DRN-5000669

The complaint

Mr and Mrs G's complaint relates to a mortgage application they made to HSBC UK Bank Plc in October 2023. They are unhappy that the application was rejected and they could not port their interest rate product to their new home.

What happened

In June 2022 Mr and Mrs G applied directly for a mortgage with HSBC. They asked to borrow £259,000 on a repayment basis with a term of 13 years. The application was accepted and a five-year fixed interest rate product of 1.74% was attached to the mortgage. The mortgage was drawn down on 26 April 2022 and so the interest rate product ended on 25 April 2027.

In May 2023 Mrs G informed HSBC that they were moving to a different part of the UK. They wanted to buy their new home using a mortgage with HSBC and port the interest rate product to the new mortgage. At that time their mortgage balance was approximately £240,000. They already had an offer on their home and planned to repay their existing mortgage, move into rented accommodation where they were moving to, and then find a property to buy. The intention was to do this within the six-month porting window that was allowed for transferring the interest rate product to a new mortgage.

HSBC confirmed this would be possible and the first stage of the process was to complete an agreement in principle (AIP). There were discussions about what would be happening with the move, and it was confirmed that Mr G would temporarily be unemployed due to the move, although there would be no changes to Mrs G's employment or income. HSBC explained that the AIP could be done based just on her income, but if it failed affordability checks, as they had existing borrowing, the application wouldn't immediately be declined.

Mrs G asked for the AIP to be completed just using her income of slightly over £33,000 and HSBC confirmed that, in principle, it would lend just under £157,000. HSBC has since confirmed that the initial assessment failed on affordability. Mrs G wasn't told this. Nor was she told that HSBC had issued the AIP on the basis that the new mortgage would be advanced on the same day as the existing one was repaid, with no new borrowing, and so the affordability assessment was set aside.

Mr and Mrs G sold their existing home in August 2023 and moved into rented accommodation. They then found a property they wanted to buy and contacted HSBC on 28 September 2023. Mr and Mrs G's application was considered, but having completed a full affordability assessment, HSBC said that it was only willing to lend them £37,000. This was because Mr G's new employment was on a contract basis, and he hadn't been in that employment for long enough to meet HSBC's criteria for acceptable income.

HSBC communicated that decision on 13 October 2023 and Mr and Mrs G have told us that by then they had already entered into missives and agreed a completion date of 30 November 2023. This was on the assumption they could borrow what had been agreed in principle.

Mr and Mrs G arranged borrowing with a different lender for £160,000. They attached a fixed interest rate product to the mortgage, but as it was taken in 2023, the rate was considerably higher than that they had on their HSBC mortgage – 5.5%. The product had a term to 31 December 2025.

Mr and Mrs G were unhappy with HSBC's decision and the service they had received, and they complained.

HSBC responded to the complaint in emails of 20 and 23 October 2023. It highlighted that the AIP was only the first stage of the application process and didn't guarantee it would lend that amount. This was because a full application would always have been required and approved before it could be guaranteed that HSBC would lend. It said it was Mr and Mrs G's decision to commit to their purchase before they had a mortgage offer. However, it acknowledged that it made a mistake when it applied its existing borrower policy when doing the AIP and so set aside the failed affordability assessment. HSBC went on to confirm that as, by the time Mr and Mrs G applied for a new mortgage, they were not existing borrowers the application could not be assessed on the same basis as the AIP had been done. As such, it had offered borrowing of the amount its affordability assessment said was affordable.

HSBC confirmed that it should have explained this to Mrs G in May 2023 when it spoke to her. To compensate them for the mistakes it made, and the upset and inconvenience it caused Mr and Mrs G, HSBC refunded the early repayment charge (ERC) of just over £5,000 and offered them £300 compensation. However, as it said they would never have been able to port the interest rate product to a new mortgage with it, it would not compensate them for the higher interest rate they would pay on their new borrowing.

Mr and Mrs G referred their complaint to this Service, as they were not satisfied with HSBC's response. They told us that had they known they would not be able to get a new mortgage with HSBC if they had a gap between the old and new mortgages, they would have acted differently. They suggested that they would have sought to sell and buy simultaneously, or Mr G would have chosen to take employment on a permanent basis, rather than on a fixed term contract to ensure they could borrow the amount they needed.

