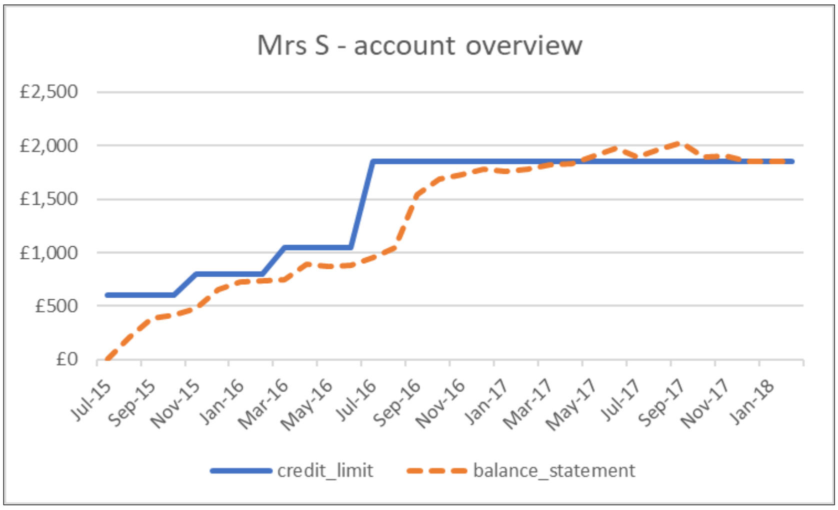
DRN-3658324

The complaint

Mrs W complains for and behalf of the estate of Mrs S that NewDay Ltd trading as Marbles ("NewDay") was irresponsible when it provided the late Mrs S with a credit card and increased her credit limit on three occasions.

What happened

NewDay opened a credit card account for Mrs S in July 2015 with a credit limit of £600. This type of credit was an open-ended or running account facility. NewDay subsequently increased Mrs S's credit limit to £800 in November 2015; £1,050 in March 2016, and £1,850 in July 2016. NewDay provided Mrs S's account history and I've summarised some of this information in the graph below which shows the account credit limits and balance.



Mrs S was charged late fees in three months of 2016 and five months of 2017, falling into sustained arrears in May 2017. She never managed to clear these and by February 2018 had an account balance of £1,847. I understand the balance was sold to a third-party debt collector in March 2018.

Mrs S's representative, Mrs W, says that NewDay didn't carry out appropriate credit checks before lending to her or increasing her credit limit. She says that appropriate checks would have shown that the account wasn't affordable for Mrs S and that she was vulnerable at the time due to her health conditions and her circumstances.

NewDay says that it is an instant credit provider and most of its applications are completed online. This means that it doesn't require evidence of income and expenditure by way of bank statements, for example, but instead it uses data submitted by the applicant and information from their credit file. NewDay says that it therefore based its assessment on what Mrs S said about her income, its estimate of her expenditure and what it could see on her credit file. It said that Mrs S met its acceptance criteria. It opened her account with a £600 balance and offered her 'opt-outs' when it increased her balance on three subsequent occasions.

Our investigator assessed the complaint and found that NewDay should have gone further in its affordability checks when it opened Mrs S's account and each time it increased her credit limit. They concluded that, had proportionate checks been carried out from the outset, NewDay would have learnt that Mrs S wasn't likely to be able to repay credit sustainably and her circumstances didn't improve over the lifetime of the account. They concluded that NewDay shouldn't have opened an account for Mrs S and recommended that NewDay pay compensation for this.

NewDay disagreed with our investigator's recommendation. The complaint came to me, as an ombudsman, to review and resolve. I issued a provisional decision on 4 August 2022 explaining why I thought Mrs S's complaint should be upheld. Mrs S accepted my decision but NewDay did not and provided some further comments for me to take into consideration when making my final decision.

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.

Having considered everything again, including what NewDay said in response to my provisional decision, I remain of the view that Mrs S's complaint should be upheld. I appreciate that will be very disappointing for NewDay and I'll set out again my reasons for doing so in this final decision and refer to NewDay's response where appropriate.

As I'd said in my provisional decision, when considering this complaint I had regard to the regulator's rules and guidance on responsible lending (set out in its consumer credit handbook – CONC) which lenders, such as NewDay, need to abide by. NewDay will be aware of these, and our approach to this type of lending is set out on our website, so I won't refer to the regulations in detail here but will summarise them.

Before entering into a credit agreement, NewDay needed to check that Mrs S could afford to meet her repayments sustainably. In other words, it needed to check she could repay the credit out of her usual means, within a reasonable period of time, without having to borrow further and without experiencing financial difficulty or other adverse consequences. The checks needed to be proportionate to the nature of the credit and Mrs S's circumstances.

NewDay says it asked Mrs S about her income, estimated her expenses and included information from her credit file about her existing debt repayments. Mrs S told NewDay she was self-employed and her income was £12,000 gross (which equates to about £960 a month net assuming no wage deductions) and she had an existing debt of £100. NewDay said it checked its figures using a credit reference agency tool which considers current account turnover, but I don't know which bank account NewDay considered – Mrs S had at least two at the time.

NewDay said "In this case when Mrs S took out the credit card she was offered a credit limit of £600 on £29.70 % APR, which… means that on the balance of £600, Mrs S would have been paying roughly about £20 a month and having reviewed her risk and affordability data, she was paying roughly around £20 a month and occasionally more. Which indicates that this was affordable for her."

