

The complaint

Mr B complains that Aviation And Tech Capital Ltd (trading as Ablrate) has failed to honour the agreement he made with it when investing on its Peer to Peer (P2P) crowdfunding platform. He is unhappy that he was unable to access the secondary market to sell his loan parts and this caused him a financial loss.

What happened

In early 2016 Mr B invested £75,000 via his SIPP into a loan which was promoted on Ablrate's crowdfunding platform. The loan was due to run for five years with interest rolled up and paid at maturity (rather than interest being paid monthly).

Later in 2016, Ablrate provided a lender update to confirm that due to market conditions it would be returning some of lenders capital with accrued interest. Following this in May 2017, lenders – including Mr B – were provided a partial return of their investment. Mr B received approximately 18% of his capital back.

In December 2017, Mr B contacted Ablrate to enquire about selling some more of his loan parts on the secondary market. He sent an email that asked about the possibility of selling some of his loan. He said the loan was supposed to be possible to trade on the secondary market, albeit with complications because of the deferred interest element. He further said he was looking to reduce his holding as this loan now represented a large percentage of his overall portfolio, so wanted to diversify. He signed off the email by saying there was *“absolutely no rush to achieve this”*.

In April 2018, Mr B chased Ablrate as he hadn't had a full response to his request to trade some of his loan parts. Ablrate responded to say they were looking into the possibility of a buy-back. Mr B said the original investor information documentation said secondary market trading would be facilitated by Ablrate. He raised concerns that trading on the secondary market had been continually blocked, which wasn't what he signed up for. He said this had limited how he could diversify his overall portfolio and having the money tied up in this loan meant he couldn't benefit from investments on the secondary market he was interested in. Ablrate said they would look for a technical solution to allow Mr B to release funds from the loan.

In July 2018, Mr B again contacted Ablrate as he had become increasingly frustrated that no solution had been offered. Over the following months communications continued but no progress was made in terms of Mr B selling his loan parts. In October 2018, Ablrate discussed a proposal to return some of Mr B's capital, but not pay interest. Despite efforts to reach a solution, this wasn't achieved and Mr B raised further concerns that the market position had negatively changed in the time he had been contacting Ablrate to try and sell his loan parts. In December 2018, Ablrate decided to treat Mr B's concerns as a formal complaint.

The project the loan was associated ran into problems. Following this, Mr B received a further return of his capital (with accrued interest) in January 2019 – this amounted to a further 40% of the capital he originally invested.

In January 2019, Ablrate responded to Mr B's complaint. It didn't uphold it. In summary it said:

- The provision of a secondary market is not guaranteed and the loan in question has features that make it technically difficult to trade.
- The lender terms state that a secondary market is provided solely at the absolute discretion of Ablrate and may be withdrawn or suspended at any time either for an individual loan or for all loans.

Mr B responded as he disagreed with the outcome. The crux of his concerns related to the availability of the secondary market. Mr B referred his complaint to this service.

One of our investigators looked into the complaint and he didn't uphold it. Mr B asked us for a review of the opinion - specifically he was concerned about Ablrate's failure to provide him with access to a secondary market, when this is something it had said it would when he initially invested. So, a second investigator reviewed the complaint afresh. She also didn't uphold the complaint but provided further reasoning for this. In summary she said:

- She didn't think Ablrate provided clear, fair and not misleading information through its promotional literature and other emails to Mr B before he invested.
- But she didn't think this failing would have led to Mr B making a different decision in whether to invest the amount he did. She referred to Mr B's involvement in the preparation of the loan before it was promoted as evidence of his intention to invest.

Mr B didn't accept the investigators findings and asked for an ombudsman to reach a decision on the complaint. He made the following points:

- He accepts market risk of the secondary market not finding a buyer, but the issue is not providing the market at all.
- He disagrees that he would have still invested if there wasn't going to be a secondary market – and said he had previously made use of the secondary market in final years of loans.
- His communications with Ablrate prior to the loan being available were as a result of an advertisement carried on the Ablrate blog – and during these exchanges he was being as helpful and approachable as possible for purely pragmatic reasons.
- Ablrate have referred to the incorrect terms and conditions to justify not providing a secondary market.
- There is a conflict of interest aspect to consider as the borrower was also a senior employee of Ablrate. So, this individual had a vested interest in keeping him interested and informed as a potential investor.

