

## **The complaint**

Mr L has complained that TFS Loans Limited (“TFS”) acted irresponsibly by accepting his loan application because he couldn’t afford the repayments.

## **What happened**

Mr L approached TFS for a loan through an intermediary. He gave the purpose of the loan as debt consolidation.

TFS provided Mr L with a loan for £5,000 in January 2015. It was repayable over 36 months. The monthly repayments were £242 and the loan’s Annual Percentage Rate (APR) was 48.9% – which, when applied to the amount borrowed over the 36-month term, amounted to £3,712 in total. As a result, the total amount payable was £8,712. The loan was secured by way of a guarantee and indemnity agreement. The guarantor was Mr L’s father.

Mr L was unable to pay the first repayment on time – due at the start of March 2015 – and then only managed to pay £200 that month. He was also unable to pay his second repayment on time but brought his account up to date within ten days of the payment falling due. Mr L made no further payments to the loan and TFS issued a notice of default in July 2015. TFS turned to Mr L’s guarantor to repay the loan. When the guarantor also couldn’t pay, TFS took Mr L and his guarantor to court and obtained a judgment ordering both Mr L and his guarantor to repay the debt.

Mr L complains TFS didn’t do enough to check his finances and personal situation to make sure he was able to repay the loan. He thinks had TFS done more, it would have seen that his income was commission based, not guaranteed and that it shouldn’t have lent to him. So, he says the loan was mis-sold.

Mr L also complains that TFS was unsympathetic when he couldn’t manage the monthly payments and didn’t signpost him to any sources of help or advice. And he points to TFS getting a court order against his father to secure the debt as the cause of their relationship breakdown.

Mr L’s guarantor had joined this complaint to begin with but has since referred his own complaint to this service.

One of our investigators looked into the complaint. He didn’t think TFS did enough to check that Mr L could repay the loan sustainably. But he found that he didn’t have enough evidence to say TFS should not have provided Mr L with the loan. And so he didn’t think there was anything the lender needed to do.

Mr L didn’t agree with the investigator’s assessment, and so the complaint was passed to me to make a decision about the matter. I’ve not seen that the court examined the decision to lend to Mr L and so I see no reason not to consider this complaint. I issued a provisional decision explaining why I thought the complaint should be upheld. An extract from my provisional findings is set out below:

*We've set out our approach to complaints about high cost credit and guarantor loans on our website - including the relevant rules, guidance, good industry practice and law. And I've considered this approach when deciding Mr L's complaint.*

*TFS needed to take reasonable steps to ensure that it didn't lend to Mr L irresponsibly.*

*I think there are key questions I need to consider in order to decide what's fair and reasonable in the circumstances of this particular complaint:*

- *Did TFS carry out reasonable and proportionate checks to satisfy itself that Mr L was in a position to sustainably repay the loan? If not, what would reasonable and proportionate checks have shown at the time?*
- *Did TFS lend to Mr L responsibly?*
- *Did TFS act unfairly or unreasonably towards Mr L in some other way?*

*...*

*Did TFS carry out reasonable and proportionate checks?*

*TFS asked Mr L for information about his income and expenditure and it obtained a credit report. Mr L applied via a credit intermediary, who in turn forwarded his application to TFS along with his last three months of payslips.*

*As a side note, I'm aware that the name of the credit intermediary Mr L used is named on the pre-contract credit information document. And I am surprised that TFS accepted Mr L's application when the intermediary wasn't listed on the FCA register at the time. After all, the intermediary needed permission or interim permission to carry out consumer credit activities after the FCA took over the regulation of consumer credit in 2014. I don't think it's unreasonable that recognising this should have put TFS on notice that Mr L's application may have required closer scrutiny – as a minimum.*

*TFS says that it performs a number of checks (as described above) to confirm the information provided by an applicant. It thinks that the checks it carried out before it agreed to lend to Mr L were reasonable and proportionate, and that the loan was affordable for him. But the extent to which a business' checks were reasonable and proportionate isn't determined simply by the types of checks it carried out. A business also needs to respond appropriately to the information it gathers from its checks when assessing a customer's application for lending.*

*I've listened to the call between TFS and Mr L during which his application was discussed. TFS' agent acknowledged receipt of his payslips and used an average take home pay figure across the three months without any further interrogation. The agent arrived at a take home pay of £1,659.40 – significantly more than the £1,014 Mr L declared on his application. His payslips show the following:*

