

The complaint

Miss I complains that BMW Financial Services (GB) Limited (“BMWFS”) provided her with car finance that she couldn’t afford to repay. She believes BMWFS acted irresponsibly in approving the finance.

Background to this decision

I recently issued my provisional decision setting out the events leading up to this complaint and my intended conclusions on how I was minded to resolve the dispute between Miss I and BMWFS. I invited both parties to let me have any further comments they wished to make in response, and I will address their responses later in this decision.

What happened

In August 2019 Miss I entered into a hire-purchase agreement with BMWFS to get a car from “E”, a dealer. A different company “M” acted in a credit broking capacity to arrange the finance. At around the same time, she also entered into a finance agreement with a different provider to acquire another car, which has been the subject of a separate complaint to us.

As I understand it, Miss I had agreed with other parties (I’ll call them “B”) to acquire the cars in her name, and that B would then sub-lease the cars to someone else. Within a year the arrangements had unravelled, and after the car was impounded by the police BMWFS terminated the agreement and took possession of the car it had financed.

BMWFS began initial legal action against Miss I to recover the balance owed under the agreement, and she responded disputing liability. According to BMWFS’s file notes, Miss I’s response was founded on (among other things) her having been the victim of a scam and on BMWFS’s failure to undertake appropriate checks when it agreed to the finance. As I understand it there are no current legal proceedings ongoing, notwithstanding the exchanges between BMWFS and Miss I’s respective solicitors.

Miss I complained to BMWFS about her having been the victim of a scam and her dissatisfaction with the steps BMWFS took to undertake appropriate checks when it agreed to the finance.

In response BMWFS said:

- it would have assessed Miss I’s affordability and creditworthiness using an automated process that was a combination of its bespoke credit scoring criteria, internal policies, and data from credit reference agencies
- its checks looked at the following key pieces of information:
 - Customer’s credit score
 - Payments to other lenders including any mortgage
 - Experian’s Consumer Indebtedness Index
 - Payday loan usage

- Credit Card Utilisation
- Customer Age
- Customer Employment Status; and
- Proposed Monthly Payment
- the information received confirmed Miss I was able to repay the credit without undue difficulty. It wouldn't have lent if it was not deemed to be in Miss I's best interest
- the application hadn't triggered the safeguards it had in place to refer for a manual underwriting review
- all of the payments due under the agreement had been paid on time and in full, without any suggestion of financial difficulty

Miss I remained dissatisfied with BMWFS's response and referred her concerns to us. Our investigator wasn't persuaded BMWFS had carried out reasonable and proportionate checks before approving the lending. The total amount of credit and the amount of the monthly payment should have suggested to BMWFS that it should have sought further information in relation to Miss I's ability to afford and sustain the credit.

However, the investigator considered that even if BMWFS had undertaken these further checks, the payments due would have been within what he calculated to be Miss I's then monthly disposable income. He didn't think it appropriate to uphold the complaint about BMWFS's lending decision. He did remind BMWFS that it was under an obligation to demonstrate forbearance in light of Miss I's current financial situation.

Miss I didn't agree with our investigator's conclusions. She submitted further evidence in respect of her monthly income and expenditure, which she felt demonstrated that approving the credit had caused her financial hardship. She's asked for this review.

What I've provisionally 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.

In making her complaint, Miss I told BMWFS of the circumstances she was in when she entered into the agreement, and the factors that led her to do so. One of the concerns she expressed was that she had been the victim of a scam. I don't know that the available evidence enables me to go quite so far; as I understand it, Miss I was aware of at least some key details of how the sub-leasing arrangement would work and that the credit was being taken out in her name. She says she did this in order to supplement her income.

I can accept Miss I perhaps entered into the contract without a full understanding of the implications of doing so, and – on the face of it – appears to have been a potentially vulnerable customer. BMWFS's file notes from as early as July 2020 indicate its awareness of what Miss I told it. However, there is no reference to this aspect of her complaint in BMWFS's response.

I find this disappointing. Even if BMWFS was unaware of Miss I's potential vulnerability when it received the hire-purchase application, this wasn't the case by July 2020. I'm conscious that BMWFS did take some steps that suggest it was considering Miss I's circumstances. While it initiated legal action, it has thus far taken a lenient approach to pursuing the debt that arose following possession of the car. But I don't think that means BMWFS has necessarily treated Miss I fairly.

For that to be the case, I would expect to see some indication that BMWFS looked into the circumstances Miss I described surrounding her entry into the agreement. For example, Miss I says she did not herself complete the hire-purchase application. She says she passed on her details via a messaging app and that B was the party who undertook the dealings with E and M. BMWFS hasn't submitted anything that might suggest it made further enquiries into those arrangements, or that it contacted M to establish what might be important facts about the execution of the deal.

