

The complaint

This complaint's about a mortgage Mrs and Mr M hold with Santander UK Plc. The essence of the complaint is that during a defined period, the rates of interest Santander charged were higher than the mortgage contract allowed it to charge. Mrs and Mr M's complaint is presented by a third party intermediary I'll refer to as C.

What happened

The broad circumstances of this complaint are known to Mrs and Mr M and Santander; they've been set out in correspondence between both parties. I'm also aware that the investigator issued a comprehensive response to the complaint which has been shared with all parties, and so I don't need to repeat all of the details here.

Instead, I'll provide a brief summary of the key points, in my own words and then focus on the reasons for my decision. If I don't mention something, it won't be because I've ignored it. It'll be because I didn't think it was material to the outcome of the complaint.

Mrs and Mr M's mortgage started in 2001, initially with a lender I'll call A, which later became part of Santander. For much of its life, the mortgage had interest rate "products" attached to it, the terms of which specified the rate to be charged. However, during a period between 1 March 2012 and 2 February 2017, no interest rate product was attached, and instead interest was charged at Santander's standard variable rate (SVR).

Following a data subject access request made to Santander in 2021, C submitted a claim for over-charging on Mrs and Mr M's behalf. The claim was supported by C's own calculation setting out the interest rates it believed Santander should have been applying during the defined period. The claim was for the difference between what Santander charged and the alternate sum C believed it was entitled to charge, plus statutory interest on the claimed overpayments.

Santander rejected the complaint, and it was passed to our service. Our investigator's opinion was that our remit was confined to looking into the six-year period leading up to the start date of the complaint. As the complaint had started on 3 March 2021, he explained that this meant his consideration of the claimed over-charging would run from 3 March 2015, rather than from 1 March 2012.

In the same document, the investigator also set out his reasons for not recommending the complaint be upheld. Briefly, he said C's audit relied on a notional interest rate that bore no relation to Santander's SVR, but in any event, he was satisfied that Santander had varied its SVR fairly during the period covered by his investigation. C asked for Mrs and Mr M's complaint to be referred to the ombudsman.

By way of a jurisdiction decision dated 21 September 2023, I confirmed that my remit to consider the merits of this complaint was confined to the interest charging events that took place after 3 March 2015.

What I've decided – and why

I'll start with some general observations. We're not the regulator of financial businesses, and we don't "police" their internal processes or how they operate generally. That's the job of the Financial Conduct Authority (FCA). We deal with individual disputes between businesses and their customers. In doing that, we don't replicate the work of the courts.

We're impartial, and we don't take either side's instructions on how we investigate a complaint. We conduct our investigations and reach our conclusions without interference from anyone else. But in doing so, we have to work within the rules of the ombudsman service, and the remit those rules give us.

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

Although my remit to consider interest-charging events runs for the six years onward from 3 March 2015, Mrs and Mr M's claim only runs to 2 February 2017 when they took out a new fixed rate and stopped being charged interest at SVR. The 2017 deal was itself superseded by another fixed rate deal in 2019 which is still current. In respect of both the 2017 and 2019 agreements, I'm satisfied interest has been charged correctly at the relevant fixed rate. So I next turn my attention to the SVR interest-charging events between 3 March 2015 and 2 February 2017.

The starting point here is the agreement Mrs and Mr M entered into for the interest rate product immediately preceding the mortgage going onto SVR. That was in January 2007, when Mrs and Mr M accepted a rate of 6.25%, fixed until 2 March 2012. That agreement set out, in section four, under the heading **Description of this additional borrowing**, what would happen when the fixed-rate product ended. It said:

"After 02/03/212, interest will be charged at [A's] standard variable rate, currently 7.09%, for the remaining term of the mortgage. Further details of how interest is charged (and other conditions applying to your mortgage) are set out in our Standard Mortgage Conditions."

The next time an interest rate product was applied to Mrs and Mr M's mortgage was, as I've said, 2 February 2017. That being the case, I'm satisfied that the interest rate that Santander was permitted to charge under the terms of the mortgage between 3 March 2015 and 2 February 2017 was its SVR.

Santander's SVR was 4.74% on 3 March 2015; it fell to 4.49% on 3 September 2016, remaining at that level until 3 December 2017, nine months after the end date of Mrs and Mr M's overcharging claim. So the contractual position is that Santander could charge interest at 4.74% between 3 March 2015 and 2 September 2016, and at 4.49% between 3 September 2016 and 2 March 2017.

