DRN-4581777

Complaint

Mrs L has complained that Marks & Spencer Financial Services Plc (trading as “M&S Bank”) provided her with an unaffordable loan.

Background

M&S Bank provided Mrs L with a loan for £13,500.00 in March 2022. This loan had an APR of 7.9% and a 72-month term. This all meant the total amount repayable of £16,825.28, which included interest, fees and charges of £3,365.28, was due to be repaid in 72 monthly instalments of £234.24.

One of our investigators looked at this complaint and thought that M&S Bank unfairly provided this loan as proportionate checks would have shown it was unaffordable.

M&S Bank disagreed with our investigator’s assessment and asked for an ombudsman to review the complaint.

My findings

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

We’ve set out our general approach to complaints about unaffordable/irresponsible lending - including the key rules, guidance and good industry practice - on our website. And I’ve referred to this when deciding Mrs L’s complaint.

Having carefully thought about everything, I think that there are two overarching questions that I need to answer in order to fairly and reasonably decide Mrs L’s complaint. These two questions are:

1. Did M&S Bank complete reasonable and proportionate checks to satisfy itself that Mrs L would be able to repay her loan in a sustainable way?

    o If so, did it make a fair lending decision?
    o If not, would those checks have shown that Mrs L would’ve been able to do so?

2. Did M&S Bank act unfairly or unreasonably in some other way?

Did M&S Bank complete reasonable and proportionate checks to satisfy itself that Mrs L would be able to repay her loan in a sustainable way?

M&S Bank provided this loan while it was authorised and regulated by the Financial Conduct Authority (“FCA”). The rules and regulations in place required M&S Bank to carry out a reasonable and proportionate assessment of Mrs L’s ability to make the repayments under these agreements. This assessment is sometimes referred to as an “affordability assessment” or “affordability check”.

The checks had to be "borrower" focused – so M&S Bank had to think about whether repaying the loan would cause significant adverse consequences for *Mrs L*. In practice this meant that M&S Bank had to ensure that making the payments to the loan wouldn't cause Mrs L undue difficulty or adverse consequences.

In other words, it wasn't enough for M&S Bank to simply think about the likelihood of it getting its money back, it had to consider the impact of the loan repayments on Mrs L. Checks also had to be "proportionate" to the specific circumstances of the loan application.

In general, what constitutes a proportionate affordability check will be dependent upon a number of factors including – but not limited to – the particular circumstances of the consumer (e.g. their financial history, current situation and outlook, and any indications of vulnerability or financial difficulty) and the amount / type / cost of credit they are seeking. Even for the same customer, a proportionate check could look different for different applications.

In light of this, I think that a reasonable and proportionate check ought generally to have been *more* thorough:

- the *lower* a customer's income (reflecting that it could be more difficult to make any loan repayments to a given loan amount from a lower level of income);

- the *higher* the amount due to be repaid (reflecting that it could be more difficult to meet a higher repayment from a particular level of income);

- the *longer* the term of the loan (reflecting the fact that the total cost of the credit is likely to be greater and the customer is required to make payments for an extended period); and

- the *greater* the number and frequency of loans, and the longer the period of time during which a customer has been given loans (reflecting the risk that repeated refinancing may signal that the borrowing had become, or was becoming, unsustainable).

There may also be other factors which could influence how detailed a proportionate check should've been for a given loan application – including (but not limited to) any indications of borrower vulnerability and any foreseeable changes in future circumstances.

I've carefully thought about all of the relevant factors in this case.

Were M&S Bank's checks reasonable and proportionate?

M&S Bank says that it carried out an income and expenditure assessment on Mrs L prior to providing her with her loan. It also carried out credit checks. Mrs L declared that she was earning around £43,000.00 a year and details of her mortgage payments as well as her outgoings.

M&S Bank also says that it carried out a credit check and that this showed Mrs L was managing her existing borrowing in line with what it expected. And, in its view, all of this meant that Mrs L had enough to cover the payments to this loan.