<i>Payslip date</i>	<i>Basic</i>	<i>Commission</i>	<i>Bonus</i>	<i>Net Pay</i>
<i>Oct-14</i>	<i>£ 833.33</i>	<i>£ 505.25</i>	<i>£ -</i>	<i>£1,420.12</i>
<i>Nov-14</i>	<i>£ 833.33</i>	<i>£ 2,350.24</i>	<i>£ 500.00</i>	<i>£2,543.73</i>
<i>Dec-14</i>	<i>£ 833.33</i>	<i>£ 449.21</i>	<i>£ -</i>	<i>£1,014.36</i>

The December payslip (which was the 9<sup>th</sup> payslip of the relevant financial year) showed a year to date take home pay figure of £21,651.64 (inclusive of a tax rebate in October), which averages out at £2,405 since April that year. So, two of the three payslips showed significantly reduced and below average take home pay. Indeed, the December payslip also shows a 'NMW' (national minimum wage) top up. Mr L's commission earnings that month had fallen to a level that meant his wage would have dropped below the national minimum wage if unadjusted.

In his application form, Mr L explained that his previous credit problems were due to "reduced hits at work making me fall behind on payments". He also responded to the question on why he was now able to afford the proposed loan by saying: "I am able to pay using my salary as my hours are now back to normal and have been consistently good". His payslips, in my opinion, suggested otherwise. And I can't see that TFS interrogated the inconsistency between his statement and payslips – nor did TFS question the reasons behind the recent fluctuations in Mr L's pay. In other words, they went unchecked.

The call between TFS and Mr L went on to discuss his income and expenditure. Mr L explained that his monthly travel expenses were only £30 because he had use of a company car and only paid for fuel for non-business journeys. Mr L was employed by a large motor dealership group. I understand the use of a company car was a taxable benefit in kind, particularly when an employee enjoyed use of the car beyond business purposes. So, I would've expected to see some reference to a company car on his payslips. There isn't. And yet TFS didn't question why.

The information gathered by TFS from its credit search shows that Mr L didn't have any active accounts not in default – only 3 settled and 13 defaulted (with unpaid balances):

Type	Start Date	Default Date	Default balance	Current balance
Home Credit	17/03/2011	25/07/2011	£750	£750
Communications	11/09/2012	22/05/2013	£44	£44
Credit Card/Store Card	09/05/2007	25/02/2010	£964	£964
Pay Day loans	14/02/2012	06/03/2012	£459	£489
Pay Day loans	20/07/2012	27/07/2012	£338	£375
Current Accounts	07/06/2007	05/02/2010	£967	£967
Communications	31/03/2010	12/10/2010	£690	£690
Communications	27/05/2010	03/12/2010	£467	£467
Communications	08/06/2010	10/12/2010	£318	£318
Current Accounts	19/01/2010	10/10/2012	£2,340	£2,340
Unsecured Loan	27/07/2012	24/09/2012	£217	£217
Mail Order	05/10/2012	23/05/2013	£224	£224
			£7,778	£7,845

TFS makes much of Mr L's defaults being a historic problem, with some dating back more than four years prior to his application. Those debts were not generally increasing – except for two defaulted pay day loans which increased by £67 over 3 years. Nor were they decreasing and so I think it's safe to say they were not attracting further interest. It also shows Mr L hadn't managed to pay off the debts or enter into arrangements to do so. But TFS didn't question why that was or what had changed by January 2015, prompting Mr L's decision to borrow £5,000 at 48.9% APR over 36 months to refinance part of these debts. And if Mr L was intending to consolidate some of his defaulted debts, I would question whether TFS were acting in Mr L's interest by lending for that purpose.

*However, I don't find of the apparent purpose of Mr L's loan to consolidate his debts plausible and I think an experienced lender ought to have found the same. This was critical to the decision to lend and not merely a historic problem. I say this because TFS needed to include a monthly payment towards these debts in its income and expenditure assessment (which would clear these debts over a reasonable time). But because TFS failed to interrogate the plausibility of Mr L consolidating his debts, it also failed to include such an amount in its assessment.*

*In summary, I don't think the checks TFS carried out were reasonable or proportionate. I find that there were significant shortcomings in the way it responded to the information it gathered as part of the checks it carried out to satisfy itself that Mr L, given his circumstances at the time, could repay the loan in question in a sustainable way.*

*Did TFS lend to Mr L responsibly?*

*From the information TFS gathered as part of its affordability assessment, I can see that Mr L declared his outgoings were made up of:*

