voicemail message.

On 4 September, Kensington left a further message for Mr P, as it wanted to discuss their income and expenditure further – in particular, whether there was any way to reduce their discretionary expenditure.

On 21 September Kensington spoke to Mr P. A further payment arrangement was agreed, waiving the requirement for an initial payment of £4,929.72. The notes record that Mr P said he'd previously been told that Kensington would waive the payment arrears on the mortgage in light of Mrs P's condition, and only recover the fees and charges that had been added to the account. Kensington had listened to the 25 June call and didn't agree that Mr P had been told that it would waive the arrears – it had said it might be able to waive the requirement for an initial payment subject to the medical evidence.

Kensington agreed at this time it would send Mr P a transcript, but not a recording, of the relevant call. Kensington no longer has a copy of the transcript. Neither do Mr and Mrs P – they've provided us with transcripts of some calls, but these are of much more recent calls where Mrs P reiterates what she believes Mr P was told; they're not of the crucial calls themselves. So these transcripts are evidence that Mr P believes he was told that Kensington would waive the arrears, but they are not evidence – beyond his recollection – that it actually did say that.

On 25 February 2019, Mrs P called and said that Mr P had been told Kensington would waive the arrears. Kensington said it had not agreed to waive the arrears, it had offered to waive the requirement for an initial payment. There are other later calls and emails which also confirm that Mr P has been consistent in his recollection of what he was told.

Mr P's recollection is that he was told that Kensington would agree to write off the arrears of around £4,000 (having more recently seen the contact note I referred to above following a subject access request, he now says £4,929.72) subject to receiving evidence of Mrs P's condition because of a relationship Kensington had with a charity working in the field.

That's the extent of the evidence I have. I've said that Kensington hasn't retained copies of the call recordings – that's not unusual given the passage of time. It seems it did prepare a transcript of the relevant calls around September or October 2018, as part of Mr P's complaint about what he'd been told. Or at least, it told Mr P it would prepare a transcript. There's no evidence that a transcript was ever actually prepared, or that it was sent to Mr P if it was. Nor does Kensington now retain a copy of the transcript.

That's unfortunate. I don't criticise it for not retaining the call recordings. But it ought to have prepared the transcript, it ought to have sent it to Mr P and it ought to have retained a copy on its file. There's no evidence it did any of those things.

As a result, the only evidence I have is Mr P's recollection, and Kensington's notes. The evidence is incomplete and unsatisfactory. But I have to do the best I can with what's available – deciding, on the balance of probabilities, what I think is most likely to have happened.

It's unfortunate that Kensington didn't prepare or retain the transcript. But I don't draw any inferences from that – I don't think it's evidence that it deliberately concealed the evidence of what was said for sinister purposes. I think it's more likely to be an unfortunate administrative failing.

Mr P has been clear and consistent in his recollection (other than, having seen the SAR, becoming more precise about the amount) since shortly after the conversation. It's recorded in Kensington's notes from 2018 that he understood then that he'd been told Kensington would waive the arrears. So his recollection is not recent; it's been consistent from shortly

after the conversation onwards.

But just because his recollection has been consistent, that doesn't necessarily mean it's also accurate. On balance, I think it's not.

The crucial conversation appears to be the 25 June 2018 call. That call was a discussion about the arrears situation, about Mr and Mrs P's finances, and about whether there was anything Kensington could do to assist them.

Afterwards, Mr P believed he'd been told Kensington could waive the arrears, subject to evidence of Mrs P's condition. Kensington didn't accept that it had said that – and the notes record that it checked the call recording to confirm it hadn't said that. It clarified that to Mr P on 21 September.

On balance, I'm not persuaded that Kensington agreed to waive the arrears. That's not what its notes say it agreed. That's not what its notes say was said on the 25 June call, having checked the recording. And, importantly, the arrears weren't around £4,000, or precisely £4,929.72, at this time. At the time of the 25 June call, the arrears were around £9,000. The notes were made contemporaneously, or at least by the next day, so I think they're likely to broadly reflect Kensington's understanding of what was discussed.

If – as Mr P said on the 21 September call he believed he'd been told – Kensington had said it would waive the arrears and only collect the arrears fees, the sum to be waived would be around £9,000, not £4,000 or £4,929.72.

At this time, the mortgage was in substantial arrears. Kensington was considering going to court to repossess the property. Before it would agree to an arrangement to clear the arrears instead of going to court, it needed to know that an arrangement would be affordable – hence asking about income and expenditure. And it would need Mr and Mrs P to make a substantial payment to reduce the arrears to an acceptable level – an “initial payment” – before it would agree to an arrangement to repay the rest.

I think what happened was that Kensington explained this to Mr P. Mr P said that he and Mrs P couldn't afford to make the initial payment – £4,929.72 – to reduce the arrears down to a level that Kensington would agree to accept repayment by arrangement. He explained Mrs P's condition. Kensington then agreed it would consider waiving the requirement for the initial payment, subject to receiving evidence of Mrs P's condition.

The later notes following Kensington's review of the call support this conclusion. So does Mr P's recollection that the amount being discussed was around £4,000 not around £9,000. And it's consistent with Kensington's policy at the time.

It's possible – and I think most likely – that there was a misunderstanding. Mr P thought Kensington was offering to write off the arrears, or £4,929.72 of the arrears, but Kensington was actually only offering to waive the requirement to make an up-front payment before agreeing to a payment arrangement. It wasn't offering to write that sum off altogether. It would be collected as part of the payment arrangement, rather than being paid first as a condition of agreeing to the arrangement.

That misunderstanding was corrected by Kensington on the 21 September call. But by then Mr P had become convinced by his memory of what had been said – whether because he'd misremembered it initially, had misunderstood what Kensington had told him, or because Kensington hadn't explained it clearly enough – and he didn't accept the correction he was given on 21 September. If Kensington had then provided the transcript of the call as it said it would, it might be that Mr P would have accepted his recollection or understanding was

mistaken. But it didn't, and Mr P continued to believe what he thought he'd been told in June rather than the correction he was given on 21 September.

Kensington should have provided the transcript. It may be that it should have been clearer in explaining things on the 25 June call. But I'm not persuaded that it actually agreed to write off the arrears – whether in full or in part. And even if it did mislead or confuse Mr P about its intentions on 25 June, the correct response to that would be to correct the confusion – not proceed as if it was true. It should have ensured Mr P understood what was actually happening, not implemented his mistaken belief. It did that on 21 September 2018. I don't think it would be fair and reasonable to require Kensington to write off the arrears when that was never what should have happened.

I understand Mr and Mrs P will be disappointed by this conclusion. But I hope they will understand why I've reached it, and why I think that Mr P's recollection of what he was told – while honest, genuine, and strongly believed – is mistaken.

My final decision

My final 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 P to accept or reject my decision before 3 January 2024.

Simon Pugh
Ombudsman