

complaint

Mr J complains about his mortgage with Santander UK Plc. He's been in dispute with Santander for a number of years, but this complaint focusses on events since April 2018. Mr J says he was unable to maintain his mortgage payments due to ill health and asked for Santander to make a reasonable adjustment, which it didn't do. He says it's in breach of the Equality Act. He also wants it to agree to allow him to port his mortgage to another property, which he says it has agreed to in the past.

background

Mr J has been a mortgage customer of Santander for many years. Unfortunately Mr J became unwell with mental health conditions some years ago, which has affected his ability to work and in turn to maintain the mortgage. For some time arrears built up. In 2016, Mr J began legal proceedings against Santander over how it had treated him up to that time. He said it had breached the Equality Act and its duty of care to him, which had worsened his health conditions and caused him loss and damage. Santander does not accept this, and has defended the court claim.

The claim has not progressed for some time, but does remain active. In attempts to resolve the issues, Mr J and Santander have been in correspondence, both directly and through lawyers. Mr J has also met with senior members of Santander staff and others. In an attempt to resolve the dispute, Santander agreed to capitalise Mr J's arrears and reduce his interest rate. Santander says it also agreed to consider porting the mortgage to another property – Mr J says the agreement was to port, not to consider porting.

All parties accept that these events, and the court claim itself, are outside the scope of this complaint. But this complaint occurs against that background. This complaint is only about what's happened since April 2018. It's about more recent financial difficulty, and about whether Santander will agree to allow Mr J to port now.

Following the capitalisation, Mr J maintained his monthly payments for a time. But in April 2018 he began to be unwell again. He wrote to Santander asking it to make a reasonable adjustment. He asked it not to collect his mortgage payment. And he asked for £25,000 further borrowing to pay off other loans. Santander said it was unwilling to lend Mr J any more money.

Over the following months, Mr J became unable to work or pay his mortgage. He missed payments in May and September 2018, and has not made any further payments since January 2019.

He wrote again to Santander asking for it not to collect his monthly payments as a reasonable adjustment, and to request further borrowing. For the same reason, he also wanted it to remove the reports of arrears from his credit file. He said its failure to do so was worsening his condition, with serious consequences.

Mr J complained to us. He said Santander should have a policy in place for granting reasonable adjustments in his situation. He said it should have assisted him when he first wrote to it in April 2018 – and if it had done so, he would have been able to recover and return to work sooner. He wanted Santander to compensate him for his lost earnings and the distress he had experienced. He wanted it to remove adverse information from his credit file. And he wanted it to agree to port his mortgage to a new property.

After our investigator got involved, Santander looked again at Mr J's situation. It agreed that, in the particular circumstances of his case, it would agree to capitalise the payments missed since April 2018 – extending that concession to December 2019. That means that Mr J is not required to make any payments until January 2020 – though the payments missed in the meantime are being added to his mortgage balance each month. Santander also offered to amend Mr J's credit file so that it didn't show any missed payments or arrears since April 2018, as each payment would be capitalised as soon as it fell due. And it agreed to pay him £500 compensation.

But Santander didn't think allowing Mr J to port his mortgage was the right thing to do. It said that while he wasn't working he had no income. It wasn't willing to increase the level of borrowing. And even when he was working, his salary is lower now than when the mortgage was taken out – so the balance is over ten times his income. It would consider an application to port, but only after carrying out a full affordability assessment and only on the basis that any ported balance met its affordability requirements based on his current finances. It said that, in the alternative, it would support him to sell the property allowing him to realise the equity and move on from a mortgage that was causing him distress.

Mr J said Santander should write off the missing payments since April 2018 and clear his credit file. He wanted it to agree to port his mortgage in advance and in full, so that he could then look for a property. He said it had an obligation to make reasonable adjustments – and a duty to pre-emptively consider what he might need, not sit back and wait to be asked. He wanted compensation for his loss of earnings because, he said, he was unable to work because of Santander's actions.

my provisional decision

I issued a provisional decision to set out my initial thoughts on the case and invite comment from the parties. My provisional findings are attached to the end of, and form part of, this decision. But in summary I said:

- In view of the court case, which is about earlier issues between Mr J and Santander, I am only considering things that have happened since April 2018, which both parties accept.
- I set out my understanding of the Equality Act and the law relating to reasonable adjustments, noting what the courts had said in a previous case involving a borrower with a disability experiencing financial difficulty.
- I also set out my understanding of the rules of mortgage regulation dealing with financial hardship.
- I noted that Mr J's situation was complex. And so was the history of his relationship with Santander. This affected how quickly and effectively it was able to assist him when he first asked for help in April 2018.
- Santander should have discussed his situation with Mr J. I thought the only realistic option that could have been considered was some kind of payment arrangement. These discussions could have happened more quickly and Santander could, initially, have done more to help Mr J.
- But once our investigator got involved, Santander agreed to a payment arrangement whereby it would not collect the monthly payments at all until December 2019. And it would capitalise them each month as they fell due, so that Mr J would not fall into arrears and no arrears marker would appear on

his credit file. It backdated this arrangement to April 2018. It also agreed to pay Mr J £500 compensation.

- While I considered that it could initially have done more, I thought this was a fair arrangement, and a fair way to put things right. I said that it showed that Santander had considered Mr J's particular and individual situation, and put in place an arrangement which went beyond what it would normally offer and beyond its usual policy. I thought this was a fair adjustment to its usual processes to take account of Mr J's circumstances.
- I then considered whether Santander should allow Mr J to port his mortgage.
- I noted the rules of mortgage regulation, particularly around the assessment of affordability when a mortgage is varied or replaced, which are to be found in MCOB 11.6.3.
- I noted that there were arguments in favour of allowing Mr J to port, and arguments against.
- In favour of allowing Mr J to port is that his current living arrangements are having an impact on his health and, he believes, are the primary factor standing in the way of his recovery, ability to resume work and ability to start paying the mortgage again.
- Against requiring Santander to allow the port is the risk that Mr J still wouldn't be able to get the mortgage back on track, having incurred substantial costs in the meantime – as well as the risk to Santander of agreeing to a new mortgage in a situation where he wasn't managing to pay his current one. And Santander also pointed to the fact that even when he is working, Mr J earns less than he did before and wouldn't qualify for a mortgage of this amount as a new borrower. Santander didn't think it was in Mr J's best interests for him to port the mortgage without carrying out a full affordability assessment and continue with a mortgage he was unable to manage.
- I said that I didn't think MCOB 11.6.3 required Santander to carry out an affordability assessment. But that doesn't mean it has to let Mr J port. It must act fairly, taking into account his best interests. And I also have to be fair to Santander, including recognising the risk to it of the port going ahead.
- I thought Santander's concerns about the long term sustainability of Mr J's mortgage were reasonable. Santander is currently offering forbearance while Mr J can't pay his mortgage – but that can't continue forever and if he doesn't resume making payments the point will come where it's no longer possible to get things back on track. That might lead to further action, up to and including repossession. And the current forbearance arrangement only runs up to December 2019.
- While I hope that doesn't happen, I have to recognise it as a real possibility. If Mr J isn't able to get back to work, and resume making payments, it's difficult to see what more Santander can reasonably be expected to do to assist him.
- But there's a real possibility that moving out of his current property, with all its history and associations, will have a significant positive effect on Mr J – allowing him to recover enough to resume work and resume the mortgage payments. When he was working previously, he was able to pay the mortgage – demonstrating that it was affordable for him, even if he wouldn't pass a full affordability assessment.
- I carefully balanced the factors for and against, while taking into account what the rules do and don't require.
- I noted that while there is a real risk associated with this mortgage, that's a risk that both parties already face. If the balance, term and loan to value were

all to remain the same or reduce as part of porting, I didn't think the risk would increase compared to what it is now.

