

complaint

Mr and Mrs T complain that Santander UK Plc has failed to provide validation of the mortgage debt, verify its claim for payment or show them a copy of a lawfully-binding contract between them. Mr T has conducted the complaint throughout.

background

In 1986 Mr and Mrs T granted a mortgage over their property to Santander as security for a loan of £34,337.51. In 2000 they switched their mortgage account to a different product. On each occasion Mr and Mrs T signed the documentation Santander requested.

In May 2013 arrears began to accrue on the mortgage account. The arrears are currently about £3,800. Santander has started possession action.

Also in 2013 Mr T started to raise questions about the validity of the mortgage. He complained to us about a Power of Attorney and in February 2014 an ombudsman issued a final decision on that matter.

Mr T has now questioned the validity of the mortgage contract. Our adjudicator considered the complaint but didn't recommend it should be upheld. He explained to Mr T that only a court is able to decide if a contract is valid or enforceable. But he was satisfied that it was fair and reasonable for Mr and Mrs T to repay the money they borrowed from Santander.

Mr T didn't agree with the adjudicator's findings. Mr T says that money is created when you sign a piece of paper agreeing to pay, and so Santander has never lent him any money.

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'm familiar with the arguments Mr T has put forward in support of his contention that Santander has never lent him any money. These theories are discussed on debt-avoidance websites that advocate 'freeman on the land' strategies about how to avoid liability for debts that have been legally incurred. The academic paper – downloaded from the internet – which Mr T has provided in support of his argument that there is no such thing as money is one that I have seen before and so I'm familiar with its contents.

At its most basic, the theory is that lenders use borrowers' Powers of Attorney (POA) or their signatures to create financial instruments, and this "money" is then "lent" to other mortgage borrowers. The argument is that no actual money has been lent and there is only false debt created out of thin air using the POAs borrowers have given to create "the Note". So, the theory goes, no actual mortgage debt exists and there's nothing to be repaid. But this theory is flawed and incorrect – there is no legal or factual basis to it whatsoever.

There is nothing wrong in Santander borrowing in the money markets. All banks do this. Santander doesn't use – or need to use – mortgage borrowers' signatures or POAs to borrow money. It couldn't use a borrower's signature or a POA for this purpose anyway.

Santander as legal owner of the mortgage is entitled to collect the payments due from Mr and Mrs T under the mortgage agreement. This is the case whether or not the money lent

to them was originally borrowed by Santander from another financial institution, or if Santander has securitised the debt to a third party. This is also the view taken by the courts, most recently in two cases decided in January 2014 (*Sinclair v Accord Mortgages Limited* and *Overson v Southern Pacific Mortgage Ltd t/a London Mortgage Co*).

In any event, Santander's activities in the wider money markets are outside the remit of the Financial Ombudsman Service. This would come under the regulatory framework of the FCA, the Prudential Regulation Authority and ultimately the Bank of England.

Mr T has also misunderstood the legal position relating to the validity of the mortgage. It's a popular misconception, repeated widely on internet forums, that a mortgage deed has to be signed by both the borrower and the lender, or that the borrower's signature has to be witnessed by two people. In the absence of this, the argument goes, the mortgage is invalid. But this is incorrect and is based on a misunderstanding of the law.

In an unreported case in Preston County Court decided in July 2013 (*TMB vs Lamb*, a copy of which is included with this final decision) a borrower raised the argument that the mortgage documentation didn't comply with the required legal formalities and was therefore void. This is one argument Mr T has raised here and so it is important to look at what the court said about this.

Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (LP(MP)A) provides that a contract for the disposition of an interest in land must be made in writing, incorporating all the terms of the contract, and signed by each party to the contract. Section 27 of the Land Registration Act 2002 (LRA) provides that if a disposition is required to be completed by registration then it does not operate at law until the relevant registration requirements are met; and that the grant of a legal charge (or, a mortgage) is a disposition which is required to be completed by registration.

In the case I refer to, the borrower's argument was that her mortgage was "null and void for want of statutory formality" because it was signed by the borrower only and not the lender (as is the case with the vast majority of mortgage deeds). Her argument was that it did not comply with the LP(MP)A. Therefore, according to her, the mortgage didn't exist at law and so could not be completed by registration as required by the LRA, and so it was not binding on the borrower.

But the judge held that the borrower's argument was "illusory" and "false". He was concerned that the spreading of these dangerous arguments on the internet could mislead borrowers into wrongly thinking that their mortgage was not binding upon them and that in the event of default they would not be in danger of losing their homes.

The relevant statutory provision for a mortgage, section 53 of the Law of Property Act 1925, does not require every term to be included in a document signed by both parties; rather the document just needs to be signed by "the person creating or disposing of the interest" (i.e. the mortgagor/borrower). The judge also explained that section 27 LRA does not go so far as to say that a disposition required to be completed by registration (such as a mortgage) is created by registration and that it does not therefore exist or operate in equity before registration.

So as far as the law is concerned, there is no merit to Mr T's argument that there isn't a valid mortgage agreement with Santander. Mr and Mrs T signed the mortgage deed and in doing

so acknowledged they received the money. That is all that is required for the granting of a valid mortgage.

I should also explain that mortgage securitisation falls outside the remit of the Financial Ombudsman Service – it falls within the regulatory framework of the Financial Conduct Authority, the Prudential Regulation Authority and ultimately the Bank of England.

Mr and Mrs T say their account is “in dispute” – something which is encouraged on internet forums where people are urged to challenge the validity of their mortgages. But the mortgage contract requires Mr and Mrs T to make their monthly repayments.

I’m satisfied there is a valid mortgage between Mr and Mrs T and Santander. This means that I don’t uphold their complaint.

Mr and Mrs T are now faced with possession proceedings – and I understand a hearing is due to take place imminently. I can see no basis upon which it would be fair or reasonable for Santander to delay recovery action any further. Arrears have been accruing on the account for about two years. In the absence of any payment proposals, Santander is entitled to take possession proceedings.

I would urge Mr and Mrs T to take legal advice from a qualified solicitor – rather than from internet forums – before they think about raising with the court any of these ‘freeman on the land’ arguments they have put forward here about why they think their mortgage isn’t valid. I don’t know of any case where a borrower has been successful in trying to defend possession proceedings using these arguments. A duty solicitor may be available to give advice and to represent Mr and Mrs T at court on the day of the hearing.

I appreciate Mr T believes his mortgage isn’t valid. But I can’t emphasise strongly enough the seriousness of the position Mr and Mrs T are now in. They are in danger of losing their home if they’re unable to come to an arrangement with Santander about repaying the mortgage arrears. If Mr and Mrs T are suffering financial hardship and need advice about debt management, they might wish to contact StepChange, the Money Advice Service or Citizens Advice. We can provide contact details for those organisations, if Mr and Mrs T would like us to.

my final decision

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

Under the rules of the Financial Ombudsman Service, I am required to ask Mr and Mrs T to accept or reject my decision before 13 July 2015.

Jan O’Leary
ombudsman