DRN-4717529

The complaint

Mr C's complaint against HSBC UK Bank Plc ('HSBC') has been previously addressed by our service – first in 2019 and then in 2020. No decision was ever issued, but adjudication/investigation views were issued in both years, which upheld the complaint and which were agreed by the parties to the complaint. Unfortunately, matters related to the practicalities of executing redress have meant the case remains unresolved, in terms of redress. It is for this reason that the parties and the case have returned to us, and that the case has been referred for a decision.

Mr C is a member of a group held Self-Invested Personal Pension ('SIPP') administered by Curtis Banks ('CB'), previously Suffolk Life. The complaint is led by him. It is about the interest rate applied to a 2016 loan from HSBC to the SIPP, and for which the SIPP's commercial property asset is security. The main allegation was that HSBC applied the wrong interest rate to the loan. This was upheld in our views, and that outcome was accepted by HSBC.

HSBC continues to accept the outcome, so the merits of the complaint are concluded and are not in dispute. Questions about our jurisdiction were raised around the times of our views, but they too have been addressed and concluded. The only matter to resolve is redress.

What happened

Further background is summarised as follows:

- HSBC's 6 October 2016 loan offer was based on the interest rate of 3.39% (fixed for 10 years); the offer was accepted and agreed; however, the need to complete and submit a specific document was raised thereafter; that was not completed until around the middle of November 2016; HSBC revised the interest rate, to 3.84%, on the grounds that the October loan offer had expired by the time the document was executed (in November); it applied this interest rate to the loan; Mr C (and his SIPP co-members) disputed the additional 0.45% interest; our view in October 2019 agreed with Mr C and upheld the complaint; we set out redress aimed at refunding, with interest, the additional interest payments, returning the interest rate to 3.39% (fixed for the relevant period) and adjusting the loan and its balance to reflect the originally agreed interest rate; HSBC accepted this outcome in the same month.

- In January 2020 Mr C informed HSBC about an issue that rendered our view's redress provisions unworkable. He said one of the SIPP's co-members has a Lifetime Allowance Election that could be jeopardised by application of the provisions. In the following month CB wrote to HSBC with a similar message, asking it to clarify how it intended to arrange redress without breaching HMRC requirements and without compromising any SIPP member's position.

- The parties, and the case, returned to us thereafter and in August 2020 we issued another view revising the redress provisions. We noted that –

"*One of the members of the SIPP syndicate has in place Fixed Protection 2016 (FP16) in order to protect his lifetime allowance regarding his pension funds. Therefore, if HSBC were to make a credit adjustment to the mortgage loan this would invalidate the member's FP16*."

and we told HSBC to do as follows –

"… *refund the difference in mortgage payments made by* [Mr C's] *SIPP from the date he was eligible for the lower interest rate, plus interest on the difference at Bank of England Base Rate from the date of each mortgage payment to the date of payment of redress.*

Your payment should allow for the effect of charges and any available tax relief. You shouldn't pay the compensation into the pension plan if it would conflict with any existing protection or allowance.

You should also calculate what the current balance of the mortgage would be on the date of payment if the SIPP had been paying the lower mortgage interest rate, and as you cannot adjust the balance then pay each individual SIPP member their equal share.

In addition to this you should also calculate the incorrect interest to be charged on the unadjusted credit balance for the remainder of the loan term and share this amount among the individual SIPP members directly too."

- Around October 2020, HSBC considered an alternative approach, involving a new loan proposal. The SIPP members raised concerns about it. This alternative approach was explored further into 2021 and 2022, but by April 2023 grounds arose/were identified which meant it was not viable, so it was abandoned. HSBC returned to considering the idea of adjusting the existing loan. It sought and obtained an opinion from CB, in which CB said it believes such an adjustment is unlikely to affect any protection held by the relevant SIPP member.

- Matters then reached what has been described as a *standstill*. The SIPP members asked for an *assurance* from CB that the relevant member's FP16 would not be affected by an adjustment to the existing loan. In response, CB shared its belief on the matter (the same belief it conveyed to HSBC), but it said it could give neither advice on it nor the assurance sought by the members, so it directed them to take independent advice. HSBC shares a similar position. It too does not give any assurance on the matter.