- On the other hand, if Mr J ports there's a real possibility that he will be able to get the mortgage back on track.
- This is an unusual and difficult case. But taking everything into account, I thought it was fair that Santander allow Mr J to port his mortgage – with no further borrowing, and no increase to the loan to value, among other conditions. This is, in the particular and very individual circumstances of this case, a last resort for forbearance, and should be strictly time limited. Santander should allow the current forbearance arrangements to continue for a limited period to allow Mr J to find a property and complete a purchase. But if a port doesn't go ahead, or it does and Mr J still isn't able to resume payments, Santander will then need to consider whether the mortgage is sustainable or whether further action is needed.

the responses to my provisional decision

Both parties responded to my provisional decision.

Mr J said Santander's failure to assist him since April 2018 had caused him substantial distress and worsened his health condition, with a particular impact on him. He said it was responsible for him being unable to work, and he wanted it to compensate him for his lost earnings since then. He said Santander had agreed to consider porting in both 2017 and May 2018, only to withdraw that later in 2018 and in 2019 – and this caused further distress.

Mr J was also concerned about what interest rate would apply to his mortgage once the current one expires in 2020. He referred to Santander's duty under MCOB 13.3.1C to have policies to assist vulnerable customers, as well as its anticipatory duty under the Equality Act. He said it should be directed to share its policy – though he doesn't think it has one – which would show that it failed to assist him as it should have done. In April 2018 he asked for a payment holiday so he wouldn't have to make his payment and wouldn't have arrears recorded on his credit file. If it had done what it was supposed to do at that point, everything that's happened since wouldn't have happened. And he set out some further detail about his future plans.

Santander said there were significant risks – for both parties – associated with what I'd proposed. It was concerned that if Mr J moved, incurring significant costs in doing so, and was still unable to get the mortgage back on track, he could be in a worse position should repossession be necessary than if he hadn't moved.

Santander pointed out that the ongoing capitalisation increases the mortgage balance each month. Once the current arrangement ends, it will expect monthly payments to be re-started – and if they're not, it will resume collections activity and treat any missed payments as arrears. If an acceptable way forward can't then be agreed, there's a risk that repossession will follow. It wouldn't be in Mr J's best interests for that to happen shortly after moving house and having reduced his equity on the costs of doing so. And, as the balance is currently increasing each month, the monthly payments Mr J will be required to pay when the arrangement ends are going up too.

Santander didn't think there was evidence that Mr J was able to sustain the mortgage when he was in work, based on the history of the mortgage over recent years. It pointed out that he was in arrears for much of the period between 2010 and 2017. And he was only able to

maintain payments for just under a year following the 2017 capitalisation before problems began again. It was concerned that even if Mr J did manage to move, he wouldn't be able to get the mortgage back on track. It said it would be better for porting not to happen until Mr J had been able to demonstrate he could afford the mortgage by making payments for say six months.

Santander also said that it would give greater certainty for both parties if I were to set out a specific figure for the maximum loan to value of any ported mortgage and therefore a minimum percentage deposit.

Santander didn't agree with what I said about MCOB 11.6.3 R. It said it didn't think that was a relevant consideration because of the effect of 11.6.4 E. And it didn't think 11.6.3 R applied where the mortgage hasn't been performing and affordability hasn't been demonstrated – its purpose is to ensure that customers who have been maintaining their mortgage, but might not pass a full affordability assessment, still had options. And it considered that the ongoing capitalisation amounts to a change in the terms of the mortgage.

It said MCOB 11.6.4 E gives – non-exhaustive – examples of changes that could be material to affordability. Mr J's income had reduced since taking out the mortgage. He currently has no income. And the ongoing capitalisation was a change that was material to affordability because it results in the contractual payment increasing each month. Capitalisation of this amount is considered "material" in MCOB 13.3.4AA, and so there has been a material change to the mortgage contract. Santander said that if I didn't agree with its view of the rules, I should set out a detailed analysis explaining why.

It also said that the rules had to be considered in light of the over-riding requirement to act fairly taking into account the best interests of the customer. And it didn't think porting was in Mr J's best interests or likely to result in fair treatment.

Santander said that if it remained my decision that porting was appropriate it would appoint a single named contact to work with Mr J. He would need to go through a full application, which would help give him guidance on porting as well as explain exactly what was involved. And it said that if Mr J didn't have any strategy for paying back the capital at the end of the interest only term, he would need to sign a declaration that he would be prepared to sell the property at that point to repay the balance. And it suggested that Mr J should give regular updates, say once a month, on his progress with the sale and purchase.

my findings

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

the application of MCOB 11.6.3

In my provisional decision, I set out my understanding of the Equality Act and how it applies to this case, so I won't repeat that here. It's one of the factors that I'm required to take into account when deciding what's fair and reasonable in all the circumstances, though as I said it's not for me to make definitive findings on questions of law; that's a matter for the courts.

I also discussed my view of other relevant considerations, including setting out my view that MCOB 11.6.3 was relevant here. As Santander doesn't agree, I think it's worth setting out my thoughts in more detail, including quoting the rules in full.

MCOB 11.6.2 R says

Except as provided in MCOB 11.6.3 R ... before entering into, or agreeing to vary, a regulated mortgage contract ... a firm must assess whether the customer ... will be able to pay the sums due

Exactly how the affordability assessment is to be done is set out in more detail in later parts of 11.6.

MCOB 11.6.3 R says:

(1) *MCOB 11.6.2 R does not apply to:*

- (a) entering into a new regulated mortgage contract or home purchase plan as a replacement for an existing regulated mortgage contract or home purchase plan between the customer and the firm (either as the original mortgage lender or home purchase plan provider or as the transferee of the existing contract), whether or not the new contract relates to the same property; or*
- (b) a variation of an existing regulated mortgage contract or home purchase plan*

Provided the conditions in (2) are satisfied

(2) *The conditions referred to in (1) are that:*

- (a) The proposed new or varied regulated mortgage contract or home purchase plan would not involve the customer taking on additional borrowing ... beyond the amount currently outstanding under the existing regulated mortgage contract or home purchase plan, other than to finance any product fee or arrangement fee for the proposed new or varied contract;*
- (b) There is no change to the terms of the regulated mortgage contract or home purchase plan which is likely to be material to affordability.*

(3) *MCOB 11.6.2 R does not apply to a variation to the terms of a regulated mortgage contract or home purchase plan which is made solely for the purposes of forbearance where the customer has a payment shortfall or in order to avoid a payment shortfall.*

MCOB 11.6.4 E says:

(1) *If a firm treats any of the following changes as not likely to be material to affordability, this may be relied upon as tending to show contravention of MCOB 11.6.2 R:*

- (a) An extension of the term of the regulated mortgage contract or home purchase plan which it is reasonable to expect will extend into (or further into) the customer's retirement...; or*
- (b) Changing from a repayment mortgage to an interest-only mortgage, or vice versa; or*
- (c) The addition or removal of a customer*

(2) *The list in (1) is not exhaustive.*

In MCOB, the suffix R denotes a rule, while G is guidance and E is an evidential provision – that sets out the sort of evidence that may show compliance with or breach of the rules.

My understanding of 11.6.3 is that, in principle, it applies in this case – since the complaint is about porting, which is the replacement of an existing mortgage contract with a new one between the same customer and firm, secured on a different property. That’s within the scope of 11.6.3 R (1) (a). So this is a relevant consideration for me to take into account in deciding what’s fair and reasonable in all the circumstances.

Santander says in practice 11.6.3 isn’t relevant because the conditions in 11.6.3 (2) aren’t satisfied. In particular, it says, there have been changes to the terms of the contract which are material to affordability, namely:

- Mr J’s income has reduced materially since the mortgage was taken out, and his current employment status and income are unclear;
- There has been a poor payment history;
- There has been capitalisation, both in 2017 and monthly since April 2018 – the level of capitalisation is defined as “material” in MCOB 13.3.4AA and has resulted in a material increase in the balance – of almost £38,000 of arrears in 2017 and of around £950 per month more recently.

