

The complaint

Miss M complains that HSBC UK Bank Plc refused to confirm whether it can take legal action to enforce outstanding debts in her name in court.

What happened

The background to this complaint and my initial conclusions were set out in my provisional decision. I said:

Miss M has previously held a bank account with associated overdraft, loan and credit card with HSBC. The accounts were all closed with outstanding balances around 2014 when Miss M entered into a Debt Management Plan (DMP). Miss M's told us that the loan and current account debts were combined into a single account by HSBC when they were closed.

Last year, Miss M contacted HSBC and asked it to provide copies of the original credit agreements. In her requests, Miss M highlighted Sections 77 and 78 of the Consumer Credit Act that requires businesses to provide copies of the original credit agreement. Miss M also asked HSBC to confirm whether the debts are enforceable in court where a copy of the original credit agreement is unavailable. Miss M highlighted CONC 13.1.6 that explains a business must not mislead a customer about the enforceability of any debt in court.

HSBC went on to confirm the credit agreements were no longer available and advised that Miss M remains liable of the outstanding debts. But HSBC didn't comment on whether the debts were enforceable, only confirming Miss M remains liable.

Miss M's complaint was referred to an investigator at this service. They thought HSBC had dealt with Miss M's queries and complaint fairly and didn't ask it to do anything else. Miss M asked to appeal and repeated her view that CONC 13.1.6 advises that business should not mislead a customer as to whether a debt is enforceable or not, by either act or omission. Miss M explained that she felt HSBC's refusal to confirm enforceability was misleading.

As Miss M asked to appeal, her complaint was passed to me to consider. Initially, I asked our investigator to contact HSBC to specifically check whether the debts remained enforceable in court or not. HSBC's response simply reiterated its view that Miss M remains liable. When I went back to HSBC directly, the query was referred to its legal team. At that point, HSBC responded and confirmed that, in the absence of the credit agreements for the credit card, current account and loan, it would be unable to take legal action to enforce the debts. HSBC also confirmed that no such action was planned and reiterated an outstanding balance remains.

What I've provisionally 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 am aware that Miss M has referred another case to us concerning HSBC's decisions to approve the various lending facilities. That case has been dealt with separately. In this decision, I'm only looking at Miss M's request for HSBC to confirm enforceability.

CONC 13.1.6 sets out what businesses can and can't do where copies of the original credit agreements are no longer available and is known as "Failure to comply". It provides the following information:

(1) Failure to comply with the provisions means that the agreement becomes unenforceable while the failure to comply persists, and the courts have no discretion to allow enforcement.

(2) In such cases, a firm should in no way, either by act or omission, mislead a customer as to the enforceability of the agreement.

(4) The firm should, in any request for payment or communication relating to a payment... in such cases, make clear to the customer that although the debt remains outstanding it is unenforceable.

I've looked at Miss M's correspondence with HSBC and can see that she requested copies of her original credit agreements, as she's entitled to do. Miss M also specifically asked HSBC to confirm one way or another whether it considered the debts (in the absence of the relevant credit agreements) could be enforced in court by way of legal action. I note Miss M cited the above regulations that HSBC is obliged to follow.

Given the clarity of Miss M's requests, and HSBC's obligation not to mislead her over enforceability either by act or omission, I would've expected it to provide an equally clear response. But despite receiving Miss M's initial requests, subsequent complaint, issuing a final response and even when this service sought to confirm enforceability, it has not been straight forward to get HSBC to provide a direct response.

I note Miss M first requested HSBC's stance back in early August 2023 and it took until 2 May 2024 for it to confirm the stance that the debts are unenforceable. I'm satisfied that goes against the regulations noted above and risked misleading Miss M by omission despite clear requests for confirmation of whether the debts are enforceable or not. In my view, Miss M should reasonably have been able to expect HSBC to confirm its stance quickly and without any undue inconvenience to her.

I agree with HSBC that the debts remain outstanding and that it has a legitimate reason to request repayments from Miss M. But I also think that as a customer, Miss M should be able to make an informed decision about her outstanding debts having been provided with all the facts. And I'm satisfied that HSBC failed to provide the full facts concerning its ability to recover the sums owed until 2 May 2024.

It's possible Miss M may've taken a different approach to the outstanding debts in light of the new information. So on receipt of this provisional decision, I invite Miss M to respond and confirm what she would've done if HSBC had confirmed the debts were unenforceable in court in August 2023, when she first asked it. If Miss M would've ceased payments, I think there's a reasonable argument to say that the failure to comply with CONC 13.1.6 may've led her to continue payments without the full knowledge that HSBC didn't have the ability to take legal action to recover them. I'll consider Miss M's response before I issue my final decision.

I'm satisfied that the length of time it's taken for HSBC to confirm its stance on enforceability has caused Miss M an unreasonable level of distress and inconvenience over a long period. It's clear from Miss M's communications with us that HSBC's failure to respond to her

questions was upsetting and frustrating. And given Miss M's been paying the debts in question back via a Debt Management Plan for around a decade now, I can understand why she wanted the full facts in order to understand their status. So I intend to award Miss M £250 in recognition of the distress and inconvenience caused.

I note that CONC 13.1.6(4) explains that any request for payment or communication relating to a payment must make clear to the customer that although the debt remains outstanding, it is unenforceable. HSBC should bear this in mind when communication with Miss M about the debts in question going forward as failure to comply could lead to further confusion and concern.

I invited both parties to respond with any further comments or information they wanted me to consider before I made my final decision. Miss M responded and provided evidence that when other creditors confirmed debts they held in her name were unenforceable in court she stopped making payments towards them. Miss M also provided evidence to show she'd made payments totalling £341.92 to HSBC after she'd asked it to confirm whether the debt is enforceable or not. Miss M confirmed she wouldn't have made those payments if HSBC had responded and confirmed whether the debt is enforceable in May 2023 (not August 2023 as I said in my provisional decision), when she first asked.

I contacted Miss M and HSBC to explain I intended to increase the settlement noted in the provisional decision to include a refund of the £341.92 of payments she made after May 2023 and provided some further time to respond. We didn't hear back from HSBC.

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 need to consider what Miss M would've done differently if HSBC had provided confirmation over the enforceability of the debt in May 2023, when she first asked about it. Miss M's provided evidence that shows when other creditors confirmed their debts weren't enforceable she stopped making payments to them. So I'm satisfied it's more likely than not that Miss M would've done the same with her HSBC debts. Miss M's sent us evidence that shows she made further payments totalling £341.92 to HSBC after she asked it to confirm enforceability and it failed to do so. On balance, I'm satisfied Miss M would most likely have stopped making payment to HSBC in May 2023 had it confirmed the enforceability position at that time.

As I'm satisfied Miss M was persuaded to make payments she otherwise wouldn't have, I'm going to tell HSBC to refund the £341.92 she paid between May 2023 and May 2024. That's in addition to the £250 award I noted in my provisional decision.

HSBC was given prior notice of my intention to vary the award but didn't respond with any new points.

My final decision

My decision is that I uphold Miss M's complaint and direct HSBC UK Bank Plc to settle as follows:

- Refund payments Miss M made totalling £341.92
- Pay Miss M £250 for the distress and inconvenience caused

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss M to accept or reject my decision before 19 July 2024.

Marco Manente
Ombudsman