DRN-3299692

The complaint

Mr M complains that a conditional sale agreement, provided by Moneybarn No.1 Limited in order for him to acquire a used car, was unaffordable. He also says the interest rate charged on the credit amount was increased after he'd entered into the agreement.

What happened

In April 2018, Mr M found a used car at a dealership that he wanted to acquire. A five-year conditional sale agreement was arranged with Moneybarn which had monthly payments set at around £357. Mr M says he was told the APR being applied on the agreement was around 30%, and that he hadn't seen the paperwork for the credit agreement until he'd signed it at the dealership.

Mr M sent Moneybarn an email in July 2018 querying the APR that had been applied. He says he was told by Moneybarn that he'd agreed to the interest rate when he'd signed the agreement.

Mr M started to struggle to make the repayments under the conditional sale agreement, missing a payment in December 2018. Mr M continued to make some payments but missed others and the arrears on the account grew. Moneybarn issued a default notice to Mr M in January 2020 and, due to a lack of payments, the agreement was then terminated in March 2020 when the arrears were £3,130. However, Mr M has retained possession of the car.

Mr M complained to Moneybarn that the conditional sale agreement had been unaffordable for him at the point of supply. He said he'd been financially unstable when he'd taken out the credit agreement. Mr M also said that he thought the APR rate had been altered on his agreement after he'd taken it out.

Moneybarn didn't uphold his complaint. In regard to the interest rate, it said that the APR was clearly set out in the paperwork, as was the actual amount of interest that had been added. Moneybarn said nothing had been altered after Mr M had signed the agreement.

In regard to whether the conditional sale agreement had been affordable, Moneybarn said it had carried out reasonable and proportionate checks that the conditional sale agreement had been affordable for Mr M. It said it had verified Mr M's income from the two-months' worth of bank statements he'd provided, and that a credit search had been carried out. It said, from the bank statements, an average net monthly income for Mr M had been calculated as £5,133.70. And, that as the monthly repayments under the agreement were under 7% of that income, they were considered affordable for him. Moneybarn also said that Mr M had signed the agreement confirming the repayments had been within his means.

Although there had been adverse information on Mr M's credit file, Moneybarn said he had been making payments to all his other credit commitments and there had been no defaulted payments for 17 months.

Moneybarn said, although it accepted that Mr M's income had fluctuated over time, it considered that an unexpected change in his financial circumstances, that had arisen after he'd taken out the agreement, had been the reason for his difficulty meeting the payments.

Mr M was unhappy about Moneybarn's view and so complained to this service. Our investigator didn't recommend that his complaint should be upheld. He said he thought Moneybarn had carried out reasonable and proportionate checks by obtaining the bank statements and undertaking the credit check. Our investigator said, looking at Mr M's monthly income and his committed expenses, the monthly payments set under the conditional sale agreement were sustainably affordable for Mr M.

When looking at the APR set on the agreement, our investigator said he was satisfied that the rate was clearly shown and that it was reasonable to have expected Mr M to have read the terms and conditions. He also said he thought Moneybarn had treated Mr M with forbearance when he had experienced difficulties paying. He noted that Moneybarn had set up payment plans, breathing space when appropriate and set out Mr M's options. Our investigator thought it wasn't unfair for Moneybarn to have terminated the agreement in March 2020, as Mr M had only made two payments in a nine-month period.

Mr M disagreed with our investigator's view. He said when he had signed the agreement, he'd been a temporary worker and was self-employed, so all income received was gross and not net. He said he'd been paying off two CCJ's at £350pm, as well as child support which hadn't been included in his committed expenditure. Mr M said he had also been paying money back to people he'd borrowed from.

Mr M also said that he hadn't been told the amount he was paying back as he hadn't been provided with time to look at the agreement. Mr M said he'd only found out the APR when he was sent a copy of the agreement after he'd signed it. He said the rate wasn't what he'd originally been told.

As the parties were unable to agree the complaint was passed to me and I issued a provisional decision along the following lines.