As I’ve set out above, the conditions in 11.6.3 (2) are that the proposed new contract would not involve the taking on of additional borrowing beyond “*the amount currently outstanding*”; and that there is “*no change to the terms of the regulated mortgage contract...which is likely to be material to affordability*”.

I don’t think any of the factors Santander refers to mean that the conditions in 11.6.3 (2) aren’t met. The rule refers to “*the amount currently outstanding*”. I think “*currently*”, in the context, means the balance as at the date the old mortgage is replaced by a new one. So I don’t think the fact that there have been past capitalisations means this condition is not met.

The other factors Santander refers to go to the second condition in 11.6.3 (2) – whether there is a change to the terms which is likely to be material to affordability. Dealing with the capitalisations first, Santander says they are “material” in terms of the test in 11.6.3 (2) (b). It relies on MCOB 13.3.4AA R in support of what it says. This rule says

In MCOB 13.3.4A R, the impact of a capitalisation would be material if, either on its own or taken together with previous automatic capitalisations, it increased:

- (1) The interest payable over the term of the regulated mortgage contract by £50 or more; or*
- (2) The contractual monthly repayment amount under the regulated mortgage contract by £1 or more*

I don’t think this is a relevant matter in this case. The definition of materiality in 13.3.4AA R is for the purpose of the use of that word in 13.3.4A R, not more widely. This is a different rule, operating in a different context, to 11.6.3 R. There might be situations where it’s relevant for the purposes of 11.6.3 R, but I don’t think this is one of them.

And, in any case, I think it’s clear from the wider context of the rule that the conditions are to be applied at the point of entry into or variation of the mortgage – and prior capitalisations happened at earlier times than that.

So while I've considered everything Santander has to say in this respect, I'm satisfied that 11.6.3 is a relevant consideration here, and I think Santander can allow porting to go ahead without needing to carry out a full detailed affordability assessment.

I think Santander does, however, make some powerful points – and while I don't think they affect the applicability of 11.6.3 R, nothing in that rule says that an application *has* to be granted. Affordability is only one factor in that decision – and I agree with Santander that the overriding principle set out in MCOB 2.5A applies. I think the points Santander makes go more to the overall context of the application and whether it's fair and reasonable in all the circumstances – and in Mr J's best interests – for it to go ahead, and it's in that context that I think they carry most weight.

I discussed in my provisional decision my reasons for concluding porting was, on balance, fair and reasonable and in Mr J's best interests and I'll now turn to that question again.

is porting a fair and reasonable outcome to this complaint?

MCOB 2.5A.1 R says

A firm must act honestly, fairly and professionally in accordance with the best interests of its customer

As I've explained, the rules are one of the factors I take into account in determining what's fair and reasonable in all the circumstances of this case. And I think this rule stresses again that what's required is fair treatment – bearing in mind Mr J's best interests.

Santander says, as I've set out above, that it doesn't think porting would be in Mr J's best interests – at least, not in advance of him being able to resume payments and show a history of affordability.

I think there is some recent evidence of Mr J being able to afford the mortgage. Following the capitalisation in 2017, he was able to maintain the mortgage payments for just under a year before becoming unwell again in April 2018, and he made some payments thereafter too, stopping altogether later in 2018. I think this does show that, when he's well and able to work, Mr J was able to afford the mortgage. I take Santander's point about the history up to 2017 – and that, as a result this is not a mortgage that has been performing over the long term. But I think what the evidence shows is that Mr J is potentially able to sustain the mortgage when he's well – but can't when he isn't.

There's a clear difference between the parties here. On the one hand, Santander doesn't want to consider porting until Mr J has resumed payments – and, ideally, maintained them for at least six months. On the other hand, Mr J says he won't be able to resume payments until he's ported as staying in the same property is hindering his recovery. These are irreconcilable positions.

I've thought very carefully about what's fair and reasonable in all the circumstances. This isn't a straightforward case. In my view it's a very difficult and finely balanced decision that I have to make. I set out many of the arguments in my provisional decision, and I don't think either party has brought significant new arguments since then – rather, existing positions have been re-stated.

If Mr J ports his mortgage, there are some very real risks and difficulties. There will be considerable costs – the costs of selling his old property, stamp duty on the new purchase, moving costs, legal fees, and more. I think Santander's right that these costs are likely to be in excess of £20,000 – and they'll have to come out of the equity Mr J has in his current property.

If Mr J ports and isn't able to get the mortgage back on track, he's likely to face significant difficulties. I said in my provisional decision that the forbearance Santander's now offered goes significantly beyond what it would normally offer customers in financial difficulty. While it's fair that it took Mr J's particular circumstances into account in deciding what to do, this form of forbearance can't continue forever – not least because, while it does, the mortgage balance and contractual payments are increasing month by month. Given the long history of Mr J's difficulties with managing the mortgage – the period between 2017 and 2018 apart – it's likely that Santander would then consider taking further recovery action. And if that comes shortly after a port, Mr J is likely to be – financially speaking – in a worse position than he is now.

However, it's possible that following a port Mr J will be able to get his mortgage back on track. He certainly believes so and in light of his condition and the wider circumstances I accept that it's a reasonable possibility. I take Santander's point that it would be easier to be satisfied of that if Mr J had already shown that he could do that for say six months leading up to porting. I agree. But I think the reality is that it's unlikely that will happen.

And I think it's clear that if Mr J isn't able to move out of his property, it's unlikely he will recover sufficiently to return to work and resume the mortgage payments in the near future. As the current forbearance ends at the end of this year, it is in my view very likely that Santander will resume collection activity in the new year – and if Mr J still isn't able to pay his mortgage, things are likely to move to recovery action within a few months.

So if Mr J ports his mortgage to a new property, he might be able to get things back on track – but he might not, and could be in a worse position if he doesn't. And if he doesn't port, it's much more likely that he won't be able to get back on track, and will be facing repossession at some point next year. Porting is likely to reduce the chances of that happening, but could worsen the consequences if it does.

I've given these competing considerations careful consideration to decide what's fair and reasonable in all the circumstances. There's a real risk to Mr J here. If he ports and still can't resume payments – and the mortgage is brought to an end – he'll be in a worse position than if that happens without porting. But if porting does work, he'll be able to move forward to recovery with a mortgage he can potentially sustain. I'm very aware of the risks involved and have thought very carefully about them. Having done so, and on balance, I'm satisfied that – viewed as a last chance at forbearance in his particular situation in this exceptional case – porting his mortgage is in Mr J's best interests.

My duty to do what's fair and reasonable in all the circumstances also includes the need to be fair to Santander. That's an important consideration too. For all the reasons I explained in my provisional decision, I don't think – provided the risks are mitigated through a clear time limit and a restriction on increased loan to value – that the risk to Santander of allowing a port to go through is such that it would be unfair to require it. I've set out above why I think it's permissible under MCOB 11.6.3. And I set out in my provisional decision why – given all that's happened, as well as Mr J's very particular and individual circumstances – it would be fair for it to happen as a last chance at forbearance to give Mr J one final opportunity to get

things back on track. With appropriate safeguards, it can be done without increasing the risk to Santander. I still therefore think that requiring Santander to allow Mr J to port his mortgage is fair and reasonable in all the circumstances.

But I agree that there need to be restrictions and safeguards on that, to protect the position and best interests of both parties.

Mr J has shown me a recent market appraisal of his property. He says he has an interested buyer, willing to pay the asking price, who is just waiting to sell their own property before making a formal offer. And he says that he's found another property, a new build, that he wants to buy – and that, as a back-up selling strategy, the developer has a scheme whereby it takes over the sale of the buyer's old property. So he's confident of achieving a sale in the near future.