- The parties, and the case, returned to us again. We issued another view earlier in this year which broadly endorsed the redress provisions in our second view (from August 2020), using the approach of redressing the case outside the SIPP [to avoid compromising the SIPP and/or its members' positions]. In this respect, we made, and then corrected/withdrew, an addition which suggested a loan capital adjustment. We confirmed to the parties that the suggestion was unintended and is not to be applied.

- HSBC raised concerns about the provisions, including its consideration that refunding the overpaid interest would or could amount to a return of capital and therefore an adjustment of the loan (which is what is to be avoided). Feedback from Mr C included an opinion from one of the SIPP members that 8% should be used for interest on the refund, instead of the Bank of England base rate (as used in our redress provisions).

- The conducting investigator considered that it will be in the parties' interests to have an Ombudsman's decision in the case that hopefully concludes it. Mr C echoed the same sentiment, given that despite our 2019 and 2020 views a conclusion to the case has remained outstanding for over three years. He also considered whether (or not) an Ombudsman will address responsibility for this delay, and he noted that, on his part, he had dealt with matters promptly throughout.

- The investigator and HSBC liaised with each other to clarify, with evidence, the following – the interest rate for the loan was corrected (to 3.39%) in November 2019 and has been applied since; however, the loan repayment amount (based on the 3.84% interest rate) has continued unchanged; this means the difference, since November 2019, has gone towards repayment (or over repayment) of the loan capital, to date. HSBC said it intends to correct the loan repayment amount once the case is concluded.

- HSBC also made, most recently, a final proposal, as follows – a refund of the incorrectly charged interest payments (up to when the interest rate for the loan was corrected); and correction of the ongoing loan repayment amount (up to expiry of the fixed term period) based on the existing loan balance and on 3.39%. It says this ensures the loan itself is not adjusted or altered, that only the repayment amount is and that the loan retains the benefit of the capital over repayments that have been in effect since November 2019.

The matter was referred to an Ombudsman.

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 repeat what I stated at the outset of this decision – our jurisdiction for the complaint has been addressed and concluded and the same applies to the merits of the complaint, we have jurisdiction to consider the complaint and we have upheld the complaint, and the parties accept both of these outcomes, so neither is in dispute. As such, the only matter I will be addressing is redress.

The reason our 2019 redress provisions did not conclude the case is because the relevant SIPP member's FP16 meant those provisions could not be applied without the risk of losing that protection. The parties considered that this risk was associated with the notion of adjusting or altering the existing loan [capital] to the SIPP, and the potential HMRC related ramifications of that in terms of the FP16. Such an adjustment was part of our 2019 redress provisions, that is why the parties did not implement it.

I note HSBC's reference to CB's more recent opinion that the risk is now unlikely. However, it appears that CB is not prepared to give an assurance to the SIPP members in this respect. I can understand this, given that CB is in no position to give assurances on behalf of HMRC or on what HMRC may or may not do. The same applies to HSBC, and the same applies to me in this decision. I understand why Mr C and his joint SIPP members have asked such an assurance, but other than HMRC itself, it could be said that no other party can reasonably be expected to give it.

However, it is possible to consider a way to reach a basis for redress that seeks to avoid the aforementioned risk and that does not alter or adjust the existing loan capital. It appears to me that this was achieved in our second view (from August 2020), which we recently endorsed. The redress description, as I quoted above, prescribed –

- That the refund of the incorrect and excess interest payments should not be made "… *into the pension plan if it would conflict with any existing protection or allowance*". In other words, it should be settled outside the SIPP, so this *first element* of the redress provisions appears to carry no risk of altering or adjusting the SIPP loan capital. I appreciate that we previously did not specify the end date for calculation of the refund, but it was implicit that the refund would be calculated up to when the interest rate was corrected – which has been confirmed as November 2019. Furthermore, in terms of applying this end date, it seems fair and sensible to do so on the condition that HSBC shows and proves to Mr C (and his joint SIPP members) that the interest rate was corrected in November 2019.

- That compensation for the difference in the loan balance, at the time of settlement, between what it factually is and what it would have been had the lower and correct interest rate of 3.39% been applied, should be paid directly to the SIPP members because the loan amount cannot be adjusted. This also means settlement outside the SIPP, so it too appears to carry no risk of altering or adjusting the SIPP loan capital.