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.

Firstly, I've considered Ablrate's role and relationship it has with investors, as well the regulatory and legal framework involved. To determine this complaint, it's important to understand the role and relationship Ablrate has with Mr B as an investor.

Essentially the overarching relationship is that Ablrate provides potential investors with different lending opportunities by way of presenting loans available for investment on the platform, but it gives no advice or recommendations to its investors.

In reaching my decision, I've considered Ablrate's wider obligations. At the time of promoting the loan on its platform, Ablrate was authorised and regulated by the FCA. The relevant

rules and regulations FCA regulated firms are required to follow are set out in the FCA's Handbook of rules and guidance.

The FCA Principles for Business ("PRIN") set out the overarching requirements which all authorised firms are required to comply with. PRIN 1.1.1G, says *"The Principles apply in whole or in part to every firm"*. The Principles themselves are set out in PRIN 2.1.1R. The most relevant principles here are:

- PRIN 2.1.1R (2) *"A firm must conduct its business with due skill, care and diligence."*
- PRIN 2.1.1R (6) *"A firm must pay due regard to the interests of its customers and treat them fairly."*
- PRIN 2.1.1R (7) *"A firm must pay due regard to the information needs of its clients and communicate information to them in a way which is clear, fair and not misleading."*

Ablate was also required to act in accordance with the rules set out in the Conduct of Business Sourcebook (COBS). And the most relevant obligations here are:

- COBS 2.1.1R (1) *"A firm must act honestly, fairly and professionally in accordance with the best interests of its client."*
- COBS 4.2.1R (1) *"A firm must ensure that a communication or a financial promotion is fair, clear and not misleading."*

So, before making the loan available on the platform for investment, Ablate needed to satisfy itself that the information it collected and used to promote the loan was fair, clear and not misleading. And it also needed to be satisfied that by providing an opportunity for its customers to invest in the loan it would continue to be acting in its client's best interests.

In order to satisfy itself of the fair, clear and not misleading nature of the claims or assertions made in the promotional material itself, Ablate would need to carry out reasonable checks. What these reasonable checks involve, or indeed what they might be in any given case, is something which is very much left to each provider to determine and would vary according to the particular circumstances.

I've also borne in mind that the FCA said the following in its July 2018 consultation paper on loan-based ('peer-to-peer') and investment-based crowdfunding platforms:

"It is our view that it will be unlikely that a platform could argue that it has met its obligations under Principle 2, Principle 6 (PRIN 2.1.1R) and the client's best interests rule (COBS 2.1.1R), if it has not undertaken enough due diligence to satisfy itself on the essential information on which any communication or promotion is based."

Whilst I appreciate Mr B had invested prior to the publication of the consultation paper and guidance, I still feel it is relevant as it provides clarity as to the interpretation and application of the existing rules and guidance which were applicable to Ablate at the time.

Taking the above into account - I've firstly considered how Ablate has acted, focussing on how the loan was promoted. The loan was slightly unusual in that it paid rolled up interest at the end of the term – which had implications for how it could be traded on the secondary market. The issue of the availability of the secondary market is therefore a key focus of my

findings. I've considered whether Ablrate provided clear, fair and not misleading information to Mr B about this before he invested in the loan.

The loan proposal was the main document available to Mr B. This contains a dedicated section on the secondary market. So, it was reasonable for potential investors to understand this was a feature – as oppose to a potential feature that had yet to be decided. The proposal does explain you should only invest if you are prepared to hold the loan to maturity and that there may be liquidity problems. But it makes a clear statement “*..Ablrate will provide a platform upon which a secondary market can be made..*”. Shortly before the commitment of the first tranche of investment in February 2016, Mr B was sent an email that asked him to acknowledge and accept several statements before investing. Amongst other things this again reiterated that Ablrate couldn't guarantee that there will be an active secondary market, so you should only enter into this loan if you are willing to remain in the loan for the entire term. There was also a point that explained that the minimum tie in would be six months as the secondary market wouldn't be made available until all tranches of the loan had been drawn down.