As at the end of December 2019, when the current forbearance ends, Mr J's mortgage balance will be around £341,600. Mr J's market appraisal suggests marketing the property at £500,000 and he says he has an interested buyer at that price. Santander thinks the value is nearer £400,000, and on online platform suggests it's around £420,000. Based on that range, Mr J's loan to value as at the end of December will be somewhere between 68% and 85%. But it's not possible to say precisely what the property is worth, and so what the LTV is, until it sells.

I agree with Santander that it's best to take the measure of loan to value as at the end of December 2019, when the current forbearance ends. Although I intend to extend it, that's only for the purpose of allowing the port to go through, and I think it's important to mitigate as much as possible the impact of further capitalisation on the equity, the loan balance and the future monthly payments.

So I think that the amount Mr J should be allowed to port to a new property should be no more than the loan to value as at the end of December 2019. And I think Mr J should use the retained equity from the sale to keep the mortgage balance as low as possible. He should use it to fund a deposit on the new property.

I know Mr J has found a property he would like to buy. Whether that particular property is feasible will depend on the sale price he achieves for his existing property. Once he has accepted an offer, he will be able to calculate the loan to value he can port. He can do so by dividing the balance as at 31 December 2019 - £341,600 – by the offer price he accepts.

That will tell him the maximum percentage loan to value – and therefore the maximum mortgage – he will be able to take out on any new property. And, in turn, that will tell him the maximum purchase price of any new property.

For example, if Mr J does manage to sell his property for £500,000, the higher estimate:

- The maximum loan to value will be $\text{£}341,600 / \text{£}500,000 = 0.683$, or 68.3%
- Therefore the maximum loan to value on a new property would be 68.3%.
- Mr J would get $(\text{£}500,000 - \text{£}341,600)$ £158,400 equity from the sale.
- If costs of sale, purchase and moving are £25,000, this leaves £133,400 as a deposit, which must be at least 31.7% of the purchase price
- Therefore the maximum purchase price of a new property would be $(\text{£}133,400 / 0.317) = \text{£}420,800$

- The mortgage balance would reduce to no more than 68.3% of the purchase price – a maximum of £287,400

But if Mr J sells his property for £400,000, the lower estimate:

- The maximum loan to value will be $£341,600 / £400,000 = 0.854$, or 85.4%
- Therefore the maximum loan to value on a new property would be 85.4%.
- Mr J would get $(£400,000 - £341,600)$ £58,400 equity from the sale.
- If costs of sale, purchase and moving are £25,000, this leaves £33,400 as a deposit, which must be at least 14.6% of the purchase price
- Therefore the maximum purchase price of a new property would be $(£33,400 / 0.146) = £228,800$
- The mortgage balance would reduce to no more than 85.4% of the purchase price – a maximum of £195,400

These examples are for purposes of illustration. The actual figures will depend on the sale price Mr J achieves. But what they show is that the loan to value must remain the same or less, and how that influences the amount Mr J has available to fund a purchase – bearing in mind that I've also said that the retained equity should be used as part of the purchase, not withdrawn for other purposes.

Mr J has a small secured loan as well as the mortgage. He says the secured lender is prepared to allow the loan to be moved to a new property – but if that's not the case and it has to be paid back as part of the sale that will further reduce the amount available to buy a new property with.

If Mr J is able to increase the deposit through other means – such as the help to buy scheme, if he buys a new build property and is otherwise eligible – that would increase the amount available to buy a new property. Though in view of his circumstances, and the risks I've outlined above if porting doesn't in the end assist his recovery, I would urge him to think very carefully indeed before taking on additional debt, even debt that doesn't require immediate monthly payments. And I think that even if this happens the retained equity should still be used towards the purchase as well.

Indeed, I would urge Mr J to consider buying the cheapest property he reasonably can, as the more he's able to downsize the more he'll be able to reduce the mortgage balance – and thereby reduce the future monthly payments. If things do go wrong in the future, and the mortgage doesn't prove sustainable, the more equity – in both percentage and cash terms – Mr J is left with, the better the position he'll be in to move on from it.

This is an interest only mortgage, and in the absence of any other repayment strategy Mr J will need to be prepared to sell the property at the end of the term, so should think carefully about any commitment that will reduce the eventual equity available to him. Santander has said it will require him to sign a declaration to that effect as part of the porting process and I think that's fair.

Santander has agreed, if it is my final decision to require it to port Mr J's mortgage, that it will appoint a single point of contact to guide Mr J through the process. That point of contact will be able to discuss with Mr J exactly what's required. Mr J will need to co-operate with that process, which is likely to involve Santander asking him for detailed information, and he may want to think about what support he might need while it's going on.

If Mr J doesn't feel able to go through a porting application, Santander won't be able to port his mortgage. The single point of contact should get in touch with Mr J as soon as possible after we notify it that Mr J has accepted this decision – if he does – so that the process can get started. I also think it's reasonable for Santander to expect regular updates on his progress, and so I think Mr J should update his single point of contact at least once a month.

I said in my provisional decision that the process should be completed by June 2020. Time has passed since then. And while I don't think it would be in anyone's interest for the current forbearance arrangements to continue longer than absolutely necessary, I do think a reasonable period will be needed to give Mr J the chance to port. I therefore intend to extend the porting period for two months, to August 2020, to reflect the passage of time since I first proposed allowing this to happen.

I think leaving the original deadline I proposed, the end of June, runs the risk of Mr J not being able to complete in time, as six months is a very tight timescale to sell one property and buy another. But I agree with Santander that it's not in anyone's interest for this period of exceptional forbearance to continue for too long, especially as it involves the erosion of Mr J's remaining equity in the property. I think August strikes a fair balance between ensuring it happens quickly and allowing enough time for it to happen at all.

Turning now to other matters raised by Mr J, I said in my provisional decision that Santander should have done more when he contacted it in April 2018. But I don't have enough evidence to show that its failure in this respect was the cause of Mr J's illness worsening over the following months. It's clear that by the time he contacted it in April he was already unwell and facing difficulties.

I don't think there's persuasive evidence that Santander was the cause of what happened in April 2018 either. I won't comment on what happened in 2016 and before, as that's the subject of the legal action. But I'm not persuaded, on the evidence before me, that Santander caused Mr J's relapse in 2018, or worsened, extended or prevented his recovery from it thereafter. And for the same reasons I don't think it's responsible for his lost earnings or needs to pay compensation for them. I'm still satisfied that £500 is fair in all the circumstances.

I'm not concerned with whether Santander's internal policies comply with MCOB or its legal obligations; that's a matter for the regulator. What I'm concerned with is whether it treated Mr J fairly and in line with its obligations, and what's fair and reasonable in all the circumstances now, and that's what I've set out in this decision. I don't think Santander's under any obligation to share its internal policies with Mr J as part of this complaint and I don't ask it to do so.

There is one unfortunate matter that's come up since my provisional decision. Santander sent Mr J a standard arrears letter in November 2019, telling him he was one month in arrears, was being charged a fee, and needed to contact Santander. In fact, he wasn't. The current capitalisation arrangement was continuing. Santander has explained that its systems automatically generate the letter when a payment isn't made, and it's necessary in Mr J's case to manually override that. Unfortunately that didn't happen in November. Mr J contacted me, and Santander, as soon as he received the letter and was clearly distressed by it. Santander has apologised for the distress receiving the letter caused Mr J and said it's taken steps to ensure it doesn't happen again. I think that's a fair response in the circumstances.

Finally, I note Mr J's concern that his current interest rate is due to expire early next year. Santander has confirmed that it's willing to continue the current concessionary interest rate for a reasonable period. What happens thereafter will depend on the wider circumstances at the time, but if Mr J is able to resume making payments, once he's been able to build up a track record he'll be able to apply for one of Santander's standard rates.

