

The Complaint

Mr J says that Everyday Lending Limited (trading as Everyday Loans) (the 'Business') lent to him irresponsibly when he was granted a personal loan on 23 May 2012.

Background to the Complaint

The Business provided Mr J with a £3,000 loan (the 'Primary Loan'). It had a 30-month term and it was repayable at £246.70 a month. The Annual Percentage Rate ('APR') was 113.6% and the total amount repayable after interest and costs was £7,134.27.

The purpose of the Primary Loan appears to have been to consolidate some existing debt, including Payday Loans, and carry out some car repairs.

The Business also provided Mr J with a secondary loan of £270 to finance the purchase of an insurance policy called Personal Accident Cover (the 'Secondary Loan'). That, too, had a 30-month term. It was repayable at £22.20 a month. The APR was 101% and the total amount repayable after interest was £624.32.

I'll refer to both loans as the 'Loan' throughout much of this decision.

In addition to the Personal Accident Cover, Mr J also purchased an insurance policy called "Everyday Life" in return for an average monthly premium of £7.86 during the term of the cover. The policy provided life cover.

In January 2020 Mr J made a complaint about the Business' decision to lend to him and he argued that what he borrowed was unaffordable.

The Business issued its final response on 20 April 2020 arguing that the Loan wasn't unaffordable for him based on the checks it carried out and the information it had available to it.

In summary, the Business said that Mr J told it that he was single, with no dependents and living with his parents – which he was paying £425 in rent for. While his monthly income fluctuated, it used the lowest of two payments based on some bank statements provided by Mr J. After assessing his credit file and bank statements, he was questioned about some Payday Loans and he told the Business that he had started to use them when he was too unwell to work and found himself in a debt cycle as a result. So, the Business confirmed his financial commitments and went on to make a provision of £954.21 for general living expenses. And having done all of that, it concluded that he would have been left with some disposable income after the repayments to the Loan.

This complaint was then referred to the Financial Ombudsman Service on 19 October 2020. Mr J said that between 2008 and 2012 he was dependent on debt, having relied on Payday Loans and other short-term high cost borrowing. In early 2012, in particular, he said he was using Payday Loans several times a month because he had significant issues with gambling and had a poor track record financially. So, in his view, it was obvious that his financial circumstances were difficult – such that further borrowing put him at risk of further hardship.

And as the Business' own records indicate that it knew about his use of Payday Loans, he suggested that there were "red flags" that the Business should have addressed but didn't – which he went on to say included the fact that his income each month was largely commission based.

When the Business was notified that this complaint had been referred to the Financial Ombudsman Service, it provided its business file. And in the letter accompanying its file, it added to what it said in its final response by saying that it had used 35% of Mr J's net income to calculate an approximate level of expenditure somewhere between a minimum of £500 and a maximum of £1,000. It said that it used 35% because it was widely regarded as the national average. The Business also suggested that it routinely added £80 of expenditure per child in a household.

This complaint was then looked at by an investigator who ultimately thought that the Business' checks weren't reasonable and proportionate before concluding that it would have discovered that the Loan was likely to have been unsustainable and, in turn, unaffordable had it carried out such checks.

The Business disagreed with the investigator. And as an informal resolution couldn't be reached, this complaint was referred for an ombudsman's decision – which is why it was passed to me.

I issued a Provisional Decision ('PD') on 25 April 2022. In summary, I thought that the Business had lent to Mr J irresponsibly and caused him a financial loss as a result.

Mr J accepted what I had to say in my PD. The Business disagreed. But it didn't give me any new evidence and/or arguments to explain why. Instead, it referred me to the information it had previously sent.

So, as the deadline I set in my PD has now passed, I'm in a position to consider this complaint for a Final Decision.

My Findings

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

When doing that, I'm required by DISP 3.6.4 R of the Financial Conduct Authority's (the 'FCA') Handbook to take into account the:

“(1) relevant:

- (a) law and regulations;
- (b) regulators' rules, guidance and standards;
- (c) codes of practice; and

(2) ([when] appropriate) what [I consider] to have been good industry practice at the relevant time.”

As I said in my PD, when the evidence is incomplete, inconclusive, incongruent or contradictory, I've made my decision on the balance of probabilities – which, in other words, means I've based it on what I think is most likely to have happened given the available evidence and the wider circumstances.

And having taken into account everything I need to consider¹, including the Business' response to my PD (which simply referred me to the information available to me before I issued that decision), I still think this complaint should be upheld for the same reasons I gave in my provisional findings – which I'll set out below.