  Before moving to the last part of the 2020 provisions, this *middle element* of the redress provisions requires some comments, in light of facts that have subsequently been confirmed. At the time, it was set out to repair the position in which more from each loan repayment had been servicing the interest than should have been the case, due to application of the higher and incorrect 3.84% interest rate. We now know that stopped in November 2019, and that since then the correct 3.39% interest rate has been applied, so the remainder part of each loan repayment has gone towards servicing the capital. Hence the capital over repayments – which essentially came from the 0.45% difference – that HSBC has highlighted.

  For this reason, and provided that HSBC can transparently show and prove the November 2019 correction to Mr C and his joint SIPP members, this middle element is potentially redundant. Since November 2019 the same loan balance *difference* that we sought to compensate Mr C (and the others) for has already been applied to the loan's capital balance (to reduce that balance), so there is nothing to compensate for.

  Having said the above, and for the sake of completeness, I do not consider that this middle element of the redress provisions should be discarded altogether, not until it is shown and proven to Mr C (and the others) that the November 2019 interest rate correction happened and that the correction has resulted in over repayments of loan capital since then. As such, an option to apply or disregard this middle element, depending on the outcome of this condition, seems sensible.

  In any case, I repeat, this middle element also sits outside the SIPP and appears to avoid the risk of adjusting or altering the SIPP loan capital.

- That compensation for the incorrect interest that will continue to be charged on the unadjusted loan capital for the remainder of its term should also be paid directly to the SIPP members, outside the SIPP. Again, this appears to avoid the risk of adjusting or altering the SIPP loan capital.

  The obvious observation to make about application of this *last element* of the redress provisions to the facts is that, based on HSBC's relatively recent confirmation and the evidence it has shared with us, the interest rate had already been corrected in November 2019 and the correct interest rate has been applied since. It has also confirmed that the correct interest rate will continue to be applied for the remainder of

the loan's fixed term. This perhaps explains its final proposal that it need only change the loan repayment amount to reflect the November 2019 interest rate correction – which will also have the effect of stopping the capital over repayments.

This does not appear to have been clear at the time of our 2020 view, hence our inclusion of the above last element of redress. It seems pragmatic and sensible that the same approach I mentioned above should apply here. This last element of the redress provisions should not be discarded altogether, not until it is shown and proven to Mr C (and the others) that the November 2019 interest rate correction happened, that the correct (3.39%) interest rate has been applied to the loan since then and that it will continue to be applied to the loan for the remainder of its fixed term. As such, there should be an option to apply or disregard this last element, depending on the outcome of this condition.

Based on the above analysis, HSBC's final proposal does not, in real terms, seem to be remote to our 2020 redress provisions. It has made the proposal based on its position about the November 2019 interest rate correction and the effects of that. At first sight, the differences were the compensation we sought to convey to Mr C and his joint SIPP members through the middle and last elements of our redress provisions, but based on the November 2019 correction and on the conditions I mentioned above, it appears to be the case that the benefits of that compensation have already been applied.

Mr C and his joint SIPP members have raised the matters of interest on the refund/first element of the redress, and responsibility for the delay in concluding the case. I am not persuaded to change our use of the Bank of England base rate and I do not consider I have been given reason to do so. But for the FP16 issue, the refund could have been applied to the SIPP instead of Mr C (and the others), so I would not say that they, personally, have been deprived use of the refund amount. The SIPP has (in the context of the SIPP loan), but for obvious reasons the refund is not to be applied to the SIPP loan. On balance, I consider that we were right to use the Bank of England base rate previously and that it should be retained, for the calculation of interest on the refund.

With regards to the delayed resolution of the case, I do not believe it will be helpful or fair to single out any party for being responsible. All parties were engaged in trying to ensure redress could be concluded without creating new problems for any of the SIPP members. That was reasonable. Even if, with hindsight, Mr C considers that things could have been done better or quicker, or that the matter could have returned to us earlier, I am still not persuaded, in the circumstances, that a single party should be held wholly or mainly responsible for the delay in concluding the case. I note that our initial view awarded Mr C an amount for the trouble and inconvenience he had been caused, and submissions from HSBC suggest that has already been paid to him. If not, it should now do so.