In conclusion, then, in the specific circumstances of this very difficult and unusual case, I've considered everything very carefully. I recognise that Santander has shown Mr J considerable forbearance and has gone beyond what it would usually offer customers in financial difficulty, taking into account his particular situation. And I recognise the concerns it has about the risks associated with allowing Mr J to port his mortgage. But it could have done more to assist him when he first contacted it in April 2018. And I think that, given all the circumstances and in light of what it's already done to assist Mr J, allowing him to port his mortgage as one final chance to get things back on track is in his best interests, and is a fair and reasonable outcome in all the circumstances.

my final decision

For the reasons I've given, my final decision is that I think it's fair and reasonable for Santander UK Plc to:

- Continue the current monthly capitalisation arrangement until 31 March 2020;
 - If necessary to allow Mr J to put in an offer on another property, provide Mr J with a decision in principle based on lending no more than his then current mortgage balance and no more than his loan to value as at 31 December 2019, based on the agreed sale price of his current property;
 - Provided that Mr J shows Santander, by 31 March 2020, that he has:
 - Accepted an offer to sell his current property; and
 - Had an offer accepted to buy a new property
- Santander should:
- Extend the current monthly capitalisation arrangement until 31 August 2020;
 - Allow Mr J to port his mortgage to a new property, provided that:
 - The new property is good security and meets its current lending criteria;
 - The new mortgage balance is the same as or less than the mortgage balance as at redemption (exact balance to be calculated from the loan to value at sale and the purchase price but likely to be less than the current balance);
 - The equity from the sale, less costs of sale purchase and moving, is to be used as a deposit on the purchase;
 - The new loan to value is the same as or less than the loan to value on the old mortgage as at 31 December 2019
 - Appoint a named single point of contact, effective as soon as possible after the date we tell Santander Mr J has accepted this decision, if he does, to guide Mr J through the porting application process and to keep in touch with Mr J for regular updates;
 - Pay Mr J £500 compensation.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J to accept or reject my decision before 23 January 2020.

Simon Pugh
ombudsman

my provisional findings

Since the investigator reached her view, I've discussed Mr J's circumstances with him and I appreciate the candour with which he's explained everything. I understand the difficulties he's faced, and the need for him to be able to move on with his life and, hopefully, recover from the difficulties he's faced over the years.

I've also discussed the case with Santander and asked it for further information about its reasons for being unwilling to allow Mr J to port.

But before I go any further, I think it's important to set out what my role is – to decide what's fair and reasonable in all the circumstances.

The rules about how the Financial Ombudsman Service handles complaints are set out in the Dispute Resolution: Complaints (DISP) of the regulator, the Financial Conduct Authority's, handbook ("FCA Handbook").

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

In doing that, and in reaching the outcome I have, I take into account the following – as DISP 3.6.4 R requires:

- The law;
- Regulator's rules, guidance and codes of practice;
- What I consider to be good industry practice

But although I'll take all of these into account, ultimately I'll decide Mr J's complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the complaint. That's what DISP 3.6.1 R requires me to do.

relevant law

Mr J has referred me to the Equality Act 2010, and the obligations it places on Santander. It's an important part of the complaint he's made. The Equality Act says, broadly, that a service provider – such as a mortgage lender – must not discriminate by not providing a service, or providing it on different terms, or by failing to make adjustments. Mr J's argument is that Santander is obliged, but has failed, to provide reasonable adjustments because of his disability.

The law relating to discrimination is a complex area, and the case law suggests that determining the application of the Equality Act, and whether there's been a breach, is not straightforward. Although Mr J has specifically complained of discrimination contrary to the Equality Act, it's important to note that it's not the role of the Financial Ombudsman Service to make a decision on whether there's been a breach of the Equality Act. That's the role of the courts. Although I'm required to take into account relevant law, my role is ultimately to decide Mr J's complaint in accordance with what I think is fair and reasonable in all the circumstances of this complaint.

It's also important to note that Mr J has an ongoing court case against Santander, and a key part of his claim is that it has discriminated against him, contrary to the Equality Act. The court claim relates to events up to 2016. I've been provided with the claim and defence in that case so that I can see exactly what it concerns.

The Financial Ombudsman Service is an informal alternative to the courts. Our rules, at DISP 3.3.4A R, say that we may dismiss a complaint without considering its merits if the ombudsman considers that the subject matter of the complaint is the subject of current court proceedings, or has already been the subject of a judgment.

We've explained this to the parties, and everyone accepts that this complaint only relates to acts and omissions of Santander from April 2018 onwards. So I consider there is no overlap with the court case in terms of the underlying facts of that case and this complaint – other than, of course, that both have Mr J's mortgage at their heart.

That said, the Equality Act is – as I've said – a relevant consideration in determining what's fair and reasonable in all the circumstances of what's happened since April 2018. I'll therefore set out a brief statement of my understanding of the relevant parts of the Equality Act. I'll then set out my conclusions on what, in my opinion, is a fair and reasonable outcome in all the circumstances of Mr J's complaint.

1. direct discrimination

Direct discrimination is where a service provider treats a customer less favourably because of a protected characteristic – here, disability.

2. indirect discrimination

Applying the test in the Equality Act, acts by a lender may amount to indirect discrimination where the following conditions are met:

- a lender, applying a provision, criterion or practice, treats borrowers who don't have a disability the same as those who do;
- doing so puts those with a disability at a particular disadvantage compared to those who don't have a disability;
- the provision, criterion or practice puts (or would put) the borrower at a disadvantage; and
- the lender can't show that it is objectively justified – that is, that it's a proportionate means of achieving a legitimate aim.

3. discrimination arising from disability

The Equality Act says that discrimination arising from disability is where a provider:

- treats a borrower unfavourably because of something arising in consequence of a disability; and
- it can't show that the treatment is objectively justified – that is, that it's a proportionate means of achieving a legitimate aim.

4. reasonable adjustments

Where a service provider's provision, criterion or practice puts disabled persons generally at a substantial disadvantage compared to those who don't have a disability, the Equality Act says a lender should take reasonable steps to avoid the disadvantage. Service providers should anticipate the requirements of disabled people and the adjustments that may need to be made for them. However, nothing in the Equality Act requires a service provider to take a step which would fundamentally alter the nature of the service. This is known as a duty to make reasonable adjustments – and again, this is relevant law I've taken into account.

did Santander act fairly in light of Mr J's disability when he was unable to make his payments?

I've set out above the role of relevant law in my decision making. It's not for me to decide the law – but I take it into account in deciding what's fair and reasonable in all the circumstances.

In this complaint, there are two key issues – the action Santander did (or didn't) take from April 2018 onwards when Mr J told it he wouldn't be able to make his payments, and whether or not Mr J should be able to port his mortgage.

In respect of the payments, Mr J wrote to Santander first in April 2018 – and again in later months – explaining that he was unwell and unable to work. He asked for a “reasonable adjustment” to be made. He didn’t set out explicitly what he wanted to happen by way of an adjustment. But I think what he wanted Santander to do was, firstly, not to collect his monthly payments; and, secondly, not to treat him as being in arrears and not to make such a record on his credit file. He’s since said he wants these payments written off.

The rules of mortgage regulation are set out in the FCA Handbook, in a section called the Mortgages and Home Finance: Conduct of Business Sourcebook (MCOB). MCOB sets out what steps a lender should take when dealing with a borrower faced with a payment shortfall, where payments which are due remain unpaid, as was the case with Mr J here.

MCOB 13.3.2A R says a lender must make reasonable efforts to agree how the payment shortfall is to be made up, allowing a reasonable time to do so and trying to agree a reasonable payment arrangement. In doing so, it should consider options such as a term extension, a change to the mortgage type, deferring interest or capital payments, capitalising the shortfall, and making use of any government forbearance initiatives that may be available. MCOB 13.3.4A R says these options must be considered – but other measures might also be appropriate. And the rules also say that lenders must have specific policies in place for dealing with vulnerable customers.