I also find cause for concern in some of the comments in BMWFS's response to Miss I's complaint. BMWFS said that all of the payments due were made in full and on time. That statement isn't borne out by BMWFS's agreement ledger (the firm's record of payments due and made under the agreement). That record shows that only the first six payments were made under a five-year agreement. The payments failed some time before the police became involved. I can't accept BMWFS's contention that the payments were sustained as evidence that the agreement was affordable.

In addition, BMWFS set out the factors it had taken into account when undertaking a creditworthiness and affordability assessment. What stands out immediately to me about those factors is the lack of any reference to Miss I's income or any expenditure she had that wasn't credit-related.

There are regulatory standards in place to say the sort of assessment a lender should carry out when considering whether to approve a finance application. Those standards are set out by the Financial Conduct Authority (FCA) and are included in its Consumer Credit Sourcebook (CONC)¹. In light of the circumstances of this complaint and some of the points Miss I and BMWFS have made, I think it would be useful to look at those provisions.

In simple terms, when carrying out an assessment a credit provider needs to consider two risks. The credit risk (the risk to the credit provider that the customer won't make payments when they fall due) and the affordability risk (the risk to the customer that they won't be able to make the payments).

The credit risk is generally assessed by reference to the customer's past and current record of taking on and servicing credit arrangements. There doesn't appear to be any question here that BMWFS conducted such an assessment, or to my mind that the assessment was sufficiently thorough. I've seen a copy of the credit check BMWFS carried out on Miss I.

There's nothing sufficiently significant there that suggests to me BMWFS ought to have had cause for concern over Miss I's payment history. There are some indications that she had in recent months begun to acquire a number of credit accounts. That might have prompted further enquiry, but at the time these accounts were being serviced on time and I can see why BMWFS concluded that additional checks weren't necessary.

The key issue here of course is the affordability risk. This requires that BMWFS consider Miss I's ability to make payments as they fall due over the life of the agreement². The regulations say that it can do so using a customer's income, savings or other assets, and/or income received by another person in so far as it is reasonable to expect such income to be available to the customer to make repayments under the agreement.

BMWFS's final response makes no reference to any assessment of Miss I's income. Nor does it appear in the underwriting information BMWFS has submitted to us in support of its

¹ The full CONC sourcebook can be found in the FCA Handbook, available on the FCA's website

² see CONC 5.2A.12R

lending decision. And income assessment isn't the only consideration. The regulations also require that payments can be met without failing to make any other payment the customer has a contractual or statutory obligation to make; and without the payments having a significant adverse impact on their financial situation. That requires that the lender has regard not just for the customer's income but also their expenditure.

The total amount payable under the hire-purchase agreement was more than £46,700. The monthly payments due were £761.77, over five years. Given this, I don't think BMWFS could reasonably seek to suggest it was obvious that Miss I was able to make repayments in line with the above requirements such that it would render the steps in CONC 5.2A.15R disproportionate. Those steps require BMWFS to take reasonable steps to determine Miss I's income and take account of it. As I've already noted, there's nothing to indicate it did so.

Further, CONC 5.2A.17R requires BMWFS to take reasonable steps to determine (and take account of) Miss I's non-discretionary expenditure. Non-discretionary expenditure includes payments needed to meet priority debts (such as mortgage payments, rent or lending secured by a charge on certain goods, council tax, and utility bills) and other essential living expenses and other expenditure which it is hard to reduce to give a basic quality of life³.

I can see that BMWFS set out the expenditure it did take into account, which was that it could ascertain from the checks it did do. But I'm minded to find those checks were inadequate for the purpose of meeting the requirement in CONC 5.2A.17R.

Like the investigator, I don't think BMWFS has demonstrated it did enough in either respect to be able to say that it conducted a reasonable and proportionate assessment of affordability risk in its overall creditworthiness assessment. The checks and assessment BMWFS carried out did not ensure Miss I could meet the payments without them having a significant adverse impact on her financial situation, including failing to make other payments she was obliged to make.

That isn't in itself enough to say the payments weren't affordable. It simply changes the question to whether proportionate checks would have shown they weren't affordable. But having reviewed Miss I's bank statements and other information we've been able to obtain for the material time (and which I consider would have formed part of a reasonable and proportionate assessment carried out by BMWFS), I'm not satisfied that this was the case. The hire-purchase monthly payments were £761.77. Based on the income and expenditure I've seen for Miss I, that level of payment wasn't likely to have been sustainable.

At the time she entered into the hire-purchase agreement, Miss I's income from the two jobs she held averaged around £2,680. She had existing credit commitments including a mortgage, loans and other credit. Her monthly payments for these totalled around £1,265.

