DRN-3997894

The complaint

Mr and Mrs E complain that Nationwide Building Society (Nationwide) unfairly declined their request to port (transfer) their mortgage and take out additional borrowing.

Mr and Mrs E took out a mortgage with another lender and repaid his Nationwide mortgage - incurring an early repayment charge (ERC).

Mr E has dealt with the complaint throughout on behalf of both parties.

What happened

Mr E had a mortgage with Nationwide which he took out in 2017. This was initially on a five-year fixed rate, which expired in 2022.

In 2020, Mr E contacted Nationwide asking to port his mortgage and add a new borrower (Mrs E).

Nationwide advised them to apply for a decision in principle (DIP) online, which they did around August 2020. Following this, they spoke to a mortgage consultant to progress their application.

Mr and Mrs E have described several issues they had throughout the process which they say led to delays, wasted time and stress. This included poor customer service and a lack of updates or promised call backs.

Ultimately, Nationwide declined the application to port the mortgage and take out additional borrowing. But said it would consider a like for like port without the additional borrowing.

Mr and Mrs E complained. Nationwide upheld the complaint and offered £200 compensation by way of an apology for the customer service issues experienced.

Mr and Mrs E brought the complaint to this service. Our investigator thought the complaint should be upheld. He concluded that Nationwide should pay Mr and Mrs E an additional £200 and refund the ERC (plus 8% simple interest).

Nationwide didn’t agree and asked for an ombudsman to consider the matter and so the case has been passed to me to decide.

I issued a provisional decision setting out my thoughts on the complaint.

My provisional decision

In my provisional decision I said:

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

It is worth highlighting to begin with that porting a mortgage involves an entirely new application, for a new mortgage. If a porting application is successful the new mortgage retains some of the features of the old mortgage – usually, amongst other things, the interest rate. But the mortgage itself is based on a new lending decision by the business, assessed at the time it is made – against the lending criteria in place at the time of the porting application.

A mortgage loan and a mortgage product are two different things. A loan is the underlying transaction in which money is lent; the product is the terms that sit on top. For example, an agreement to borrow £100,000 over 25 years is a mortgage loan; an agreement that for the first two years a fixed interest rate rather than the standard variable rate will apply is the mortgage product that sits on top.

When moving house, a borrower pays off their old mortgage with the proceeds of the sale. They also, and separately, apply for a new mortgage to fund buying the new property. Here, Mr and Mrs E asked to increase their borrowing. A lender will consider the new application on its own merits. If it's prepared to grant a new mortgage, it will then consider whether to port across the old product – if the terms of the old product allow it. These are two separate decisions.

If a lender isn't prepared to grant a new loan, then porting can't happen, and so the mortgage product ends with the old loan. Depending on the product terms, an ERC may be payable.

Looking at the mortgage offer I think it was made sufficiently clear that while porting was a feature of the mortgage product there were conditions attached.

I understand that Mr and Mrs E feel that Nationwide hasn't treated them fairly. But in my view the decision not to lend as much as Mr and Mrs E requested (that is, an increase in the mortgage debt) was one that Nationwide was entitled to make as a matter of its commercial discretion. It has explained that the loan to value (LTV) was 88% - which is greater than the maximum amount of 85% it was willing to lend and so didn't meet it's criteria at that time. And it's provided reasons as to why the underwriters didn't approve the application. Having reviewed these, I don't consider them unreasonable. As I've said, Nationwide doesn't have to lend more.

I can see that Mr and Mrs E were able to re-mortgage to another provider. But the fact they could get a mortgage elsewhere doesn't mean that Nationwide did anything wrong. Different lenders have their own policies, which is only right.

Nationwide gave Mr and Mrs E the option to reduce the requested amount to the same amount as was currently outstanding, so in effect port the mortgage on a like-for-like basis, but they chose not to do so.

And so I don't think the fundamental underlying decision to reject the application was unfair here. But I do think that Mr and Mrs E were misled somewhat throughout this process and can appreciate their obvious disappointment when the application didn't proceed.

It's not in dispute that there were customer service issues here. And I think it's clear that Nationwide's mortgage consultant raised Mr and Mrs E's expectations that the application would be approved. He should have been aware of the LTV limits and advised here – Nationwide has accepted this and offered compensation in recognition of the failings.

I've considered the email from the mortgage consultant to Mr and Mrs E in October 2020. Whilst this explained that the case was still to be underwritten - the mortgage consultant said that it was 'well within affordability and it's only the payment holiday that's caused the automatic refer'.

This was incorrect information, or a mis representation. It was not 'well within affordability'. When we are looking at complaints about misrepresentation, we consider the appropriate remedy is to place the consumer in the position they would be in if the incorrect information hadn't been given. We don't put them in the position they would be in if the misinformation had been correct (that is, that Mr and Mrs E could port the mortgage and take out additional borrowing), or in a position where they've "gained" from this misinformation.

Mr and Mrs E were led to believe that the application would be successful. But even if they were not misled in this way by the adviser – the application still would not have been approved and so the appropriate remedy is to put them in that position.

I still think that they would have needed to seek a mortgage with another lender as Nationwide was not prepared to lend on this basis and so they would have still needed to pay an ERC. As a result, I don't consider the fair remedy here is for the ERC to be refunded.

And it's important to note here why an ERC is charged. The ERC is not a "penalty" as that has a distinct meaning in law; it's a contractual term that applies where there is a breach of contract.

And here – the termination of the contract prior to the end of the fixed rate deal triggers the payment of the ERC (in short, it needs to be paid so there is no breach of contract – as per the conditions). The ERC is not a penalty imposed by the business; it's charged in line with the offer.