There are no longer government forbearance schemes in England, so that’s not an option in this case. And as the mortgage is already interest only, extending the term or changing its type wouldn’t assist Mr J by making it more affordable.

Realistically, therefore, the only option open to Santander was to come to some kind of payment arrangement whereby it would collect reduced payments – or no payment – for a period of time to allow Mr J space and time to recover, return to work and maintain the payments.

In cases of financial difficulty, I would ordinarily expect the lender to contact the borrower to explore what can be done – and I would expect the borrower to engage, openly and frankly, with the lender and explain their situation. It’s only when both parties work together that the lender can understand the borrower’s situation and which of the options that are open to it will assist in resolving the situation – if any will.

It’s important to note that a period of financial difficulty doesn’t change the need for the mortgage to be repaid. Even where a reduced payment arrangement can be agreed, there will need to be a further discussion about how the missed payments can later be made up to get the mortgage back on track and hopefully repaid by the end of the term.

In this particular case, there has been a longstanding dispute between Santander and Mr J. As a result, communication between them was difficult. There was some communication via solicitors, but that was mainly about the court case, since neither solicitor was instructed to deal with the ongoing relationship. And Mr J’s condition made it difficult for him to communicate with Santander in the usual way – Santander had made some adjustments to take account of that.

As a result, Mr J had named individual contacts who were senior members of staff in Santander’s complaint function. It doesn’t seem that Santander’s mortgage centre, or specialist vulnerable customer team, were directly involved in dealing with Mr J.

There was some delay in getting up to date income and expenditure details from Mr J. And I think Mr J wasn’t always clear about exactly what assistance he needed – at times he asked for a “reasonable adjustment” without setting out exactly what adjustment he felt he needed.

All of this meant that Mr J’s situation, and his request for help, was more complex – and took longer to deal with than would be usual in cases of financial difficulty.

But the underlying issue was that Mr J was experiencing renewed financial difficulty. Because of a new change in his circumstances – a relapse in his condition affecting his ability to work – he couldn't make his mortgage payments. Once it understood his situation – which took some time – Santander agreed not to collect payments from him. Mr J wanted it to go further than that. He didn't want his payments to be collected, his mortgage to be in arrears, or recorded as such on his credit file.

There's a binding mortgage contract in place between Mr J and Santander. Under that contract, Santander agreed to lend Mr J money – and he agreed to pay it back. If he misses a payment, he's in breach of his mortgage contract, and falls into arrears.

The rules allow for a payment arrangement to be put in place, by which agreement is reached that the mortgage won't be paid for a time. But this doesn't change the fact that the payments are due, or that they will have to be paid eventually. This is part of standard forbearance, which should be considered in all cases – not just those of customers with a particular vulnerability or disability.

It doesn't mean that the monthly payments are written off; merely that collection of them can be deferred, in full or in part. And to go further than that, simply to write the missing payments off or not treat them as owing at all, wouldn't in my view be reasonable even in cases of vulnerability or disability.

As a result, there will always be limitations on how far a payment arrangement can go. Once it's over, the payment shortfall that results will need to be cleared. This is generally done either by formally adding the shortfall to the balance and increasing the contractual monthly payment (known as capitalisation), or by informally agreeing an extra payment to be made on top of the existing contractual monthly payment.

The courts have said that a reasonable period of time to clear a payment shortfall can be up to the whole of the remaining mortgage term¹. It follows that the higher a payment shortfall, the longer it goes on, or the shorter the remaining term of the mortgage, the higher the amount payments will need to increase by to clear the shortfall – whether or not it is capitalised. It's also the case that the longer it takes to clear the shortfall, the more expensive it will be through the charging of additional interest.

MCOB 13.3.2A (1) says that a firm must make reasonable efforts to reach an agreement for the repayment of a shortfall, and MCOB 13.3.2A (3) says it should allow a reasonable time for it to be repaid – which, taking into account the law, might be up to the remaining term. And 13.3.2A (6) says that it should treat repossession as a last resort. But the reality is that if no payment arrangement can be agreed, or if it's not possible to repay the shortfall in a reasonable time, a lender might need to consider repossession of the property as a last resort to recover the sums owed.

Nothing in the law or in MCOB says that it's reasonable to expect a lender not to recover the payment shortfall at all. Simply to write off debt properly due under the contract is to fundamentally change the relationship between lender and borrower, and the nature of the product and how the lender does business.

Mr J has referred to Santander's obligation to make reasonable adjustments under the Equality Act. As I've said, it's not for me to make findings on matters of law. That's for the courts. I'm aware of a case where the Court of Appeal considered this duty in the context of financial difficulties and mortgages². That case was concerned with an application to convert from a repayment mortgage to an interest only mortgage where the borrower was a disabled person facing repossession because of financial difficulties. The Court said it was reasonable for the lender to refuse that change. It was something it never offered, so it wasn't treating disabled people, or this borrower, less favourably. And making the change would be to require the lender to accept a fundamentally different, and riskier, agreement than had originally been taken out, which wasn't compatible with how it carried out its business.

¹ See *Cheltenham & Gloucester Building Society v Norgan* [1996] 1 WLR 343

² *Green v Southern Pacific Mortgage Company* [2018] EWCA Civ 854

That case was decided on different underlying facts. But I think one of the principles it set out was that a lender doesn't have to agree to fundamentally change the nature of a mortgage by way of reasonable adjustment.

I think, taking into account the law and the rules of mortgage regulation, it's fair and reasonable to expect Santander to have made adjustments in *how* and *when* Mr J's outstanding payments were collected. That's something required by MCOB, and Mr J's health and ability to return to work are relevant factors to take into account. But I don't think it's fair and reasonable for it to make adjustments to *whether* payments are collected at all. There's a fundamental difference, in my view, between a mortgage where payments are required but deferred by agreement, and a mortgage where payments are not required.

And where payments are deferred, it follows that – at some point – they will need to be resumed and the shortfall made up.

For similar reasons, I think it's not fair and reasonable to expect Santander to stop recording missed payments on Mr J's credit file. The purpose of a credit file is to contain an accurate record of the conduct of an account, so that other lenders considering applications for credit can have a true picture of the credit history of the applicant. There are rules around the compilation of credit files, and guidance from the Information Commissioner – but they're to do with the accuracy of what's recorded. I'm not aware of a rule or guidance that says the conduct of an account should not be recorded at all, or not recorded accurately, in cases where vulnerability or disability is the cause of missed payments.

And, given the purpose of credit files is to help ensure lenders lend responsibly (and there's an element in that of protecting applicants from taking on more debt than they can afford), I don't think it's fair and reasonable to expect Santander to depart from that general position in this case.

A lender only records the bare facts of whether payments have been made, have been missed in line with an agreed arrangement, or have simply been missed – as well as the level of any arrears. But it's open to a borrower to place a notice of correction on a credit file explaining the reasons behind a recording, which other lenders are required to consider in future. While I understand why Mr J wants more than that, I don't think it's something that Santander should fairly be required to do.

Santander did agree not to collect payments for a time. Since the complaint has been with us, it's gone further and taken the decision to capitalise all the missed payments immediately from their due date, and will continue to do so up to December 2019.

While this means Mr J's mortgage balance is increasing month by month – and so when he does resume making payments the amount he pays each month will need to increase – it does address his concerns about having to make the payments now. And as they're being capitalised, rather than being treated as subject to an arrangement, Mr J is not being treated as being in arrears. Nothing is being added to his credit file, and late payment markers since April 2018 have been removed.