Her other non-discretionary expenditure included utility bills, council tax and similar costs that came to another £470. While that gives a potential disposable income of some £945, a true figure should take into account that out of that remaining sum, Miss I would need to buy essentials such as food and clothing, not to mention the costs associated with running the car she was acquiring under the agreement, such as tax, fuel and insurance.

I should add that I've thought about the fact that Miss I was expecting to receive such income from the arrangements she had with B; indeed, her submissions state that this was her purpose in entering into the agreements in the first place. As previously noted, CONC does say that a firm can also take account of income received by the customer jointly with

³ see guidance at CONC 5.2A.18G

another person or income received by another person in so far as it is reasonable to expect such income to be available to the customer to make repayments under the agreement⁴.

However, the hire-purchase agreement issued by BMWFS expressly excluded the sub-leasing arrangements that would have provided that income. So any decision to take such income into account when approving the agreement would have been unreasonable.

Having seen evidence of Miss I's financial circumstances as I consider BMWFS ought to have obtained in this case, I consider the repayments under the hire-purchase agreement would have had a significant adverse impact on her financial situation, contrary to relevant CONC provisions. In addition, had BMWFS undertaken reasonable and proportionate steps to look further into the application, it's quite possible that it would have established the true nature of the underlying arrangements and decided not to lend at all. As such, I'm currently minded to uphold her complaint.

Putting things right

I'm conscious of the fact this matter has been ongoing since BMWFS was first alerted to the situation in July 2020, and that this must have been the source of much concern and distress to Miss I. I must also take into account that much of the distress that she has experienced is a consequence of entering into the arrangements with B, rather than being caused to her by BMWFS. That said, I do think BMWFS could have handled matters overall rather better than it has and that has contributed towards Miss I's upset. I propose to require BMWFS to pay her £200 in recognition of this.

In respect of the outstanding account balance, I understand this is currently around £18,100. To my mind it's appropriate to strike a balance between recognising BMWFS shouldn't have provided the credit to Miss I and the fact that Miss I did have some understanding and intention of the arrangements she was entering into, albeit her use of it wasn't to the extent she anticipated. I also accept Miss I might not view this in quite the same way.

I'm currently minded to require that BMWFS limits the amount it can recover from Miss I under the credit agreement to no more than £4,500 (to include any interest accrued or that would otherwise have accrued in future). In doing so, BMWFS should ensure it takes reasonable steps to agree a suitable and affordable repayment schedule with Miss I over a term that takes account of her current financial position.

I don't propose to make any direction at this stage in relation to the information BMWFS has recorded on Miss I's credit file in relation to the account, other than that the outstanding balance should be amended to reflect the lower sum due.

Responses to my provisional decision

BMWFS advised that didn't accept my intended conclusions and said it wished to make further submissions, which were of a commercially sensitive nature. Although I have provided BMWFS with details of how it can supply its submissions by secure message transmission and extended the response date, it hasn't provided anything further.

Miss I also responded with additional information about the circumstances leading up to the finance arrangement and correspondence from her former legal representative. In summary, Miss I believes that BMWFS should have exercised some form of control over M as the credit broker and should've insisted that M supply supporting documents about her finances.

⁴ see CONC 5.2A.12(2)R

She maintained that she was unaware she was entering into a personal credit agreement, having been led to believe by B that the arrangements were standard business practice. Miss I believes she shouldn't have to pay anything and that her credit record should be clear.

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 considered what Miss I has said, and I do understand her position. She clearly feels that she shouldn't be liable for any of the outstanding debt. As I've already noted, she does appear to have been in a vulnerable position and accepted what B told her as fact. However, her submissions aren't in any material respects different from the arguments I considered and addressed in my provisional decision. Whether BMWFS was in a position to exercise control over M is questionable.

As I understand it, M was an independent company other than the car dealer. Given the way the arrangements were structured I don't think there's enough to indicate the existence of an agent/principal relationship for the purpose of arranging the finance. And in any event, given that I've already found that BMWFS ought to have done more to ensure it properly assessed Miss I's ability to make the payments and the impact they would have on her financial position, I don't believe it's necessary for me to look further into this aspect.

Nothing Miss I has said in her response gives me reason to change my provisional findings or the proposed outcome, and in the absence of further submissions from BMWFS I'm satisfied it's appropriate for me to adopt my provisional conclusions in full in this decision.

My final decision

My final decision is that to settle this complaint, BMW Financial Services (GB) Limited must, within 28 days of receiving Miss I's acceptance, take the following steps:

1. limit the amount it can recover from Miss I under the credit agreement to no more than £4,500 (to include any interest accrued or that would otherwise have accrued in future), and amend the outstanding balance on her credit file accordingly
2. makes reasonable efforts to engage with Miss I to agree a suitable and affordable repayment schedule for the balance in 1. over a term that takes account of her current financial position

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss I to accept or reject my decision before 1 December 2023.

Niall Taylor
Ombudsman