I've looked at the audit C submitted in support of Mrs and Mr M's claim; it has used different rates as the basis for its calculation of how much interest it says should have been charged; specifically 2.34% and 2.09%. I can't see where C has explained why it used those rates rather than the relevant SVR. No argument or evidence was given to support the use of alternative rates when C responded to the investigator's view of the complaint asking for the case to be reviewed by an ombudsman.

Having found that Santander was contractually entitled to charge interest at its SVR between the relevant dates, and having set out what the SVR was during the period under consideration, I've next considered whether the rates themselves were fair.

One of the considerations that I am required to take into account is relevant law. I consider that the application of the Unfair Terms in Consumer Contracts Regulations (UTCCRs) to the relevant terms in this case falls into that category of relevant law. The way the UTCCRs apply to the relevant terms of Mrs and Mr M's mortgage contract is ultimately a matter for the courts. But they are a relevant consideration I must take into account when determining what is fair and reasonable in all of the circumstances of this case.

The crux of this is whether any of the terms, contrary to the requirements of good faith, cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. As part of this, relevant considerations are:

- the extent to which the terms are sufficiently clear and transparent;
- the extent to which there were any significant barriers to Mrs and Mr M being unable to exit the contract.

At a general level, interest variation clauses such as those that applied to Mrs and Mr M's mortgage have a legitimate purpose and are common in financial services consumer contracts, particularly those of long or indeterminate duration, such as mortgage agreements.

A fair variation term can benefit both consumers and lenders, by providing flexibility and a wider choice to consumers and enabling firms to provide competitively priced products, knowing they can vary the interest rates they charge to reflect changes in circumstances, particularly in their own cost of funding. A reversion rate also permits lenders to provide for future changes that justify increases in the rate, and a lender's own costs of funds are by nature difficult to foresee.

The time period I'm looking at (3 March 2015 to 2 February 2017) followed on from a time of significant change in the wider market as a result of the financial crisis in 2008/09. This had impacted on the funding costs of businesses and was reflected in changes to a number of lenders' interest rates charged across the market at the time and subsequently.

I'm also mindful that the FCA has noted the adverse impact the financial crisis had on lenders' costs during that period, and that it hasn't seen that SVR variation terms have generally been relied on unfairly to cause widespread detriment to consumers (see for example the May 2018 Guidance Consultation GC18/2 Fairness of Variation terms in financial services consumer contracts under the Consumer Rights Act 2015 paragraphs 2.8 to 2.10).

Santander has provided the Financial Ombudsman Service with detailed information about the reasons why it varied its SVR in the way that it did. The information Santander has given us is commercially sensitive, so can be treated as confidential. The information has been reviewed in line with Santander's mortgage documentation, relevant law and regulations.

I've considered whether Santander acted fairly overall. Having done so, I'm satisfied it varied the SVR in line with the mortgage terms and conditions and that Santander exercised those terms fairly. This means that I'm satisfied Santander did not overcharge interest on Mrs and Mr M's mortgage account between 3 March 2015 and 28 February 2017.

Whilst the base rate had reduced significantly leading up to this period, the costs to lenders of funding their businesses changed, as did their prudential requirements. These are made up of several factors that are not directly linked to base rate. There was a substantial increase in risk to all lenders before and during that period, and that led to them having to mitigate that risk in different ways. So there are objectively justifiable reasons why Santander

did not always reduce the applicable rate at the same level as the reduction in Bank of England base rate.

Overall I am not persuaded there is any basis to say that the variations Santander made to its SVR resulted in Mrs and Mr M being charged an unfairly high rate of interest on their mortgage during the period I can consider. Nor does the evidence lead me to conclude that the interest rate applied during that period was unfair for any other reason.

As regards clarity and transparency, I accept that it's possible a court may find the terms to be unfair under UTCCR but this in itself is not determinative of this complaint. I also need to consider whether the application of these terms has led to Mrs and Mr M being treated unfairly. And for the reasons set out above, I don't think this is the case.

Lastly, there was no early repayment charge applicable to Mrs and Mr M's mortgage account at the point it reverted to SVR. So, if Santander had exercised its rights as set by the variation terms, and Mrs and Mr M were unhappy with the decisions it made, they were free under the contract to seek a re-mortgage with another lender. In saying that, I am aware of the possibility that there may have been external factors that might have impacted on Mrs and Mr M's ability to re-mortgage to another lender. But if there were, they will not have been imposed by Santander.

My final decision

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

My final decision concludes this service's consideration of this complaint, which means I'll not be engaging in any further consideration or discussion of the merits of it.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs and Mr M to accept or reject my decision before 24 October 2023.

Jeff Parrington

Ombudsman