<i>Rent</i>	<i>£275.00</i>
<i>Council Tax</i>	<i>£50.00</i>
<i>Housekeep</i>	<i>£50.00</i>
<i>Electricity</i>	<i>£50.00</i>
<i>Gas</i>	<i>£50.00</i>
<i>Phones</i>	<i>£25.00</i>
<i>TV</i>	<i>£6.00</i>
<i>Transport</i>	<i>£30.00</i>
<i>Contents</i>	
<i>Insurance</i>	<i>£5.00</i>
<i>Cigarettes</i>	<i>£80.00</i>
	<i>£621.00</i>

*In addition to his declared expenditure, TFS needed to allow for payment towards his defaulted debts as I've explained above. I think to make a fair assessment of whether Mr L was able to sustainably repay the new loan repayments, TFS needed to make reasonable assumptions about repaying his defaulted debts within a reasonable period. For example, by working out the required payment that would see those debts repaid within the timeframe consistent with the typical time it would take to repay a personal loan for the total amount. In this case, it means that if Mr L were to repay the £7,845 in defaulted debts within three to four years, he would've needed to pay between £164 and £218 a month.*

*The monthly repayments on the TFS loan were £242 and brought Mr L's non-discretionary spending – albeit largely unchecked – and credit repayments to a combined total of £1,027 a month (£621 +£164+£242). But he only earnt £1,014 in December 2014. Much of Mr L's income was derived from commission, not guaranteed and it had varied considerably over the three months before TFS granted the loan. His payslips showed that his basic pay was significantly lower than the amount he was committed to spend each month.*

*TFS had to satisfy itself that Mr L would be able repay the loan sustainably. CONC 5.3.1G(6) explains:*

*For the purposes of CONC, "sustainable" means the repayments under the regulated credit agreement can be made by the customer:*

- a) *without undue difficulties, in particular:*
- i. *the customer should be able to make repayments on time, while meeting other reasonable commitments; and*
  - ii. *without having to borrow to meet the repayments;*
- b) *over the life of the agreement, or for such an agreement which is an open-end agreement, within a reasonable period; and*
- c) *out of income and savings without having to realise security or assets; and*

*“unsustainable” has the opposite meaning.*

*In my view, sustainability in the context of Mr L circumstances required involved budgeting very carefully in well paid months to meet his commitments in poorly paid months. But his credit file doesn't suggest that he was following that discipline. Indeed, Mr L told TFS he paid his partner a one-off payment to cover all his bills and rent each month because she was better organised. And he points to “reduced hits at work making me fall behind on payments” as the cause of his existing credit problems. I also find it telling that Mr L was looking to borrow new funds following a run of three months significantly reduced pay.*

*I think TFS ought reasonably to have realised that Mr L was heavily reliant on unguaranteed commission to meet his non-discretionary spending and credit repayments. I think TFS ought to have recognised that his commission-based income led him into financial difficulties and that he was most likely borrowing as a result of a shortfall in his commission earnings. And I also think TFS ought reasonably to have realised that it was unlikely that Mr L would be able to sustainably repay his loan. So it should have concluded that it was not appropriate to lend to him.*

*Did TFS act unfairly or unreasonably towards Mr L in some other way?*

*I've carefully read, listened to and thought about all the evidence provided by each party to this complaint. Having done so, I don't think TFS has acted unfairly or unreasonably towards Mr L in some other way. But I do think TFS should have refused to lend to Mr L, so I am upholding his complaint about the loan.*

## **Responses to My Provisional Decision**

Mr L acknowledged receipt of my provisional decision, but he didn't have anything to add.

TFS disagreed with my provisional decision. In summary, it does not agree the loan should have been refused and that it had an accurate understanding of Mr L's financial circumstances, enough to deem the loan to be affordable for the term of the loan.

TFS asked that I reconsider my findings on the treatment of commission when assessing Mr L's income. It argues the use of year to date figures where an income includes a consistent bonus is not unfair and points out that Mr L did not disagree with the income figure used. It believes the type of employment should be taken into consideration as it is very common for a sales adviser to be paid a basic salary and a consistent bonus. And continues by suggesting that if my view reflected standard practice for lenders, then most of the UK's lending would be deemed unaffordable.

TFS says it had no reason to doubt the information provided by Mr L, if the employer was not including a benefit in kind on his payslip, then maybe it should be reported to HMRC.

Turning to Mr L's defaulted debt, it says he had disposable income should the lenders of the defaulted debt request token payments – clearly, they hadn't. It argues the adverse credit would only last six years and as most of the defaults were historic, it didn't believe Mr L would have been required to repay this debt. It suggests it was, therefore, a moral issue if Mr L wanted to repay the money he borrowed.

TFS also pointed out that the credit intermediary named on the pre-contract credit information document was a trading style of an intermediary registered with interim permission to carry out consumer credit activities.