When looking at whether a credit agreement was fair and affordable, I needed to take into account the relevant rules, guidance, good industry practice and law. There were two overarching questions I needed to think about in order to decide what was fair and reasonable in the circumstances of this complaint. These were:

- Did Moneybarn complete reasonable and proportionate checks to satisfy itself that Mr M would be able to repay the loan in a sustainable way?

  a). If so, did it make a fair lending decision?

  b). If not, would reasonable and proportionate checks have shown that Mr M would've been able to sustainably repay the agreement

- Did Moneybarn act unfairly or unreasonably in some otherway?

Moneybarn said that the necessary checks were carried out to ensure this loan had been affordable for Mr M by looking at his income via bank statements, and also his credit history. I hadn't seen any evidence that it had reviewed his committed outgoings as it appeared to have relied upon the agreement's payments being just under 7% of what had been calculated as Mr M's net monthly income.

The FCA's Consumer Credit sourcebook ("CONC"), contains rules for responsible lending by consumer credit companies and to assist in assessing a consumer's ability to repay credit. Checks carried out by lenders should be conducted to ensure any lending is affordable and sustainable for the borrower, and so should be borrower focused and proportionate to the circumstances of the credit. That means things like the amount being borrowed, the length of the loan, the size of the repayments as well as credit history should be considered.

The conditional sale agreement for the car was for 60 months. The car's price was £9,995 and Mr M had made an advance payment of £400, leaving a balance of £9,595 to be paid via the credit agreement. Interest charges on the agreement amounted to £11,509.89 making a total to pay of £21,104.89. Payments were £357.71pm.

Here, Mr M had provided two months of bank statements. I hadn't seen that any questions were asked as to whether he - was employed or self/employed; was working full or part time; was contracted for weeks/months; was single or with a partner or had dependents. I also hadn't seen whether Mr M had been asked to set out his committed monthly expenses such as rent, utilities and council tax.

The results of the credit check carried out by Moneybarn on Mr M weren't available, but I had seen a credit report provided by Mr M which showed that he had recently had three loans, two of which had been satisfied and one which, although showing late payments, had been satisfied the month this agreement was taken out. However, this report was newer than the one which would have been seen by Moneybarn, and so it was possible there was other information present which had since dropped off due to time.

I had also seen that there were two County Court Judgements ("CCJ") registered against Mr M in 2014 - one for £926 in respect of council tax which was satisfied in 2019, and another for £11,529 which was in respect of a bank loan. Mr M said that he was paying around £350pm in total towards these judgements.

Looking at the amount of credit, the length of the agreement, the size of the monthly repayments and that there were two CCJ's to settle, I didn't think Moneybarn had carried out proportionate and reasonable checks. I hadn't seen any evidence that it had asked any questions as to Mr M's work, level of income, or outgoings. The statements provided by Mr M didn't appear to have shown a regular amount of money coming in as the amounts fluctuated and I thought this should have prompted more enquiries from Moneybarn as to his earnings. These statements only provided a small snapshot of his income and outgoings and I thought it was unfair for Moneybarn to assume his monthly income would be at that level throughout the year. It would have been reasonable and proportionate for Moneybarn to have asked more questions about Mr M's income and committed expenditure to obtain a fuller picture of his financial situation.

Moneybarn appeared to have based its decision that the credit agreement was affordable because it had amounted to less than 7% of what had been calculated as Mr M's net monthly income. I thought it would have therefore been reasonable and proportionate for Moneybarn to have checked that it was satisfied that the income shown in the statements represented his monthly income position.

I appreciated Mr M signed the conditional sale agreement confirming it was affordable for him. But I didn't think that just because Mr M had agreed it was affordable, Moneybarn didn't have to carry out reasonable and proportionate checks that this was the case for the agreement. It was aware that Mr M had struggled to manage credit and other payments in the past, and Moneybarn acknowledged that it was due to Mr M's poor credit history that he was seeking a credit agreement with itself. I thought it was reasonable to say that Moneybarn should have been aware that this agreement would be a substantial commitment for Mr M to meet and therefore checks as to his income and outgoings would have been required.

