DRN-3066276

The complaint

Mr O is complaining that he wasn't made aware that he was taking out a fixed sum loan agreement ("loan") with 3J Finance Limited ("3J") to fund an online education course for his son with a supplier that I will call "E". He's also unhappy he wasn't allowed to cancel it.

What happened

Mr O was keen to arrange some additional tutoring for his son, so he contacted E to enquire about it. In June 2019 one of E's representative's visited Mr O at his home, following which he entered his son onto a maths and English tuition course, which cost £4,935. He entered into a five-year finance agreement with 3J to pay for it.

Around 15 months later, Mr O tried to cancel the course, but he was told he wasn't able to do so. Mr O thought this was unfair as he says he was told he could cancel at any time. And he didn't think it was fair he had to continue to pay for something his son wasn't using anymore.

E responded to say Mr O signed the finance agreement, so it was satisfied he was reasonably aware he was taking out a finance agreement. It also said the paperwork he signed set out the terms and cancellation rights.

E subsequently went into administration, so Mr O referred his complaint to 3J as the finance provider. 3J says it understands E always aimed to do all it could to make clear what was being entered into when a family chooses to purchase a programme from them. It says Mr O signed the agreement which contained a section which set out he had 14 days to withdraw from the finance agreement. And it said the paperwork was emailed to him which also set out he had 14 days to withdraw from the agreement.

Our investigator upheld the complaint as he was satisfied Mr O had been given misleading information about whether he could cancel the agreement or not. He said he'd found Mr O's testimony plausible and persuasive. He acknowledged the paperwork set out Mr O was entering into a finance agreement and what the terms of the contract were. But he didn't think Mr O was given an opportunity to review the information before he entered into the contract.

The investigator was satisfied Mr O had been misled into entering into the finance agreement. He was also persuaded the salesman had told him he could cancel the contract at any time. And he didn't think Mr O would have entered into the contract had he known it was to run for five years.

So the investigator thought 3J should cancel the finance agreement with nothing further to pay. But he thought it could retain what Mr O had paid towards the finance agreement. He also said 3J should remove any adverse markers from his credit file.

3J didn't accept the investigator's opinion. It didn't think it was fair to rely on one person's testimony. It said it was safer to refer to tangible, contemporaneous evidence from when Mr O entered into the agreement. It said the documentation Mr O signed clearly sets out the

terms of the contracts. It said there's a general legal principle that when someone has signed a document they are taken to have read and understood it.

3J highlighted the investigator had said the documentation was reasonably clear. It said Mr O would have had an opportunity to read through the documentation before signing it and could have queried anything he didn't understand. It also said he'd been given copies of the paperwork after he purchased the course. And it said he had 14 days to reconsider if he wanted to cancel it.

3J also said Mr O would have been shown an introductory video which explained he was entering into an interest free finance agreement to pay for the course. It maintained Mr O was given sufficient information that he was entering into a finance agreement and what his cancellation rights were.

As 3J didn't agree with the investigator, the complaint's been passed to me to decide.

What I've decided – and why

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

I've decided to uphold this complaint and I shall now explain why.

Mr O paid for the course through a fixed sum loan agreement. Section 75 of the Consumer Credit Act 1974 sets out that in certain circumstances, as the finance provider, 3J is jointly liable for any breach of contract or misrepresentation by the supplier – E. I'm satisfied those circumstances apply here.

Further to this, section 56 of the Consumer Credit Act 1974 has the effect of making E the agent of 3J during the "antecedent negotiations" leading up to Mr O entering into the loan agreement, starting from when he was first approached by E. But essentially, this means 3J is responsible for the acts or omissions of E in relation to the sale of the loan to Mr O. In other words, 3J has to stand behind the things E said, did, didn't say, or didn't do during the sales process.

Mr O is unhappy he wasn't allowed to cancel the course when he got into financial difficulties. He says he thought he was paying a monthly subscription towards it and was told by the salesman he could cancel at any time. He says he was misled into entering into the course and the finance agreement.

Under the terms of the finance, Mr O had the right to withdraw from it within 14 days, but after that it was a non-cancellable contract. Mr O maintains he was told he could cancel it at any time. He says he wouldn't have entered into the course had he known he'd have to continue to pay for it for five years. He also says he didn't know he was entering into a finance agreement. So I think the key issues I have to think about is whether the course and finance agreement were misrepresented to him.