### **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.

We've set out our general approach to complaints about irresponsible and unaffordable lending on our website. Having taken this into account along with everything else I need to consider, including the responses to my provisional decision, my decision remains unchanged and I'm upholding this complaint.

TFS suggests I reconsider my findings on the treatment of commission when assessing Mr L's income. It considers the use of year to date figures where an income includes a consistent bonus is not unfair.

I'm not necessarily in disagreement. However, I note that this wasn't the approach TFS took when it assessed Mr L's income. It looked at an average of his last three months earnings instead. But what is critical in Mr L's circumstances, is that his commission earnings were *inconsistent* and varied significantly over the preceding three months.

I've not considered Mr L's commission earnings in isolation. At the time of applying for the loan, Mr L presented with a portfolio of defaulted debts, which by his own admission, had resulted from him not earning the level of commission he needed to sustain their repayment. His pay had fallen well below his year to date average monthly earnings in two of the three months before he applied for the loan. In considering all these circumstances, I don't think it was reasonable to take account of *his* unguaranteed commission income in assessing whether Mr L would be able repay the loan sustainably.

TFS says it had no reason to doubt the information provided by Mr L about his travel expenses and if his employer was not including a benefit in kind on his payslip, then maybe it should be reported to HMRC. I disagree. The fact Mr L said he had use of a company car and the fact his payslip did not show as such, was every reason to doubt the information he had given.

Turning to Mr L's defaulted debt, TFS disbelieves Mr L would have been required to repay this debt and suggests it was a moral issue if he wanted to do so. I'm a little surprised by this, given that it couldn't be further removed from the position TFS took in accepting Mr L's intentions to use the TFS loan funds to repay some of his defaulted debts. And by doing so, ultimately passing liability for them on to his guarantor – when it believes he wouldn't have been required to repay them at all. I don't consider it a moral issue but more a question of whether the lender acted with integrity or in the interest of its customer by accepting such a plan.

But for the reasons I gave in my provisional decision, I do not find Mr L's intentions to use the TFS loan funds to consolidate his defaulted debts plausible. And I still think TFS needed to make reasonable assumptions about repaying his defaulted debts over a reasonable

period as part of its affordability assessment, again for the reasons I gave in my provisional decision. I don't think it reasonable to base those assumptions on token payments which merely prevent a debt becoming statute barred and fail to repay a debt within a reasonable period.

TFS pointed out that the credit intermediary named on the pre-contract credit information document was a trading style of an intermediary registered with interim permission to carry out consumer credit activities. I have now traced the parent business behind the intermediary named and I accept it was registered with interim permission.

### **Putting things right**

When I find that a business has done something wrong, I'd normally direct that business – as far as it's reasonably practicable – to put the complainant in the position they would be in now if the mistakes it made hadn't happened.

In this case, that would mean putting Mr L in the position he would now be in if he hadn't been given the loan in question.

However, this isn't straightforward when the complaint is about unaffordable lending. Mr L was given the loan and he used the money. In these circumstances, I can't undo what's already been done. So, it isn't possible to put Mr L back in the position he would be in if he hadn't been given the loan in the first place.

Instead, I must consider another way of putting things right fairly and reasonably given the circumstances of this complaint.

The approach to complaints about high cost credit and guarantor loans set out on our website includes how to put things right. It explains that if a borrower has a complaint upheld and there's still an outstanding balance on the credit, we'll usually tell the lender to remove all the interest and charges applied from the start. But in this case, Mr L's guarantor fully repaid the loan including any outstanding charges and unpaid interest. Mr L had only made two payments towards the loan, which totalled much less than the amount he borrowed. So, given Mr L has had the benefit of the money he borrowed, I'm not persuaded it's fair to tell TFS to refund those payments or pay any cash award.

We also explain on our website that we would likely tell TFS to make sure Mr L's credit file doesn't have any adverse information recorded on it as a result of the loan. But it's more complicated in this case. This is because TFS secured a judgment debt (CCJ) against Mr L and his guarantor in November 2015 – over five and a half years ago. I expect the record of the judgment to stop appearing on Mr L's credit file after its sixth anniversary. I think that's likely to happen sooner than the time it would take TFS to get the judgment set aside, if at all possible. So, I won't direct TFS to take such action. But I think TFS should arrange for any remaining adverse information recorded about this loan to be removed from Mr L's credit file.

### **My final decision**

For the reasons I've explained, I uphold Mr L's complaint and direct TFS Loans Limited to put things right for Mr L in the way I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 17 August 2021.

Stefan Riedel  
**Ombudsman**