Before I explain why, I want to repeat what I said in my PD about my role as an ombudsman. It isn't to address every single point that's been made to date. Instead, it's to decide what's fair and reasonable given the circumstances of this complaint. And for that reason, I'm only going to refer to what I think are the most salient points when I set out my conclusions and my reasons for reaching them. But, having read all of the submissions from both sides in full, I will continue to keep in mind all of the points that have been made, insofar as they relate to this complaint, when doing that.

The Business lent to Mr J at a time when it needed a licence from the Office of Fair Trading (the 'OFT') to carry out certain consumer credit activities. Section 25(2) of the Consumer Credit Act 1974 (the 'CCA') set out the factors the OFT had to consider when deciding whether to grant a consumer credit licence to a lender. The factors included *"evidence of the kind mentioned in subsection (2A)"* – which referred to evidence of *"practices appearing to the OFT to be deceitful or oppressive or otherwise unfair or improper (whether unlawful or not)"*.

Section 25(2B) of the CCA then went on to set out a specific example of the type of practice referred to in Section 25(2A)(e) – saying:

*"For the purposes of subsection (2A)(e), the business practices which the OFT may consider to be deceitful or oppressive or otherwise unfair or improper include practices in the carrying on of a consumer credit business that appear to the OFT to involve **irresponsible lending**."*
[my emphasis added]

In March 2010, the OFT introduced guidance intended to provide greater clarity for businesses and consumer representatives as to the business practices it considered may constitute irresponsible lending for the purpose of Section 25(2B) (the 'OFT's IL Guidance'). And it's that guidance that's important here.

In Paragraph 2.2 of the Guidance, the OFT said that creditors (like the Business) should *"make a reasonable assessment of whether a borrower can afford to meet repayments in a sustainable manner"*.

Paragraph 4.1 stated that the level of detail a business needed to go into was *"dependent on – and proportionate to – a number of factors"*, some of which were set out in Paragraph 4.10. It also went on to describe what the OFT meant by 'assessing affordability' in the context of the Guidance – saying:

"'Assessing affordability', in the context of this guidance, is a 'borrower-focussed test' which involves a creditor assessing a borrower's ability to undertake a specific credit commitment, or specific additional credit commitment, in a sustainable manner, without the borrower incurring (further) financial difficulties and/or experiencing adverse consequences."

¹ Including what the Financial Ombudsman Service has set out on its website on its general approach to complaints about irresponsible and unaffordable lending.

And Paragraph 4.2 made it clear that:

- (1) The means and methods employed by creditors to assess affordability had to be sufficient enough to assess the risk of the credit sought being unsustainable for the borrower;
- (2) An assessment of affordability was *“likely to involve more than solely assessing the likelihood of the borrower being able to repay the credit in question”*; and
- (3) Creditors had to take *“reasonable steps to assess a borrower’s likely ability to be able to meet repayments under the credit agreement in a sustainable manner”*.

As a result, and in keeping with the information on the Financial Ombudsman Service’s website about its approach to complaints about unaffordable lending, there remain a number of overarching questions to deciding a fair and reasonable outcome in the circumstances of this complaint:

1. Did the Business carry out reasonable and proportionate checks to satisfy itself that Mr J was likely to have been able to repay the Loan in a sustainable way?

- i. If the Business carried out such checks, did it lend to Mr J responsibly using the information it had?

Or

- ii. If the Business didn’t carry out such checks, would the requisite checks have demonstrated that Mr J was unlikely to have been able to repay the Loan in a sustainable way?

2. If relevant, did Mr J lose out as a result of the Business’ decision to lend to him?

Did the Business carry out reasonable and proportionate checks?

There are many factors that could be relevant when determining how detailed proportionate checks should have been. And while much will depend on the circumstances in question, the more obvious factors include – though aren’t necessarily limited to:

- the type of credit Mr J was applying for along with the size, length and cost of the borrowing; and
- Mr J’s financial circumstances – which included his financial history and outlook along with his situation as it was, including signs of vulnerability and/or financial difficulty.

As I said in my PD, I was satisfied the Business had asked for a proportionate amount of information given the circumstances of this complaint. And that’s still the case now.

However, I also said in my PD that the Business didn’t satisfy its obligation to lend responsibly to Mr J by simply requesting a proportionate amount of information from him before making its decision to lend. Once it got the information it asked for, it then had to evaluate it because it still had to reasonably assess whether he could afford to meet the loan repayments in a sustainable way over the term of the Loan.

The Business says that its assessment of the information it obtained led it to conclude that the Loan was affordable for Mr J. But, in the absence of new evidence and/or arguments, I’m still not persuaded that was a reasonable conclusion to reach in light of what the Business knew of his financial circumstances.

