

The complaint

This complaint is about a mortgage Mr B took out in 2021 with HSBC UK Bank Plc on the advice and recommendation of a third party intermediary. The essence of the complaint is that HSBC issued the mortgage funds based on the first of two different mortgage offers that were issued. The chief consequence of this is that Mr B was on a higher interest rate than he believes he should have been, and that this rate expired, and therefore needed to be refinanced, sooner than he was expecting. Mr B seeks redress for the financial loss this has caused.

What happened

By way of a provisional decision dated 22 November 2023, I set out my provisional conclusions on this complaint. The following is an extract from the provisional decision.

“In what follows, I have set out events in rather less detail than they have been presented. No discourtesy’s intended by that. It’s a reflection of the informal service we provide, and 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. This approach is consistent with what our enabling legislation requires of me.

It allows me to focus on the issues on which I consider a fair outcome will turn, and not be side-tracked by matters which, although presented as material, are, in my opinion peripheral or, in some instances, have little or no impact on the broader outcome.

Our decisions are published and it’s important that I don’t include any information that might result in Mr B being identified. Instead I’ll give a summary in my own words (and rounding the figures where appropriate) and then focus on giving the reasons for my decision.

Mr B applied for the mortgage with HSBC via a firm of mortgage brokers I’ll refer to as H. H submitted the application online through an electronic portal. Mr B also instructed a firm of solicitors I’ll refer to as J to act for him. On 6 April 2021, HSBC issued an offer of £295,999 based on a purchase price of £575,000. Attached to the offer was an interest rate product which fixed the rate at 1.14% until 31 May 2023. On 21 June 2021, J submitted a “smart” certificate of title (COT) requesting the funds to complete the mortgage. HSBC released the funds but these were returned when completion didn’t take place.

On 9 July 2021, H submitted a revision to the application to reflect a reduction Mr B had negotiated in the purchase price; this was now £567,500. On 13 July 2021, HSBC messaged H via the portal to say the application couldn’t be changed because it had already completed, so a new application would be required. That was submitted on 29 July 2021, and approved by HSBC’s underwriters on 11 August 2021; the offer was issued the same day. The second offer was still for £295,999, albeit based on the lower purchase price, and came with a different

interest rate product attached. This time, the rate was fixed at 0.94% until 30 November 2023.

On 13 August 2021, so two days after the second offer was issued, HSBC messaged H with instructions to cancel the first application. H received the message, but it turns out didn't read it, because by this point, it was only monitoring the new application on the portal.

On 24 August 2021, J again submitted a COT requesting funds to complete the mortgage; the funds were released and this time, the purchase went ahead. On 9 September 2021, HSBC wrote to Mr B at his new address, confirming drawdown of the mortgage, on a rate of 1.14% fixed until 31 May 2023; i.e. the rate from the first offer. This seemingly went unnoticed until December 2022 when HSBC wrote to Mr B to say his fixed rate deal was due to end in May 2023, so he should consider his options for picking a new rate. This prompted Mr B to complain that he was on the wrong rate product.

HSBC rejected the complaint, pointing out that H hadn't cancelled the first application, and that J had used the first application's reference number when submitting the COT for the second time. To avoid reverting to HSBC's standard variable rate, Mr H booked a new rate to follow on from the disputed product. This product, which was reserved in February 2023 to take effect from 1 June 2023, was for a rate of 3.99% fixed until 30 June 2028.

What I've provisionally decided – and why

I'll start with some general observations.

Although I've read and considered the whole file, I'll keep my comments to what I think is relevant. If I don't comment on any specific point it's not because I've failed to consider it but because I don't think I need to comment on it in order to reach what I think is the right outcome in the wider context.

If the available evidence is incomplete and/or contradictory (or simply disputed) we reach our findings on what we consider is most likely to have happened, on the balance of probabilities. That's broadly the same test that the courts use in civil cases.

It's for us to assess the reliability of evidence, from both sides, and decide how much weight should be attached to it. When doing that, we don't just consider individual documents in isolation. We consider everything together to form a broader opinion on the whole picture.

Our enabling legislation, the Financial Services and Markets Act 2000, provides at section 225 that we are required to resolve complaints "*quickly and with minimum formality*". 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. That means I don't have to address every individual question or issue that's been raised if I don't think it affects the outcome.

In reaching my decision, I will have regard for the law and good industry practice where relevant, but my overarching responsibility is to decide what is fair and reasonable in the circumstances. That can sometime mean reaching a different outcome from what might prevail in court.

We have no regulatory function; that's the role of the Financial Conduct Authority (FCA); nor are we a consumer protection body. We're an alternative dispute resolution body; an informal alternative to the courts for financial businesses and their customer to resolve their differences. We deal with individual disputes – when we're able to – subject to rules laid down by the FCA (which are known as the DISP Rules).