I note 3J say the primary focus should be on the paperwork Mr O signed. I agree that we must take the paperwork into consideration – particularly in assessing whether there's a breach of contract or not. But I also need to take into account the salesman's responsibilities to provide clear information to enable Mr O to make an informed choice *before* he agreed to enter into the course. And I don't think the finance agreement is necessarily always an accurate description of the conversations that were had before the contract started.

In arranging the loan between Mr O and 3J, E was acting as a credit broker. The Financial Conduct Authority (FCA) has set out what it expects a responsible credit broker to do and it does so in the Consumer Credit Sourcebook (CONC). As the lender, these regulations and guidance don't apply to 3J directly. But, I think E was acting on 3J's behalf in arranging the finance agreement. So it is something I need to think about in this decision.

CONC 4.2.5 R requires brokers to provide what is described as "adequate explanations", which include explanations of the following things:

"(a) the features of the agreement which may make the credit to be provided under the agreement unsuitable for particular types of use;
(b) how much the customer will have to pay periodically and, where the amount can be determined, in total under the agreement;
(c) the features of the agreement which may operate in a manner which would have a significant adverse effect on the customer in a way which the customer is unlikely to foresee;
(d) the principal consequences for the customer arising from a failure to make payments under the agreement at the times required by the agreement including, where applicable and depending upon the type and amount of credit and the circumstances of the customer:

(i) the total cost of the debt growing;
(ii) incurring any default charges or interest for late or missed payment or under-payment;
(iii) impaired credit rating and its effect on future access to or cost of credit;
(iv) legal proceedings, including reference to charging orders (or, in Scotland, inhibitions), and to the associated costs of such proceedings;
(v) repossession of the customer's home or other property; and
(vi) where an article is taken in pawn, that the article might be sold, if not redeemed; and

(e) the effect of the exercise of any right to withdraw from the agreement and how and when this right may be exercised."

CONC 4.8.2 R refers back to CONC 4.2.5 R and states:

"A firm must not unfairly encourage, incentivise or induce a customer to enter into a regulated credit agreement quickly without allowing the customer time to consider the precontract information under section 55 of the CCA and the explanations provided under CONC 4.2.5 R."

CONC 2.5.3 R sets out more general expectations from the FCA as to how a credit broker should conduct itself, explaining that a broker must:

"*(2) take reasonable steps to satisfy itself that a product it wishes to recommend to a customer is not unsuitable for the customer's needs and circumstances;*
(3) advise a customer to read, and allow the customer sufficient opportunity to consider, the terms and conditions of a credit agreement or consumer hire agreement before entering into it;"

The FCA also sets out more general principles which it expects financial firms (including E and 3J) to follow, and there are two which are of particular relevance here:

"6 Customers' interests

A firm must pay due regard to the interests of its customers and treat them fairly.

7 Communications with clients

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."

Having set out the relevant regulatory background, I've also thought about how E sold the product Mr O purchased. I think it's likely that the nature of this product and the way it was sold is likely to have influenced Mr O's assumptions about how he was going to be paying for it.

E marketed the programme as an affordable, online alternative to private English and Maths tuition for a child. I think parents will typically pay for private tuition by the hour, although tutors may sometimes offer discounts for bulk-bookings. There are a number of online-based services available. But in my experience, and based on my further research, these are often offered on a subscription basis ranging from one month up to a year. E itself appeared, based on statements on its website and on other documents it's provided us, to have offered a monthly subscription or "pay as you go" service as an alternative to the "Lifetime Licence" model that it sold to Mr O.

From what I've seen, the "Lifetime Licence" model appears to operate differently as the applicant has to make a single large upfront payment and this gives the child access E's programme for the duration of their schooling up to GCSE. Due to the substantial size of payment required, the applicant often had to take out a loan to cover it, and these loans are not cancellable. So this ultimately means that, once a person has signed up for the programme and the loan, they can't cancel and are committed to repaying the loan after 14 days have passed. This seems to me to be an unusual model to adopt for a child's tuition due to its lack of flexibility. I don't think it's uncommon for children to change tutors for a variety of reasons. So I think most parents are likely to value flexibility when considering either face to face or online tuition.