Did the Business lend to Mr J responsibly using the information it had?

As I've said before, Mr J provided the Business with bank statements for it to review before it made its lending decision. Those statements were for two different bank accounts and covered 5 to 29 March 2012 and 2 April to 22 May that year. And as both sides are already aware, they revealed that Mr J had applied for nine Payday Loans between 11 April and 22 May 2012. The Business' internal records suggest that it discussed those loans with Mr J and it looks like he told the person who dealt with his loan application that he had turned to them because he had been off sick from work and, as his income was largely commission based, the drop in his income had left him short of money.

Yet, captured in the Business' internal records was the following note:

*"risk on loan is use of pdl's but paying off and need for using these came from being off work sick **which would be a risk ongoing if suffered drop in income again** ... loan supported by good job stability ... excellent income and good voters tracking ... using funds to pay off pdl & p2p with remainder for car repairs"* [my emphasis added]

And as Paragraph 4.3 of the OFT's IL Guidance defined the notion of repaying credit in a "sustainable manner" as doing so "without undue difficulty", which included not "incurring or increasing problem indebtedness", I'm still not persuaded the decision to lend to Mr J was consistent with that guidance given what the Business knew.

After all, as I said in my PD, as far as the Business was concerned, the practical reality of a monthly income made up in large part of commission had already exposed Mr J at least once before to shortfalls that had forced him into taking Payday Loans given his financial circumstances. And as the bank statements given to the Business suggested that his income and regular outgoings, which included frequent cash withdrawals that he says were for gambling but appear to have been unexplored by the Business, were already quite finely balanced, I still can't see how the Business could have been reassured that, if history was to repeat itself, there wasn't the real risk of Mr J struggling to make the repayments to the Loan without undue difficulty or further borrowing given the sheer number of Payday Loans he had to turn to in a relatively short period of time – especially when he didn't have the added burden of the repayments to the Loan.

Did Mr J lose out?

As Mr J has described the challenge of trying to repay the Loan, which the Business' own records support², I think he ended up borrowing and trying to repay a substantial sum of money when he was likely to struggle financially. And had the Business carried out its affordability assessment in keeping with the OFT's IL Guidance, I still think he would have been saved from the financial burdens of not only the Primary and Secondary Loans but also the monthly cost of Everyday Life.

Fair Compensation: Putting the matter right for Mr J

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 J in the position he would now be in if he hadn't been granted the Loan.

² There's an internal note dated 21 December 2012 that states Mr J couldn't make his payment that month because he hadn't received any commission for three months.

However, this isn't straightforward when the complaint is about unaffordable lending because it isn't always possible to undo what's already been done.

Mr J suggests that he had a gambling problem when the Business lent to him. But as I said in my provisional findings, there was nothing immediately obvious from the bank statements he gave to the Business to suggest that was the case. There were frequent cash withdrawals between 2 April and 22 May 2012. And it's possible that, if questioned about those, he may have told the Business that he had a gambling problem. But I hadn't seen anything to persuade me that was probable when I issued my PD. And as Mr J doesn't dispute that finding, I still think that's the case now. So, as the Business could only make its decision to lend to Mr J based on the information available to it at the time, I don't think it would be fair or reasonable on this occasion to put him back in the position he would be in if he hadn't been granted the Primary Loan at all. Instead, I have to consider if there's another way of putting the matter right fairly and reasonably insofar as that loan is concerned given the circumstances of this complaint.

But I still don't think the same can be said of the Secondary Loan or the premiums Mr J paid for Everyday Life – which he only took on because he had been granted the Primary Loan when he should not have been.

So, here's what I think the Business should do:

1. Refund:
 - i. Mr J's repayments to the Business under the Secondary Loan;
 - ii. the premiums Mr J paid for Everyday Life; and
 - iii. all of the interest and charges Mr J paid to the Business under the Primary Loan.
2. Add simple interest at 8%* per year on the refunded repayments, premiums and interest and charges in Step 1 from the date they were paid to the date this complaint is settled.
3. The Business should remove any adverse information recorded on Mr J's credit file as a result of the Loan.

*HM Revenue & Customs may require the business to take off tax from this interest. If that's the case, the Business must provide a certificate showing how much tax it's taken off if one is requested.

My Final Decision

For the reasons set out above, I uphold this complaint and direct Everyday Lending Limited (trading as Everyday Loans) to compensate Mr J in keeping with what I've said above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J to accept or reject my decision before 13 July 2022.

Morgan Rees
Ombudsman