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

If I'm to find in Mr B's favour, I have to be satisfied of two things:

- that there were errors and omissions on HSBC's part in how it handled his mortgage applications; *and*
- that such errors and omissions are the sole or primary reason Mr B ended up on the rate from the first offer instead of the second.

The latter is not entirely a binary question. Ultimately, the test I have to apply is this: notwithstanding other factors, but for any shortcomings there may have been on HSBC's part, is it more likely than not that Mr B would have completed on the right offer?

Mr B's case centres on two key points, which I've taken from his submission dated 19 June 2023 and summarised below:

- The first offer was no longer valid, because the terms and conditions forbade a price change;
- HSBC had contradicted itself. On the one hand, it had told H and Mr B that the first application couldn't be amended. On the other hand, it had since shown that it was able to amend the purchase price on the system, which was why J's second COT submission (using the reference number from the first offer but the price from the second) was accepted without challenge.

I've thought hard about these points, and whilst I appreciate Mr B's logic, and his eloquence in arguing his points, I don't think they're what the outcome of the case turns on. To me, what is more relevant is the timing of HSBC's instruction to H to cancel the first application.

It's not clear to me why HSBC waited until two days after the second offer had been issued to tell H to cancel the first application. It seems to me that a better time to have done this was on 13 July 2021 at the same time as informing H that a new application was required. If HSBC had done that, H would have seen the instruction and, it's reasonable to assume, would have acted on it.

In summary, my overall finding is that there probably *was* an omission on HSBC's part (because it unduly delayed instructing H to cancel the first application) and that this omission *was* partly to blame for Mr B completing on the wrong rate (because it meant J's second COT submission was processed without any challenge to the error it contained).

Having found that HSBC's omission contributed to Mr B completing on the wrong interest rate, I now need to consider fair redress. It might seem obvious to order HSBC to reconstruct Mr B's mortgage from inception by substituting the right rate for the wrong one. A complication to that is that the right rate expired just recently, but

there are ways of accommodating that into the redress; for example by inviting Mr B to choose a rate from those currently available to replace the one he is currently on.

However, simply because I've found HSBC to be at fault doesn't then mean I must order it to remedy Mr B's current position. There's more to consider. Firstly, there isn't an unbroken chain of causation between the business' omission on its own and the loss. It still needed something else to go wrong outside HSBC's span of control as well. There's something else. I mentioned earlier that Mr B had taken a new rate in February 2023 to mitigate his position when the wrong rate expired at the end of May 2023. That's fine as far as it goes, but it seems to me Mr B had opportunities to mitigate his position much sooner than he did.

The earliest of these was when HSBC wrote to him immediately after completion. This letter not only made it clear that the interest rate was 1.14% fixed until 31 May 2023; it also specified what the monthly payments would be. Allowing for the first payment being slightly higher - which is normal because it includes the interest for the part month in which the loan started - the letter told Mr B he'd be paying a little under £1,135 per month. That's consistent with the figure quoted in the first offer, and higher than the figure quoted in the second offer.

The difference may not be huge (around £28) but combined with the specific reference to the rate product, this letter should have put Mr B on notice that something was wrong and needed putting right. Had he acted on that, HSBC would have had an opportunity to resolve the situation – by switching rate products – immediately.

Even if I give Mr B the benefit of the doubt on the completion letter - and in all fairness, I don't think there's a compelling reason to do so - it seems to me he then missed another opportunity to spot the anomaly, and ask for remedial action, when HSBC sent him his first annual statement in June 2023. This document again drew attention to the rate being charged, and that it was fixed until 31 May 2023. It also listed the payments he'd made each month since the mortgage started, and again these sums were consistent with the first offer and not the second.

Put all of the above together and I'm not minded to order HSBC to compensate Mr B for the loss he's claiming due to his mortgage having completed on the wrong interest rate. All I am minded to award Mr B is modest compensation for his time, and the trouble and upset caused by having to bring the complaint. In all the circumstances, the sum I'm currently minded to award is £200.

I said at the outset that I wouldn't be commenting on every single point, and I haven't. I have, as I said I would, confined myself to those matters that I consider have a material effect on the outcome. I can see how strongly Mr B feels. That's a natural, subjective reaction, and entirely understandable.

Be that as it may, I have to take a different approach. I'm impartial and I have to look at things objectively, sometimes taking a step back from the minutiae, focussing on the broader picture. That's what I've done. Having done so, for all the reasons I've set out, I can't find in Mr B's favour, to the extent he is seeking.

I will however make a further observation. There's more (and sometimes less) to complaint resolution than simply deciding who's right or who's wrong. It's not just about winning the argument or indeed pursuing the argument to its ultimate legal conclusion; sometimes it's about compromising to reach a *fair* conclusion. In my view, I've done that here.