So I don't currently think I can fairly uphold this part of the complaint as the fee was correctly charged.

But I do think that Mr and Mrs E should be compensated for the obvious distress, worry and upset this matter caused. I've noted what they have said and I can see that they contacted Nationwide for updates and to chase the progress of the application. I've thought about a fair way to put this right.

Putting things right

I don't consider that Nationwide's offer of £200 goes far enough to recognise the distress and inconvenience caused.

I think it's clear that there were failings in how Nationwide dealt with this application and so I'm currently minded to uphold this complaint in part and direct Nationwide to pay Mr and Mrs E an additional £300 compensation (bringing this to a total of £500).

But I don't think that it would be fair for the ERC to be refunded – for the reasons I've explained.

Having considered all the available evidence, I currently think this is a fair resolution to the complaint.

Responses to my provisional decision

Mr E responded to my provisional decision. He said that I had missed the whole point of his complaint – that they were incorrectly told they could apply to port their mortgage with a LTV of 88% but this was not possible.

He said that, as the application was refused on the basis that Nationwide would not accept the loan to value (LTV) being above 85%, it should not have allowed it to proceed with the application on this basis from the very beginning. And that, as a result, he incurred solicitor costs and estate agent fees that he otherwise would not have.

Mr E also said that it was too late to back out once his application was declined and so was left with no choice but to incur the ERC – or otherwise pay thousands in solicitor and estate agent fees.

Nationwide responded to say it accepted my provisional decision.

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 can completely understand that Mr and Mrs E are upset and disappointed with the outcome of my provisional decision. But I can assure them that I did consider their main point before issuing my decision – I'm very sorry if it felt like I had not. I reviewed all of the information and evidence provided by both sides and thought very carefully about what the fair outcome should be here.

And I can understand Mr E's point that he simply would not have committed to the estate agent and solicitor fees if he knew from the outset that there may have been issues with the porting application. That's understandable – as is his point that he felt that he got to a stage in the application in which he had no choice but to proceed. Mortgage applications can be complicated, stressful and drawn out – particularly when 'porting' a rate from one mortgage to the next.

I've thought really carefully about what Mr E has said but I'm afraid I still don't consider that it would have been apparent from the outset that the application may have been declined.

Nationwide has accepted that it incorrectly told Mr E that he could obtain a decision in principle (DIP) online. Actually, it should have said that this would need to be completed over the phone – as that is the process for porting applications. But notwithstanding this, a DIP is not a formal offer. It's merely an indication of how much a lender may be willing to lend – subject to further checks and being considered by an underwriter. And so, as is often the risk with buying a new property, nothing is certain until the mortgage offer is issued.

I've noted that the online DIP was issued on 15 August 2020. And I can see that Mr E agreed to the estate agent contract on 20 August 2020 and put the house on the market from 27 August 2020, having already had their offer accepted on the house they were hoping to move to.
The appointment with the mortgage consultant was not until 14 September 2020, which is a few weeks afterwards. I certainly think that the mortgage consultant could have managed Mr and Mrs E's expectations better at this stage and should have provided correct information about the LTV limits. It's regrettable that the adviser said that the DIP was accepted and that there was nothing to worry about. He should have explained that the DIP was only partly accepted to allow for a full submission of the application for an assessment.

And it is only once an application is assessed by an underwriter that a full decision can be made. By this time Mr and Mrs E had instructed estate agents and solicitors, their house was on the market and they had an offer accepted on the house they wished to purchase. And so, they were quite advanced in the process by this stage. I can understand that they felt they had no choice but to continue.

But what is crucial here is that it was not the case that - just because the LTV was above 85%, he could not apply – Nationwide has said that as the application fell in a bracket of between 85% - 90% LTV and he was an existing borrower looking to port his rate – this needed to have a full assessment by underwriters to evaluate the application as a whole.

And so it was simply not apparent at this stage that the application might be declined purely on the level of the LTV.

Nationwide said that the reason Mr and Mrs E's application was declined was also due to concerns about the wider affordability of the mortgage and lack of disposable income. Whilst the end result was not what Mr and Mrs E were hoping for – I don't consider that Nationwide has treated them unfairly when it declined the additional borrowing, and I've noted that it offered to consider an application on a like-for-like basis.

I can also see that Mr E borrowed additional money from a family member to reduce the LTV - but the application was still, unfortunately, not accepted due to affordability concerns. And so I think it was not possible that they would have been able to obtain a mortgage with Nationwide – but this was not apparent until the full affordability assessment was undertaken.

And whilst I've noted that Mr and Mrs E secured a new mortgage with a different lender, this does not have any bearing on whether Nationwide should have approved the application – different lenders have different criteria and lending appetite, which is only right.

As Mr and Mrs E exited their mortgage early – the ERC was charged in line with the original mortgage offer. As I explained in my provisional decision, I don't consider that this should be waived or reduced in some way. It's not a penalty, but a fixed cost of breaking the contract at that stage and as a result, I don't consider it reasonable to charge a reduced amount of the fee. That's not a fair remedy here.

But I still agree that Nationwide provided poor service here and I still consider that an additional £300 is fair and reasonable in the circumstances – bringing the total compensation to £500.

Putting things right

I consider that there were failings in how Nationwide dealt with this application and I don't think the offer of £200 goes far enough to address this. I consider that an additional £300 is fair and reasonable in the circumstances.

This brings the total compensation to £500. I direct Nationwide Building Society to pay this to Mr and Mrs E.

My final decision

For the reasons I've given, my final decision is that I uphold this complaint in part and direct Nationwide Building Society to settle the complaint as outlined above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs E to accept or reject my decision before 6 April 2023.

Camilla Finnigan
Ombudsman