As Moneybarn hadn't asked about Mr M's income and outgoings then I couldn't reasonably say it had made a fair lending decision based on reasonable and proportionate checks.

The next issue I therefore needed to consider was, if reasonable and proportionate checks had been carried out, what would they have revealed? Here, I'd seen that Mr M was, at the time he entered into the credit agreement, working on a temporary contract and was self-employed. This meant that all payments he was receiving were gross and not net as had been assumed by Moneybarn.

Moneybarn calculated that Mr M had a net monthly income of £5,133.70, based on the payments he'd received from a company over the two months covered by the bank statements. This equated to an annual income of around £90,000. However, Mr M had provided me with his tax returns for the years 2017/18 and 2018/19, which showed Mr M earnt £34,000 and £29,500 respectively. I thought it was fair to say that Mr M's annual income wasn't close to £90,000 and the calculation by Moneybarn of Mr M's net monthly income had been inaccurate and inflated.

As Mr M was self-employed, I thought it was more likely than not that his income would fluctuate, and I'd seen Moneybarn would also have accepted that. However, if he had been asked about his income by Moneybarn at the point he entered into the credit agreement, then I thought it was more likely than not that he would have declared it as £34,000. This figure would have been corroborated by the amounts he was shown as being paid in his bank statements. This would mean the monthly payments for the conditional sale agreement were around 16% of his income.

An income of £34,000 equates to a monthly income of £2,230. I'd seen that during the life of this credit agreement Mr M 's partner had a baby, but I didn't know whether his partner had contributed to the expenses of the household. But this credit agreement was Mr M's responsibility and so its affordability shouldn't rely on the potential income of his partner.

I'd seen that Mr M was covering the following expenses each month:
Rent £1250
£60 gas and electricity
£30 water rates
£350 towards his CCJs
£100 food
£20 gym
£40 TV/internet
£53 insurance
£30 mobile
£28 bank account fees
£63 health insurance

This amounted to a total of £2,024. There was also a regular payment of £350pm to his accountants, though I was unclear whether this payment included a payment towards his tax and national insurance since Mr M received his income as a gross payment. But, looking at the total amount paid to the accountant, I thought that would be likely.

Mr M's expenses were complicated by various payments leaving his account, which he said were payments to others from whom he'd borrowed. As the picture of these expenses was unclear, I didn't take them into account since looking at the above figures I could see that he would have been left with insufficient disposable income to sustainably meet the conditional sale agreement's monthly cost. Mr M would have had a disposable figure of around £206pm.

I thought, looking at the evidence that had been provided, that had Moneybarn undertaken reasonable and proportionate checks on Mr M's income at the time he took out the conditional sale agreement, it wouldn't have found he could sustainably afford it.

The final question I needed to consider was whether Moneybarn had acted unfairly or unreasonably in some other way. Although I'd seen it had terminated the agreement due to Mr M's defaulting on his payments, I didn't think Moneybarn had acted unfairly other than not proportionately checking the credit agreement's affordability. I'd seen that Moneybarn had treated Mr M with forbearance when he'd struggled to make payments, it had agreed payment holidays and set payment plans that Mr M agreed to meet. The credit agreement was terminated after Mr M had made only two payments in a nine-month period. I understood that Mr M still had possession of the car.

Mr M had also complained about the interest rate charged on the conditional sale agreement, as he said he was misled on the rate. But, looking at an email he sent Moneybarn in July 2018, he said he took out a loan with an APR of 46% and was querying how the charges had been worked out. I thought this showed Mr M was aware of the APR rate but had misunderstood how it was to be applied. However, since I thought Moneybarn would have considered the conditional sale unaffordable for him had it done reasonable and proportionate checks, then I didn't have to look at the interest rate issue further.

So, for the reasons given above I intended to uphold Mr M's complaint that the conditional sale agreement was unaffordable for him.