There's a possibility that this case may go to court, if Mr B ultimately reject my final decision. And if that happens, then subject to any time limits or other restrictions a court might impose, Mr B's recourse to a legal remedy of his own against HSBC over the subject matter of this complaint won't have been prejudiced by our consideration of it. But of course he will need to weigh up the likelihood of a successful outcome and the potential costs he'll face if not successful."

I gave the parties two weeks to comment on the provisional decision; both have done so already. HSBC rejected the notion that it should have notified H sooner that the first application needed to be cancelled. It said it was H's responsibility, not HSBC's, to know which application was progressing and which wasn't. Mr B made four points, which I summarise below.

- It was factually wrong to say something else had to go wrong outside HSBC's span of control.
- If he had spotted the error immediately, he'd have either had to complain to HSBC - which begs the question of whether it would have reacted differently from how it did when he complained in December 2022 - or re-mortgage at considerable extra financial cost and personal time.
- Taking the timeliness of noticing misconduct into account runs contrary to a wide range of contract and criminal law.
- I am applying different burdens of care to HSBC and to Mr B. He was being penalised for failing to detect a change that was 0.5% of his monthly income, but HSBC also failed to identify anomalies on the second COT.

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.

Having considered afresh everything that both parties have said and provided, I'm not persuaded to depart from my provisional conclusions. But I will address the further points that the parties have made.

HSBC says it's wrong of me to hold it accountable for not instructing H to cancel the first application sooner than it did. But it was HSBC that made the instruction to cancel a key part of its defence against the complaint. I don't think HSBC can fairly and credibly repudiate that argument when I have found it to be a relevant point, but at the same time questioned the timeliness of the action.

It's important also to remember that I haven't found a direct causal link between the timeliness of HSBC's instruction to H and Mr B's loss claim. My finding was that it was a *contributory* factor, in that it allowed J's submission of the second COT with the reference number from the first application to go unchallenged. And that brings me to Mr B's points.

When I mentioned something else outside HSBC's control having to go wrong, I was referring to the submission of the second COT with the reference number from the first application. That's not factually incorrect; it happened, and it's why the second test I alluded to in the provisional decision – i.e, errors and omissions on HSBC's part being the sole or primary reason Mr B ended up on the rate from the first offer instead of the second – hasn't been met.

I can't know for certain whether or how HSBC might have responded differently if Mr B had noticed the mortgage was on the wrong rate at completion, but I don't need to. As I explained in the provisional decision, the test we apply is the balance of probabilities; that is, what would most likely have happened. HSBC would have less reason to stand its ground if Mr B had raised the issue immediately. Firstly it would have been immediately apparent the terms on which the mortgage had completed weren't what Mr B wanted, rather than possibly being something he'd initially gone along with but then later changed his mind about. Also, unwinding something as soon as it has happened is substantially simpler than doing so more than a year into the life of the transaction.

Mr B says taking timeliness into account runs contrary to contract and criminal law. The first point to make there is that the timeliness of actions taken by both parties is a factor in the overall outcome of this case. The second point to make is to revert to something I said in the provisional decision, which is that whilst I will have regard for the law and good industry practice where relevant, my overarching responsibility is to decide what is fair and reasonable in the circumstances. That can sometime mean reaching a different outcome from what might prevail in court.

The general position is that mitigation requires a person to take steps to minimise their loss and to avoid taking unreasonable steps that increase their loss. A person can't recover damages for any loss (whether caused by a breach of contract or breach of duty) which could have been avoided by taking reasonable steps. A person is said to have a "duty to mitigate".

This isn't a duty that's enforceable by anyone, rather it is a recognition that if a person fails to do so, their capacity to seek redress will be affected by that failure. In my view, that's relevant and appropriate here.

Mr B has said that until now, he has never reviewed documents from financial services providers with the mindset they might be trying to defraud him. He says there's no statutory or regulatory duty to do so and consumers aren't expected to detect misconduct by regulated businesses. But this isn't about statutory or regulatory duty, attempted fraud or detecting misconduct. It's basic common sense for a consumer to check that what they have received – whether a product or a service – is what they ordered.

To do that, Mr B didn't need to pick up a 0.5% difference in his monthly disposable income; he just needed to cross-reference his completion letter with the second mortgage offer to make sure they contained the same information about the interest rate and monthly payment.

Mr B references HSBC not picking up discrepancies in the second COT. I've not ignored that; but because it happened earlier in the timeline, ultimately I'm not persuaded the outcome of the complaint turns on it.

My final decision

My final decision is that I uphold this complaint in part, by ordering HSBC UK Bank Plc to pay Mr B £200 compensation for his time, trouble and upset. My final decision concludes this service's consideration of this complaint, which means I'll not be engaging in any further discussion of the merits of it.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 8 January 2024.

Jeff Parrington
Ombudsman