Putting things right

Fair Compensation

In assessing what would be fair compensation, my aim is to put Mr C (and his joint SIPP members) as close as possible to the position they would probably be in had HSBC applied the original and correct loan interest rate at the outset, and since. This was the same approach in the views we have issued.

The redress provisions below are in line with our August 2020 view. However, for the reasons explained above and because of what appears to be new information since that view, a conditional calculation end date will be referred to for the first element of the provisions and conditions will be applied to determine the application or otherwise of the

middle and last elements. I have described the three elements of redress in my own words, but they are fundamentally the same as set out in the August 2020 view, plus the conditional updates required due to the new information we have.

What must HSBC do?

To compensate Mr C (and his joint SIPP members) fairly, HSBC must do the following:

- First element of redress –

  Calculate the total loan interest payments made in the SIPP loan based on the incorrect 3.84% interest rate, from the first payment to the last payment before the interest rate was/is corrected. If HSBC shows and proves to Mr C (and his joint SIPP members) that, as facts, the interest rate correction happened in November 2019 and that the correct (3.39%) interest rate has been applied since, then the calculation end date will be the date of the last payment that was based on the 3.84% interest rate, otherwise the end date will be when the interest rate correction was or is actually made and applied. The result is 'A'.

  Calculate the total loan interest payments that would have been made in the SIPP loan based on the correct 3.39% interest rate, for the same period used above. The result is 'B'.

  Calculate A minus B, plus interest (at Bank of England Base Rate) calculated on the difference at and from the point of each interest payment during the same period used above and up to the date of settlement, and including allowance for the effect of charges and any available or relevant tax relief. The result is 'C'.

  Pay C directly to Mr C and his joint SIPP members. Do not pay C into the SIPP, for the reasons we have all been addressing since 2020, and as summarised above.

- Middle element of redress –

  Calculate the difference in the SIPP loan capital balance, at the time of settlement, between what it is and what it would have been had the lower and correct interest rate of 3.39% been applied to it throughout.

  Pay the difference to Mr C and his joint SIPP members.

  Do not pay the difference to Mr C and his joint SIPP members if HSBC can show and prove to them that, as facts, the SIPP loan interest rate was corrected in November 2019, that the correct interest rate – 3.39%, not 3.84% – has been applied to the loan payments since and to date (and to the date of settlement), and that even though the loan payment amount(s) has remained unchanged the 0.45% difference (between the interest rates) paid within each and every loan payment since the correction has gone towards servicing the loan capital. If these conditions are met, that means the difference in the SIPP loan capital balance referred to above has already been redressed, so no further compensation is required.

- Last element of redress –

  If, as facts, the SIPP loan interest rate has not been corrected (to 3.39%), if the correct interest rate has not been applied to the loan, and if the correct interest rate will not be applied to the loan for the remainder of its fixed term, HSBC must calculate the total of all the incorrect and excess interest payments that will be

applied to the unadjusted loan capital balance for the remainder of its fixed term and pay that amount to Mr C and his joint SIPP members. This is to compensate them for the incorrect excess interest payments if they will continue to apply, but if they will not continue to apply no compensation is required for this.

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £150,000, £160,000, £170,000, £190,000, £195,000, £350,000, £355,000, £375,000, £415,000 or £430,000 (depending on when the complaint event occurred and when the complaint was referred to us) plus any interest that I consider appropriate. If fair compensation exceeds the compensation limit the respondent firm may be asked to pay the balance. Payment of such balance is not part of my determination or award. It is not binding on the respondent firm and it is unlikely that a complainant can accept my decision and go to court to ask for such balance. A complainant may therefore want to consider getting independent legal advice in this respect before deciding whether to accept the decision.

In Mr C's case, the complaint event occurred before 1 April 2019 and the complaint was referred to us in 2019 (the specific date is not presently available to me), so the applicable compensation limit could be either £150,000 or £160,000.

My final decision

For the reasons given above, I uphold Mr C's complaint and I order HSBC UK Bank Plc to calculate and pay redress as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 29 July 2024.

Roy Kuku
Ombudsman