One of our Investigators considered the complaint and, ultimately, recommended that it be upheld. She concluded that treating Mr and Mrs G as 'new' customers when the application was submitted, because the existing mortgage had been repaid the previous month, was unfair given the application was made within the porting window. The Investigator recommended that HSBC compensate Mr and Mrs G for the higher interest rate they were having to pay on their new mortgage, in addition to the redress it had already paid and offered.

HSBC didn't accept the Investigator's conclusions. It reiterated its previous points about the AIP not being a guarantee of lending and that there was no live mortgage in place for it to apply its policy where affordability checks could be waived.

I issued a provisional decision on 30 July 2024 setting out my conclusions on the complaint and my reasons for reaching them. Below is an excerpt.

'*Initially I would comment that HSBC is right to point out that the AIP didn't guarantee that it would lend Mr and Mrs G around £157,000. What they would be able to borrow, if it was possible, would always have been subject to a full mortgage application being made and it, along with the property, being acceptable to HSBC.*

That said, the rules of mortgage regulation – set out in the Mortgages and Home Finance: Conduct of Business Sourcebook (known as MCOB) – changed following the

Mortgage Market Review in April 2014. One of the changes was the introduction of much stricter affordability tests. However, MCOB rule 11.6.3 says that a lender doesn't need to carry out an affordability test if:

- *A customer is entering a new mortgage contract 'as a replacement for an existing regulated mortgage contract ... between the customer and the firm… whether or not the new contract relates to the same property, or as a variation to an existing contract;*
- *The new or varied mortgage doesn't involve any extra borrowing; and*
- *There's no other change to the terms of the mortgage which is likely to be material to affordability.*

I don't think that there was any change to the terms of the mortgage likely to be material to affordability. Mr and Mrs G wanted to keep their mortgage on a repayment basis, over the same term. Although they were borrowing less on a lower value property, the loan-to-value was approximately the same as it had been on the original mortgage when it was paid off and lower than when it was originally granted.

I don't agree with HSBC that this rule doesn't apply where customers don't port simultaneously because they stop being existing customers.

HSBC said that – provided Mr and Mrs G took a new mortgage and ported their product to it within six months – it would refund any ERC they paid on the mortgage they redeemed. Mr and Mrs G checked with HSBC whether they'd be able to do this and it said they would (subject to being granted the new mortgage).

Had HSBC granted Mr and Mrs G the new mortgage to complete within six months that would in my view make it a new mortgage contract granted as a replacement for an existing one. Nothing in the rule says that there can't be a gap between the two contracts, and the existence of a gap clearly contemplated in a lender's contract or policy means, in my view, that until the gap expires there is an ongoing relationship between lender and borrower.

I am aware from my knowledge of the mortgage industry that some lenders always require porting to be simultaneous, while others don't – some allow a gap of up to six months or more. I don't think it would be fair to only apply the rule to customers whose port is simultaneous when HSBC allows non-simultaneous porting.

So I think HSBC should have taken rule 11.6.3 into account when it assessed the porting application. It says that the application failed on affordability when it used only Mrs G's income and applied a higher interest rate "stress test". That test was carried out because MCOB requires it as part of the assessment of affordability – but 11.6.3 says that assessment doesn't need to be carried out. HSBC doesn't suggest the mortgage was unaffordable to Mr and Mrs G on the actual interest rate; only at the stressed rate. Also, as I say, HSBC assessed affordability using only one income, whereas there were two, even if one was not yet at the point of being acceptable to HSBC.

So I am satisfied that the application was refused because HSBC applied a specific test that the rules said wasn't necessary in this case. I don't think that was fair in these circumstances. Had HSBC taken account of 11.6.3 – even though this wasn't a simultaneous porting case – I don't think it would, or should, have refused the application. It therefore follows that, to put matters right, it should place Mr and Mrs G in as close a financial position to that which they would have been in had their application for a new mortgage been accepted.