NewDay provided the credit file information it relied on which showed Mrs S had two active accounts, a public record of a £700 debt (either bankruptcy or a county court judgement recorded over five years prior) and five defaulted accounts to a total of

£12,900, with the last default just over three years ago.

CONC 5.3.1G(4) stated that if a lender takes income or expenditure into account it needs to take account of actual current income or expenditure and that it is generally not sufficient to rely solely on a statement of those matters made by the customer. I appreciate that NewDay took steps to sense-check the income figure Mrs S had given and to estimate her expenditure but, given the amount of existing albeit older debt she had it doesn't seem to me that its usual estimates would be appropriate in this case. Also I've borne in mind CONC 5.3.1G(8) which stated that a lender should not use the assumption of the amount necessary to make only the minimum payment each month and should consider the customer's ability to repay the maximum amount of credit available under the agreement within a reasonable period of time.

Altogether, I don't think the checks NewDay carried out here were proportionate to the circumstances and it ought to have taken steps to look into Mrs S's finances in more detail before lending to her. Mrs W has provided Mrs S's bank statements for her current account and a savings account and I've reviewed these to get an understanding of what NewDay might have found out had it carried out proportionate checks. To be clear, I'm not suggesting this is what NewDay ought to have done but, in the absence of any other evidence such as payslips, benefit letters or mortgage statements for example, I think this information is a reasonable proxy.

Mrs S's current account statements show that her income was approximately £660 a month made up of her state pension. Mrs S's identifiable outgoings, including her mortgage, council tax, insurances, bills, internet and mobile and overdraft charges came to over £600. This doesn't include any food or petrol expenses. I don't think this leaves Mrs S sufficient means to pay her credit balances within a reasonable period of time, assuming she borrowed up to her agreed limit.

Furthermore, the management of this bank account doesn't reassure me that Mrs S's money problems were historic. Mrs S had a £3,000 overdraft and didn't earn enough to take her out of this each month, in fact she was being charged at least £50 a month in interest and charges and her balance was about £2,800 at the time she took out this credit card. It's likely Mrs S would need to use this facility to meet repayments on any further credit she took out. Mrs S also had a savings account and, it seems to me, used this to manage her money by transferring amounts in and out of her current account. This savings account had a positive balance of about £100 at the time. I don't know if NewDay saw any of this information on its credit check but I think it's likely it would have learnt this through a proportionate check.

Altogether, I don't think NewDay would have agreed to a credit card facility for Mrs S had it carried out further checks and so I've concluded it was irresponsible to have done so.

I haven't seen any evidence that Mrs S's finances improved over the time she held the account. As evidenced by the above graph, her balance kept pace with her credit limit increases. It wasn't likely she would be able to repay the money she borrowed within a reasonable period of time, given she seemed to be making minimum repayments and her account balance was building up. As mentioned, Mrs S missed payments on her account in 2016 and 2017, and her account was eventually closed.

Putting things right

NewDay said that the account offered to Mrs S was interest-bearing and that it applied fees and charges in line with the terms and conditions of the agreement. It also said that while it could see that Mrs S was over-limit and late to make her payments from May 2017, this wouldn't prompt it to stop applying fees or charges.

As I've explained, I don't think NewDay should have offered this facility to Mrs S in the first place or increased her limit. Where we find credit to have been agreed irresponsibly, our approach to putting things right is to refund any interest, fees or charges associated with the credit that were paid by the borrower in order to put them back into the position they would have been in had the credit not been agreed.

In addition, we usually direct the lender to pay a refund of 8% per annum simple interest on these payments where the borrower was unfairly deprived of their money. We'd expect the borrower to repay the capital borrowed as they have had the use of these funds.

I've concluded that NewDay was irresponsible when it offered Mrs S's the account in the first place and subsequently offered her more credit in 2016 and 2017. In order to put Mrs S back into the position she would have been in had this not happened means she shouldn't have to pay any interest or charges on the account from the outset.

In summary, NewDay should:

- Rework Mrs S's account to ensure that from the opening of the account no interest is charged. Any late payment or over limit fees should also be removed; and
- Apply Mrs S's repayments to this adjusted balance; and
    - If the effect of this reworking results in there no longer being an outstanding balance to pay, then any remaining amounts paid by Mrs S should be treated as overpayments and refunded along with 8% simple interest* on the overpayments from the date they were made until the date of settlement.
    - If an outstanding balance remains on the account once these adjustments have been made NewDay needs to ensure that Mrs S only owes this adjusted balance. As the debt has been sold NewDay should either repurchase it or liaise with the current debt owner. In this event, I would remind NewDay of its obligations to deal with Mrs S's representative fairly and with due consideration and forbearance, which typically might include coming to an agreed repayment plan for any balance but doesn't rule out any further forbearance measures.
- Refund to Mrs S any payments she's made toward insurance premiums associated with this account, along with 8% simple interest* from the date they were made to the date of settlement.

* HM Revenue & Customs requires NewDay to take off tax from this interest. NewDay must provide a certificate showing how much tax it's taken off if asked.

My final decision

As I've explained above, I am upholding Mrs S's complaint about NewDay Ltd trading as Marbles and it needs to put things right as I've proposed.

Under the rules of the Financial Ombudsman Service, I'm required to ask the estate of Mrs S to accept or reject my decision before 17 September 2022.

Michelle Boundy
Ombudsman