I've carefully considered what M&S Bank has said. But M&S Bank's credit checks clearly show that Mrs L was already significantly indebted. Furthermore, there was no indication the additional funds being borrowed through this loan were going to be used to pay down some of Mrs L's existing debt – indeed it seems as though the recorded purpose of this loan was to purchase a vehicle. And this means that Mrs L's unsecured debt to income ratio was going to increase from the existing 66.2% that M&S Bank was already aware of as a result of its credit checks.

Given all of this and Mrs L was being provided with a loan with repayments of a reasonably chunky amount over an extended period, I think that M&S Bank needed to take steps to verify Mrs L's actual income and take steps to look into her actual living costs too.

For the avoidance of doubt, I wish to be clear in saying it is not my here finding that M&S Bank shouldn't have lent to Mrs L because of her existing indebtedness and what it saw. Rather my finding here is what M&S Bank saw should have prompted it to find out more about Mrs L's circumstances. As I can't see that this M&S Bank did do this, I don't think that the checks it carried out before providing Mrs L with this loan were reasonable and proportionate.

Would reasonable and proportionate checks have indicated to M&S Bank that Mrs L would have been unable to repay her loan?

As reasonable and proportionate checks weren't carried out before this loan was provided, I can't say for sure what they would've shown. So I need to decide whether it is more likely than not that a proportionate check would have told M&S Bank that Mrs L would have been unable to sustainably repay this loan.

M&S Bank was required to establish whether Mrs L could make her loan repayments without experiencing significant adverse consequences – not just whether the loan payments were technically affordable on a strict pounds and pence calculation.

I've carefully considered the information provided. Having done so, it's clear that Mrs L was earning significantly less than £43,000.00 a year – at closer to £2,200.00 a month. I think that M&S Bank will have know that Mrs L was already significantly indebted and if it had carried out further checks it will have seen that the lower than reported income she had was pretty much being used to meet her living costs and commitments to existing creditors.

So I think that proportionate checks would more likely than not have shown M&S Bank that Mrs L was unlikely to be able to make her payments without borrowing further or suffering significant adverse consequences.

Bearing all of this in mind, I'm satisfied that reasonable and proportionate checks would more likely than not have demonstrated that Mrs L would not have been able to make the repayments to this loan without borrowing further and/or suffering undue difficulty. And, in these circumstances, I find that reasonable and proportionate checks would more likely than not have alerted M&S Bank to the fact that Mrs L was in no sort of position to make the payments on this loan without suffering significant adverse consequences.

Did M&S Bank act unfairly or unreasonably towards Mrs L in some other way?

I've carefully thought about everything provided. Having done so, I've not seen anything to suggest that M&S Bank acted unfairly or unreasonably towards Mrs L in some other way. So I don't think that M&S Bank did act unfairly or unreasonably towards Mrs L in some other way in this instance.

Did Mrs L lose out as a result of M&S Bank unfairly providing her with these loans?

As Mrs L paid and she is still being expected to pay interest and charges on a loan that she shouldn't have been provided with in the first place, I'm satisfied that she has lost out as a result of what M&S Bank did wrong.

So I think that M&S Bank needs to put things right.

Fair compensation – what M&S Bank needs to do to put things right for Mrs L

Having thought about everything, I think that M&S Bank should put things right for Mrs L by:

- removing all interest, fees and charges applied to the loan from the outset. The payments Mrs L made, whether to M&S Bank or any third-party, should be deducted from the new starting balance – the £13,500.00 originally lent. If Mrs L has already repaid more than £13,500.00 then M&S Bank should treat any extra as overpayments. And any overpayments should be refunded to Mrs L;

- adding interest at 8% per year simple on any overpayments, if any, from the date they were made by Mrs L to the date of settlement†

- if no outstanding balance remains after all adjustments have been made, all adverse information M&S Bank recorded about this loan should be removed from Mrs L's credit file.

† HM Revenue & Customs requires M&S Bank to take off tax from this interest. M&S Bank must give Mrs L a certificate showing how much tax it has taken off if she asks for one.

My final decision

For the reasons I've explained, I'm upholding Mrs L's complaint. Marks & Spencer Financial Services Plc (trading as "M&S Bank") needs to put things right in the way set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs L to accept or reject my decision before 25 March 2024.

Jeshen Narayanan
Ombudsman