Although the credit agreement shouldn't have been offered to Mr M, when looking at a fair resolution for his complaint I thought it was fair I took into account that Mr M had been able to use the car and that he still has it in his possession. In the circumstances I thought it would be fair for the car to now be returned to Moneybarn, as had the agreement not been terminated, I would have asked Moneybarn to end it with nothing further to pay.

I also thought it was fair and reasonable that Mr M paid for the usage he has had from the car. There wasn't an exact formula for working out what fair usage should be. However, in deciding what's fair and reasonable, I'd thought about the amount of interest that was charged under the agreement, the usage Mr M likely had of the car and what his costs to stay mobile might have been had he not entered into this agreement. In doing so, I thought a fair amount he should pay was £200pm for each month he had use of the car. It seems Mr M had use of the car for around 44 months, which amounted to £8,800. I therefore thought it would be fair and reasonable for Moneybarn to retain any payments made by Mr M up to this amount

I asked Moneybarn to do the following:

- Collect the car at no cost to Mr M.
- Calculate the total amount paid by Mr M to date including the initial payment.
- If this amount is more than £8,800 then it should reimburse him the amount paid above this figure.
- If the amount is less than £8,800, agree a suitable repayment plan with Mr M for the balance.
- Remove any adverse information regarding this account from his credit file.

However, if Mr M subsequently defaults on payments due under any agreed payment plan for this account whether he retains the car or returns it, then Moneybarn may report that information to the credit reference agencies.

Moneybarn hasn't asked me to look at any parts of my provisional decision again. Mr M has asked that I reconsider the monthly amount I think would be reasonable for him to pay for the use he has had of the car while in his possession. He says as he has had to pay insurance and maintenance costs it will actually cost him more than £200pm to use the car.

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 haven't changed my view that the credit agreement was unaffordable for Mr M and that Moneybarn failed to carry out reasonable and proportionate checks as to Mr M's income and expenses. I'm therefore upholding his complaint.

While I appreciate this will be of disappointment to Mr M, I also haven't changed my view as to what would be a fair amount for him to pay regarding the usage he has had from the car while it was in his possession. As I explained above, there isn't a set formula to use but I have taken into account what his costs to stay mobile might have been had he not had this particular agreement. I think it's unlikely Mr M would have chosen not to have a car at all, and any car ownership means additional expenses are incurred such as insurance and maintenance costs. I think it's reasonable to say even if Mr M hadn't entered into this agreement, he would have faced those costs in any event for another car. So, I think it's fair that I don't take them into account when looking at the monthly amount Mr M should pay for the actual usage he has had from this car. I still think it's fair he pays £200pm for the 44 months he's had the car in his possession which amounts to £8,800.

Putting things right

I'm asking Moneybarn to do the following:

- Collect the car at no cost to Mr M.
- Calculate the total amount paid by Mr M to date including the initial payment.
- If this amount is more than £8,800 then it should reimburse him the amount paid above this figure.
- If the amount is less than £8,800, agree a suitable repayment plan with Mr M for the balance.
- Remove any adverse information regarding this account from his credit file.

However, if Mr M subsequently defaults on payments due under any agreed payment plan for this account whether he retains the car or returns it, then Moneybarn may report that information to the credit reference agencies.

My final decision

As set out above, I'm upholding Mr M's complaint that the conditional sale agreement was not sustainably affordable for him. As the agreement has already been terminated, I'm asking Moneybarn No. 1 Limited to do the following:

- Collect the car at no cost to Mr M.
- Calculate the total amount paid by Mr M to date including the initial payment.
- If this amount is more than £8,800 then it should reimburse him the amount paid above this figure.
- If the amount is less than £8,800, agree a suitable repayment plan with Mr M for the balance.

- Remove any adverse information regarding this account from his credit file.

If Mr M does not make payments as required by any agreed payment plan after the settlement of his complaint, then Moneybarn may record this adverse information on his credit file.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr M to accept or reject my decision before 7 March 2022.

Jocelyn Griffith
Ombudsman