In this case that would have involved Mr and Mrs G having a mortgage of the same amount as they applied for in September 2023. When that mortgage was advanced they would have *received a partial refund of their ERC and would have been paying interest at 1.74% until 25 April 2027. However, the interest rate product Mr and Mrs G attached to their new mortgage expires on 31 December 2025 and it is not known what interest rate they will be able to obtain at that point – it might be higher than the previous rate or lower. As such, it is not possible to determine if Mr and Mrs G will suffer a loss for that period.*

As such, HSBC should calculate:

A the amount of the ERC that would have been refunded had the interest rate product been ported. This sum will be lower than the amount HSBC has already refunded.

B the amount of interest Mr and Mrs G would have paid between 30 November 2023 and 31 December 2025.

C the amount of interest Mr and Mrs G have and will pay between 30 November 2023 and 31 December 2025 based on the 5.5% fixed interest rate.

Mr and Mrs G's loss should be calculated as A plus (C minus B). From this figure HSBC should deduct the amount of the ERC it has already refunded.

When refunding interest that has already been paid, we would usually require a lender to add simple interest to each refund from the date it was paid to the date it was refunded. However, Mr and Mrs G will be receiving funds for payments they have not yet paid, and there are more of these that they have already paid. As such, I consider this balances out the loss of use of the funds from 30 November 2023 to date and no interest should be paid.

HSBC offered Mr and Mrs G £300 compensation for the upset the poor communications caused them. While, given my above conclusions, those communications should not have had an adverse effect on them. However, the decision not to treat them as existing customers did have such an effect and I consider HSBC should still pay £300 for the upset and inconvenience Mr and Mrs G suffered when their application was declined.'

Mr and Mrs G accepted my provisional decision.

HSBC did not accept the provisional decision. It said when Mr and Mrs G repaid the existing mortgage their borrowing relationship with it ended and the porting window did not in its view constitute a continuation of the relationship due to the break in the 'active engagement'. HSBC also disagreed with my interpretation of MCOB 11.6.3 R as it considered it can only be applied to existing customers, and not to new borrowing applications as Mr and Mrs G's application would be considered. HSBC also highlighted again that when Mr and Mrs G committed to their purchase, they had only received an AIP and not a mortgage offer – which was a risk they chose to take.

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.

Essentially, HSBC's reasons for disagreeing with my provisional decision are the same as those it made in response to the Investigator's opinion of the case. I explained in my provisional decision why I considered there was an ongoing customer relationship during the porting window HSBC allowed Mr and Mrs G. I also confirmed that in the circumstances of this case, why reasonably the new mortgage applied for would under MCOB 11.6.3 R be considered a replacement for the existing mortgage. As I highlighted, there was nothing in the rule that said there could not be a gap between the two contracts, where such a gap was allowed by a lender.

I considered HSBC's opinions on this matter before I reached my provisional decision, along with relevant rules and guidance, including MCOB 11.6.3R and MCOB 2.5A R which requires a firm to act in a customer's best interests. HSBC has not added anything material to the arguments it previously made, and I am not minded to change my conclusions.

I would also comment that this Service has had this approach to non-simultaneous porting situations for some time. While this may be the first time that HSBC has had such a case being referred to an Ombudsman for consideration, my approach in this case has generally been accepted and adopted by lenders as good practice.

Putting things right

HSBC should calculate:

A	the amount of the ERC that would have been refunded had the interest rate product been ported. This sum will be lower than the amount HSBC has already refunded.

B	the amount of interest Mr and Mrs G would have paid on their HSBC mortgage between 30 November 2023 and 31 December 2025.

C	the amount of interest Mr and Mrs G have paid, and will pay, on their current mortgage between 30 November 2023 and 31 December 2025 based on the 5.5% fixed interest rate.

Mr and Mrs G's loss should be calculated as A plus (C minus B). From this figure HSBC should deduct the amount of the ERC it has already refunded.

HSBC should also pay Mr and Mrs G £300 compensation for the upset and inconvenience they suffered because of its decision not to treat them as existing customers, which resulted in their application being declined.

My final decision

My final decision is that I uphold this complaint. I order HSBC Bank UK Plc to settle the complaint as detailed in 'putting things right' above.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr and Mrs G to accept or reject my decision before 3 October 2024.

Derry Baxter
Ombudsman