Santander's usual policy is not to capitalise arrears until the borrower has resumed their monthly payments and has demonstrated the ability to maintain them for some time. That's because capitalisation increases the contractual monthly payment – the arrears are formally added to the loan balance, and the payments adjusted to collect the increased balance over the remaining term. So it requires the borrower to agree to pay more, and carries the risk of increased arrears in the future if they're not able to. An informal payment arrangement, on the other hand, does not increase the amount the borrower is contractually required to pay.

Santander agreed to a payment arrangement whereby it would not collect the payments due. But once our investigator got involved, it took into account Mr J's particular circumstances – and the impact the worry about arrears and his credit file was causing him in light of his wider health concerns. It agreed to capitalise month by month as payments fell due. This is an adjustment it made to its usual policy – which I've set out above – to take account of Mr J's particular situation, and goes further than it usually would. I think that's fair and reasonable in all the circumstances, and a fair way to resolve this part of Mr J's complaint. As for how long this arrangement is to last, I'll say more about that below.

should Mr J be allowed to port his mortgage?

I can readily understand why Mr J wants to move house. He's been living in the same property for the duration of his illness. It's been the scene of some traumatic incidents and continuing to live at their scene is a matter that causes him ongoing distress. Mr J believes that moving away to another property would give him a fresh start, significantly aiding his recovery and reducing the risk of further relapses. While I haven't seen any definitive medical evidence confirming that, I can understand why – at the very least – Mr J strongly believes that to be the case. And I can understand why his belief in that is likely to contribute to making it so. But for the mortgage, this is something he would be able to do.

The difficulty is that this isn't simply a matter of moving house. Mr J has his mortgage. It's secured by a charge on his property. So if he sells, Santander is entitled to first call on the proceeds of sale to repay the debt – and that in turn wouldn't leave Mr J enough money to buy somewhere else. He's spoken to an independent mortgage broker who has confirmed that he wouldn't be able to raise a mortgage from another lender, based on his finances and salary when working.

So Mr J's only options are to stay in his property, sell and move into the rented sector – which Mr J has been very clear he doesn't want to do – or to port his current mortgage to another property.

Mr J says Santander should allow him to port his existing mortgage balance. At times, he's also said it should agree to lend him further money to cover his costs and to repay other debt. He says that the monthly payments are affordable when he's working – and moving will help with that. Mr J wants Santander to agree to port, to tell him exactly what he can borrow and then process a porting application so he can then go out and look for properties.

Santander says that it doesn't think it would be responsible to allow Mr J to port at the moment. He's not currently able to pay anything to his mortgage at all. Even when he's working, his income is lower than it used to be and the mortgage balance is now over ten times his income. It says it's not in his best interests to continue with a mortgage he's having difficulty managing. And it's concerned that even if he did port, Mr J would still be unwell and still be unable to work – and would fall back into arrears. So it says his best options are either

- to sell the property and simply repay the mortgage; or
- If he wants to port, it will only consider that when payments have resumed, and it will then carry out a full affordability assessment and only lend what its assessment shows he can afford, which is likely to be substantially lower than the existing balance.

The discussions and negotiations about porting which may have taken place as part of the negotiations around trying to settle the court case pre-date April 2018 and are part of the court case. Those conversations fall outside the scope of this complaint and I make no finding as to what actually occurred.

In this decision, I'm only considering the view Santander has now taken of Mr J's desire to port his mortgage, as set out in the options it presented to the investigator. In any event, the key issue I have to decide here is whether or not Mr J should be allowed to port his mortgage now, regardless of what may or may not have been discussed in the past.

When considering a porting application, a relevant consideration in deciding what's fair and reasonable in all the circumstances is the rules of mortgage regulation, MCOB. The ability to port a mortgage is, in general terms, not a right. A lender is not generally required to port – but it should consider an application as part of its discretion, and when it does so should consider it fairly and in line with the rules.

There are various obligations in the rules that have to be balanced. MCOB 11.6.2 says a full affordability assessment should be carried out – but 11.6.3 says that requirement doesn't apply when varying or replacing an existing mortgage, and where there is no further borrowing, the term doesn't extend past retirement age, and no change in the parties to the mortgage. I think the purpose of these rules is to require lenders to lend responsibly – but also to ensure that existing borrowers, who a lender has already taken on, are not treated unfairly because their circumstances or the lender's criteria have changed since the mortgage was taken out.

Finally MCOB 2.5A says that a lender has to act fairly, taking account of the borrower's best interests – also a factor in the regulator's overriding principles that apply to all businesses.

I don't think Santander is required to agree to additional borrowing. I agree that it's likely that were a full affordability assessment to be carried out in Mr J's current circumstances Mr J would fail the assessment. Since his first illness, he's changed jobs and now earns less than he used to. When working, his salary is around a tenth of his mortgage balance. He spoke to a mortgage broker who advised him he wouldn't pass other lenders' affordability assessments. I think that's likely to be true were Santander to carry out a full affordability assessment as well. But it's also worth noting that, when working, he has in fact been able to afford the monthly mortgage payments.

Where there's additional borrowing there's no discretion in the rules – a full affordability assessment must be carried out, and I think, as I set out above, Mr J would be likely to fail it. Part of the purpose of the rules – made more strict in 2014, following the financial crash – is to make sure lenders lend responsibly by not lending more than borrowers can afford. In my view, it wouldn't be fair and reasonable to expect Santander to ignore the rules and lend Mr J more money.

However, if Mr J doesn't borrow more money – he just ports the same balance, or a lower one – there's no obligation for Santander to carry out an affordability assessment. This provision is contained in MCOB 11.6.3 R. And, given that, I don't think it would be fair to use an affordability assessment as the sole basis for refusing a porting application. That's why I don't think what Santander told the investigator went far enough.

That's not to say, though, that Santander is *required* to allow Mr J to port his existing balance in full. The rules merely say it has to act fairly, taking into account his best interests. And our rules require me to decide what's fair and reasonable in all the circumstances – taking into account the mortgage rules – which includes what's fair to both parties.

Santander raises the point that if Mr J is to move house, he would incur substantial costs – including estate agent commission on his sale, stamp duty on his purchase, and legal and valuation fees, as well as moving expenses. These could add up to many thousands of pounds.

If Mr J can't borrow more funds from Santander to cover those costs, he might have to use some of the equity from the sale. That means he would have less money available to buy a new property. And, if that was the case but his loan balance remained the same, the loan to value on his new property would increase.

It's also fair to say that there's a long history here of Mr J having been in arrears and struggling with his mortgage. Santander capitalised the arrears two or three years ago, and from then until 2018 Mr J was in work and making his monthly payments.

But since his recent illness, Mr J has again been unable to make his payments. Because of the monthly capitalisation, he's not in arrears. Ongoing capitalisation isn't a sustainable position, though, because – as I explained above – it makes the mortgage balance and the contractual monthly payment higher each time it happens. If it continues, there will come a time when Mr J wouldn't be able to afford the monthly payment even if he does return to work. Santander is concerned that porting won't in fact resolve the underlying problem and Mr J will continue to struggle to meet his mortgage payments.

Given that, and given the history, as well as what I said above about what Santander can and can't reasonably be expected to do by way of forbearance, I do think Santander has reasonable concerns about how sustainable Mr J's mortgage is in the long term.

I think it's a genuine concern, and a fair one, that there may come a point where it's not reasonable for Santander to continue to offer further forbearance – because the point has been reached at which it's no longer possible to get the mortgage back on track. If that happens, and Mr J wasn't able to resume making his new contractual monthly payments, there's a risk that it may need to take alternative action – up to and including repossession.

I very much hope that doesn't happen, of course. But it can't be ruled out. The existing forbearance arrangement is only in place until December 2019. If after that point Mr J can't resume paying his mortgage, and agreement on further forbearance can't be reached, matters may reach the next stage. And the same is true if further forbearance is agreed, and things still haven't resolved by the end of any extended period. I've said above that it's fair that the mortgage remains payable, and the purpose of forbearance is to avoid repossession where possible by trying to get the mortgage back on track. But there may come a time when that's no longer a realistic prospect.