Bearing all of the above in mind I think, in general, when a parent asks to learn more about the programme, they would assume that it was being offered on a subscription basis. I think it's unlikely they would think they were going to be signing up for a long-term commitment paid for, up front, by a loan. Because E was offering a very different proposition with long-term financial implications, I think it needed to make this very clear.

In thinking about this case, I've taken Mr O's testimony into account and, in particular, whether I'm persuaded by what he's told us given what subsequently happened and what we know about the product he ultimately bought.

We've spoken to Mr O to understand why he enquired about the course in the first place. He's told us that he wanted extra tuition because son was falling behind with Maths and English and he was already paying for extra tutoring. I think it's *most* likely Mr O was only looking for a short-term arrangement to help his son catch up. I think it's likely he would have wanted to have the option to cancel the contract once he was satisfied his son had caught up with what he'd missed. I'm persuaded that he was given some assurances that he could cancel at any time. And I don't think it's likely he would have entered into a five-year contract, unless he was told he could cancel it.

I've considered 3J's comments that Mr O signed the agreement. But I think the evidence here supports that Mr O was only asked to tick a series of boxes on a tablet. I can see Mr O electronically signed the following:

- the enrolment application
- pre-contract information document

- the finance agreement
- direct debit mandate
- affordability document
- adequate explanations document

But I can also see that he signed them all in a two minute window. I don't think it's likely he could have signed them all separately and be given the time to read and understand what they said in such a short timeframe. So I think it's most likely he ticked separate boxes to electronically sign the documents. And I'm not persuaded he would have been given a copy of the documents to review – or at least time to review them – *before* he signed them.

However, I've also considered the customer satisfaction and clarification form Mr O hand-signed. In this I can see Mr O initialled to confirm he only had 14 days to cancel the course and finance agreement. But Mr O has explained the salesman assured him he could cancel at any time, so he says he signed the agreement on reliance of this. Mr O's testimony is consistent with what we've heard from others in a similar situation and from what I've seen in the training material 3J has provided us that E gave its sales people.

I note 3J has said Mr O was given an opportunity to review the finance agreement before he ticked the box to enter into the agreement. But I haven't seen anything to support this. I don't disagree with 3J that it was Mr O's responsibility to understand what he was entering into. But, at the same time, CONC particularly sets out that the salesman had a duty to ensure he had enough information about the credit agreement – as I set out above – and about the finance in respect to E's responsibility as a credit broker *before* he agreed to enter into the course and finance agreement.

Given what I know about what Mr O wanted to use the training for, I'm not persuaded he would have entered into the course and agreement if he'd know it was a five-year commitment. I think Mr O has been consistent in what he's told us about what happened. And, I've ultimately found his testimony to be plausible and persuasive.

As I said, I've seen some of the training material provided by E to its salespeople, which I understand was current at the point Mr O entered into the finance agreement. When covering how to explain the financial aspects of the sale, E doesn't refer to the word "loan" anywhere in these training materials. Instead, I think the focus seems to have been on setting an affordable monthly payment and, it seems to me, the wording is fashioned in such a way as to avoid making the arrangement sound like a loan.

So taking everything into consideration, I don't think the salesman did explain everything to Mr O as clearly as he should have done. And I think Mr O has lost out as a result of what's happened.

That said, Mr O has had a benefit from the course because his son did use it for around 15 months and his son had completed a reasonable proportion of it. So I think it's fair he pays for some of the amount payable. I understand Mr O stopped paying the finance around December 2020.

Taking everything into account, I think the fairest way to resolve this complaint is that 3J waives the outstanding balance on the finance agreement. And it can retain the payments Mr O has made to reflect the usage his son has had from the course. As I don't think Mr O would have entered into this finance agreement had he been given sufficient information at the outset, I don't think it fair that it continues to appear on his credit file. So I think 3J should remove any record of the agreement from Mr O's credit file.

My final decision

For the reasons I've set out above, it's my final decision that I uphold this complaint and I require 3J Finance Limited to:

1. Waive the outstanding balance on the finance agreement;
2. remove any record of the agreement from Mr O's credit file; and
3. Arrange with Mr O to return any equipment or learning materials received under the contract with E.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr O to accept or reject my decision before 11 March 2022.
Guy Mitchell
Ombudsman