I'm satisfied the information in the promotion and the follow up email did explain to Mr B there would be a secondary market. I don't think there was any guarantee given about finding a buyer when selling loan parts – indeed it does suggest you may need to hold the loan to maturity. But overall the information provides nothing to suggests there was uncertainty as to whether a secondary market would be established at all.

When Mr B did attempt to access the secondary market, after drawn-out communications with Ablrate, it became apparent that it hadn't put one in place because it was too difficult a technical proposition. Ablrate say that technically a secondary market was provided, it was just always paused. But this is different to the active secondary market that was described when promoting the loan. Ultimately, I don't agree Ablrate did provide a secondary market that was ever open for potential secondary trades. If there was any doubt on whether a secondary market would be available at all then I think this should have been made clear when promoting the loan.

Having considered all of the evidence provided, I've reached the finding that the information Ablrate provided about the availability of the secondary market was misleading. For these reasons, I think it failed to meet its obligation to provide clear, fair and not misleading information to Mr B.

I note Mr B has raised other concerns – including those about what are the relevant investor terms and conditions. But I don't think I need to make a finding on this as I've already established that Ablrate failed to meet its obligations towards Mr B when promoting the loan. I also acknowledge that he has raised concerns about a conflict of interest. I note that the director link between the borrower and Ablrate was detailed in the promotion and something Mr B was aware of through his communications with the individual prior to investing. Again, this information, hasn't led me to think differently on whether Ablrate met its obligations to Mr B when promoting the loan as I've already reached a finding that it didn't do everything it should have.

I need to decide whether the failure to provide clear, fair and not misleading information about the secondary market would have made Mr B make a different decision on whether to invest. Mr B has been clear that he understood the risk that he may not be able to find a buyer on the secondary market. He also says, if he would have known that there was any doubt of there being a secondary market at all he wouldn't have invested. He says he felt confident despite the risks that the loan would be attractive on the secondary market – so the ability to trade his loan was key to his decision making. To support this, he says he previously used the secondary market to exit from other loans before maturity –

in order to avoid being overly exposed to capital defaults during the final year of a loan.

I need to decide what I think is most likely to have happened had there have been no failings. To do this I've considered what I know of Mr B's circumstances at the time he invested in the loan in February 2016. Ablrate has provided a breakdown of his use of the platform at this point. His account started to be used for investment in October 2015 and Mr B invested in several loans and made purchases on the secondary market. But by February 2016, he hadn't used the secondary market to sell any loan parts. While this evidence leads me to believe he had an interest in P2P lending, it doesn't present a picture of an investor who regularly sold out of loans on the secondary market.

I've noted Mr B's comments that his family held another account with Ablrate – and he's provided information about the use of this account. He says, while the account was in his wife's name, he had completed transactions on this account to try out all the different systems. This included using the secondary market to sell a loan part in September 2015. While I acknowledge that Mr B does appear to have had some involvement in using the secondary market, I'm not persuaded this supports that in February 2016 he was a frequent user of the secondary market and was regularly using it as a strategy to reduce risk as loans moved towards their redemption point. So, this information doesn't lead me to think this is strong evidence of his likely intentions to use the secondary market.

From what Mr B has told us, he appeared to have a lot of confidence in the project. He had prior involvement before promotion on the platform after responding to a blog about it. He also comments that it was oversubscribed, so felt it was an attractive proposition to investors. Taking all of this into account, if he was told that there was an intention for a secondary market but no guarantee, I don't think it is clear that this would have put him off altogether. I appreciate Mr B has strong feelings about this, but I don't think the balance of evidence supports that he wouldn't have invested. This leads me to the conclusion that the misleading information given on the availability of the secondary market wouldn't have led to him making a different decision to invest in the loan. So Ablrate don't need to do anything further.

For the reasons I've explained, I think Ablrate failed in its obligations to provide clear, fair and not misleading information but I do not find that this would have led to Mr B making a different decision with regards to his investment. So, I am not recommending Ablrate do anything to compensate Mr B.

My final decision

I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 9 July 2021.

Daniel Little
Ombudsman