And if the last resort is reached and Santander does need to take repossession action, it wouldn't in my view be reasonable to expect it to allow Mr J to port his mortgage at the same time as it was taking action to bring it to an end

As I say, I hope that position never arises. But I do think Santander does have legitimate concerns here.

I also have to bear in mind the particular circumstances of this case. These include the nature of Mr J's illness, and how it affects him. He very strongly believes that only moving house, by porting, will allow him to recover sufficiently to get back to work. But it's also fair to say that I don't have any professional medical evidence on this point. And it may be that – despite Mr J's strong belief and best intentions – he remains unwell even after porting.

Having thought very carefully about this, I do think it would be fair and reasonable and in Mr J's best interests to allow him to port. But I also think it's reasonable to meet Santander's concerns.

I've said there's no need for a full affordability assessment when a mortgage is ported without further borrowing. Santander argues that it's in Mr J's best interests to get the mortgage back onto a sustainable footing – which means reducing the balance to an amount he can currently afford.

There's force in that argument, in my view. But it's also the case that – until he had to stop work – Mr J was affording the mortgage as it now stands.

MCOB 11.6 says that a full affordability assessment involves detailed and rigorous examination of Mr J's finances, based both on the mortgage balance now, and the balance were interest rates to rise substantially in the future. I agree he's likely to fail that assessment. But that doesn't change the position that, as things stand (when he's working), he can in fact afford the monthly payments. He was able to make the monthly payments while working, and the income and expenditure form he completed shows that to be a sustainable position.

If Mr J were applying to Santander as a new borrower, following the full affordability assessment it would have to carry out, I think it's likely it wouldn't agree to give him this mortgage based on his current circumstances – as his financial adviser has shown is the case with other lenders. But if he ports, he wouldn't be applying as a new borrower, he would be applying as an existing borrower.

I agree with Santander that Mr J's circumstances mean that it faces more than usual risk over whether the mortgage will be repaid. And I agree that there's more risk of it having to take action to recover the balance in future than is generally the case. And having a large mortgage and an uncertain income puts Mr J in a difficult position too.

But Santander and Mr J both face those risks already. If Mr J were to port his mortgage to another property without further borrowing, in my view the risk position wouldn't change. The monthly payments would stay the same. The balance would stay the same. The term would remain the same – and so would the long term issue of Mr J's ability to repay the capital at the end of the term.

One area where the risk could increase is if the loan to value were to increase. If Mr J uses some of the equity to cover the costs of moving, but then keeps the same mortgage balance, he would have less equity to buy a new property – and the share of the purchase price covered by the mortgage would go up.

Loan to value doesn't in my view present an immediate risk to the sustainability of the mortgage. But were the worst to happen and Santander need to take repossession action, it would mean there's more risk that the property value wouldn't cover the full balance – and more risk to Mr J that he would be left with less equity or even a shortfall. Of course, I very much hope that things never come to this. But there's always a possibility of it with every mortgage, and it's not unreasonable to plan to mitigate the risk in deciding the level of borrowing. Santander acknowledges it could consider an application with the same or lower loan to value – but still has the other concerns I have set out. I acknowledge that's a matter for its commercial judgement – but its commercial judgement has to be exercised fairly in all the circumstances, and that's a matter for me to consider.

I also have to bear in mind Mr J's best interests. It's not in his best interests to take on a mortgage he couldn't afford – but in porting, he wouldn't be taking on a new mortgage, or increasing the payments he's already liable to make. And I think he has clearly and cogently explained how important it is for him and his future health and wellbeing to be able to move away from his current property. In the particular circumstances of this case, I think that's a strong factor to weigh in the balance.

So I understand Santander's concerns about allowing Mr J to port, and I understand his strong desire to do so. I've taken all the above into account.

next steps

I don't think it's possible to deal with the two aspects of this complaint – the forbearance, and the porting – separately. I think the right approach is for me to take a step back and look at things in the round, setting out what I think is fair and reasonable in all the circumstances.

I've taken into account everything I've said above. That includes the law, regulations and guidance. It also includes the facts of this case – and I'm very mindful of Mr J's particular situation and the individual circumstances he finds himself in.

In this particular, unusual and difficult case, I think it would be fair to allow Mr J to port his mortgage so that he has the best chance of recovering from his illness, getting back to work and getting his mortgage back on track.

But, as I've said, Santander has legitimate concerns both about the situation now and about the long-term sustainability of the mortgage. I think it's fair that those concerns are taken into account and addressed.

The current arrangement to capitalise the monthly payments ends at the end of December 2019. And Mr J's current interest rate ends in April 2020.

December 2019 is only a short time away. I don't think that gives Mr J enough time to port his mortgage to a new property.

Equally, however, I don't think it would be fair to require Santander to give an open-ended commitment to allow him to port when – as I've said – the balance is going up each month and Mr J is not yet in a position to resume payments.

I think the fair outcome here is to say that Santander should allow Mr J to port his mortgage. Having tried other methods of getting the mortgage back on track, this could be seen – in the particular circumstances of this case – as a last resort for forbearance. But it should only be expected to do so if neither the balance nor the loan to value increase, other than as a result of the capitalisation. And – to avoid a situation where porting takes place against a background of mounting arrears or other action in the future – there should be a time limit on doing so.

And I think the current breathing space Mr J is being given by Santander, exceptionally and in his particular situation, should also continue to allow Mr J to go through the porting process and get himself into a situation where he can resume work and resume payments.

I think a fair outcome is for Santander to extend the current capitalisation forbearance for three months, until the end of March 2020. That will allow Mr J time to market his property and find another to buy.

If, by the end of March 2020, Mr J can show Santander that he has accepted an offer to buy his current property, and in turn has himself had an offer accepted to buy a new property, Santander should then extend the capitalisation arrangement for a further three months, until the end of June 2020, to allow the porting process to complete. If Mr J needs a decision in principle to allow him to make an offer on a property, Santander should provide him with one – recognising that a decision in principle is not a guarantee that a mortgage offer should follow.

And, again if Mr J has offers in place by the end of March 2020, Santander should allow him to port his mortgage provided that the loan balance does not increase, provided the new property is good security and meets lending criteria, and provided that the loan to value on completion of the new mortgage is no higher than the loan to value on redemption of the old one. It should be prepared to show a small amount of flexibility around the June 2020 deadline provided it is satisfied that the house sale and purchase is proceeding properly.

I don't think it's fair to expect Santander to continue the current forbearance arrangements indefinitely – and I don't think it's in Mr J's best interests either. If Mr J isn't able to port by the deadlines I've set, and he is not able to resume making his mortgage payments, I don't think it would be right for me to pre-empt here the discussions that will need to follow between Mr J and Santander. And if Mr J is able to port – and having done so is still unable to return to work, or resume his mortgage payments, it's difficult to see how the mortgage can fairly be maintained into the future after that.

This is an unusual and difficult case. I've thought carefully about what I think is fair and reasonable in all the circumstances – and in the particular circumstances of this case I think it would be fair for Santander to allow Mr J some final breathing space to get matters back on track. But if that doesn't prove possible, I think it would also be fair for Santander to review whether the mortgage really is sustainable into the long term.

Finally, I think – given the relationships between the parties, and given Mr J's vulnerability – Santander should make arrangements for Mr J to have a single named point of contact to work with through the porting process.

Mr J's trouble and upset

Our investigator recommended – and Santander accepted – that it should pay Mr J £500 compensation. I've thought carefully about this. Having done so, and having noted that Santander has taken considerable steps already to offer Mr J forbearance in his individual situation that goes beyond its usual arrangements, I think that's a fair offer in all the circumstances.