

The complaint

Mr H is complaining about BMW Financial Services (GB) Limited trading as Mini Financial Services (BMWFS). He says they acted irresponsibly in lending to him because of his credit history and complains that this created an unfair relationship. Mr H's complaint has been brought to us by a representative but for ease I've written as if we've dealt directly with him.

What happened

In December 2019, Mr H took out a hire purchase agreement with BMWFS to finance the purchase of a vehicle. He paid a deposit of £5,275.15 and borrowed £21,276.89 – the cash price of the vehicle was £26,552.04. The agreement required Mr H to make 47 monthly repayments of £270, followed by an optional final payment of £11,083.42.

Mr H made payments on time for the first six months of the agreement, then made no payments for six months having agreed a payment deferral with BMWFS. He made most of his subsequent payments but then sold the car and settled the agreement in full in April 2023.

In September 2023, Mr H complained to BMWFS. He said they'd not taken reasonable steps to assess whether the agreement was affordable or suitable for him, this had caused him financial difficulty, and had meant the relationship between himself and BMWFS was unfair. Mr H also said BMWFS hadn't treated him with forbearance and due consideration when he missed payments.

In response, BMWFS said they would have assessed Mr H's affordability and creditworthiness using their own policies and credit reference agency (CRA) data. They said they look at a number of factors including a customer's overall indebtedness, credit score, payday loan usage and employment status. They said an automated review raised no concerns and the agreement was considered to be affordable. So they didn't uphold Mr H's complaint and he brought it to our service.

One of our investigators looked into the matter and thought it should be upheld. She said she didn't think BMWFS had carried out reasonable and proportionate checks and that Mr H's credit file suggested they should have done more to understand Mr H's financial situation. Our investigator thought if BMWFS had carried out proportionate checks, they wouldn't have been able to fairly decide to lend to Mr H. Mr H accepted our investigator's view but BMWFS didn't respond so the complaint came to me for a decision. I issued a provisional decision on 16 May 2024 in which I said:

"I've considered Mr H's statement that BMWFS's failure to establish that the hire purchase agreement was unsuitable resulted in the relationship being unfair. He referred to the 2020 High Court judgment in the case of Kerrigan vs Elevate Credit International Limited ("Kerrigan") where HHJ Worster confirmed a breach of creditworthiness assessment is a significant factor in making the relationship unfair.

I've considered the Kerrigan judgment and I'm inclined to agree with Mr H - paragraph 11 states: "Thus a failure by a creditor to undertake a proper creditworthiness assessment prior to entering into a regulated credit agreement would almost certainly affect the fairness of the relationship and so trigger the Court's power to make appropriate orders under section 140B." So I'll first consider whether BMWFS carried

out a proper creditworthiness assessment before deciding to lend to Mr H. I'll then go on to think about what impact that had during the credit relationship, and whether the debtor-creditor relationship was unfair to Mr H.

Did BMWFS carry out a proper creditworthiness assessment?

The Financial Conduct Authority (FCA) sets out in a part of its handbook known as CONC what lenders must do when deciding whether or not to lend to a consumer. In summary, a firm must consider a customer's ability to make repayments under the agreement without having to borrow further to meet repayments or default on other obligations, and without the repayments having a significant adverse impact on the customer's financial situation. In effect this means considering whether a customer is likely to be able to meet their financial commitments (including the repayments under the proposed agreement) and their non-discretionary expenditure out of their income each month.

CONC says a firm must carry out checks which are proportionate to the individual circumstances of each case.

Whether or not a firm's checks were proportionate would normally depend on factors such as the size and term of the loan, the cost of credit, and what BMWFS found in the process of doing the checks. This was a four-year agreement requiring Mr H to pay BMWFS £270 per month. So the checks needed to be thorough.

BMWFS haven't given us any specifics about the checks they had carried out or what they found. They've told us they looked at Mr H's credit file and the application was automatically accepted, but I've not seen any details of Mr H's application or the credit file BMWFS looked at. So it's difficult to conclude on whether their findings should have prompted them to do more.

However, CONC 5.2A.15R says a firm must take reasonable steps to determine or estimate a customer's income unless it's obvious in the circumstances that the customer would be able to make the repayments. And CONC 5.2A.16G says it's not generally sufficient for a firm to rely on a customer's own statement of their income without independent evidence. I've seen no evidence that BMWFS estimated or verified Mr H's income. And I can't say it was obvious that Mr H would be able to pay £270 to BMWFS each month in a sustainable way. So I've concluded BMWFS didn't carry out proportionate checks before deciding to lend to Mr H.

What would BMWFS have found if they had carried out proportionate checks?

I've looked at Mr H's credit report and his bank statements to get an understanding of his financial circumstances at the time. I'm not saying BMWFS should have looked at Mr H's bank statements, but these documents give me a good idea of what BMWFS would have found if they'd done proportionate checks.

The statements are joint and include income from both Mr H and his wife. Whilst the hire purchase agreement was in Mr H's sole name, it looks as though all of the household finances went through a joint account. So it's reasonable to consider the household income and expenditure rather than trying to split out Mr H's. Mr H was earning a net income of around £4,000 and his wife £850. They also received child benefit each month, totalling around £220. While I noted a few other ad hoc receipts into the bank account, these weren't regular, so I don't think BMWFS could have reasonably included them in an assessment of income. It follows I think BMWFS would have assessed Mr H and his wife's income as around £5,070 per month.

Looking at Mr H's credit report, I can see he had a large number of active credit accounts at the time of this lending decision. Many of these were significant, with his mortgage and second charge mortgage alone requiring payments totalling around £2,655 per month. He had loans with monthly payments totalling around £1,300, and two existing hire purchase agreements. One of these was with BMWFS and seems to have been replaced by this agreement – so I've just included the £282 per month he needed to pay on the other hire purchase agreement. On top of the non-revolving credit, Mr H seems to have had two catalogue shopping accounts and a credit card and was paying around £400 per month to these creditors. So Mr H's credit commitments going forward at the time of the agreement totalled around £4,637 (before taking into account this agreement). Deducting this figure from the joint income of £5,070 suggests Mr H and his wife would have had just £433 per month to cover all living costs (excluding the mortgage) as well as this new agreement – for which the payments were £270 per month. I don't think a further review of Mr H's expenditure would have been necessary – I'm satisfied it should have been clear to BMWFS from this that the agreement was unaffordable for Mr H.

It follows I don't think BMWFS could have fairly decided to lend to Mr H.

Did BMWFS act unfairly in any other way?

Part of Mr H's complaint was that BMWFS hadn't acted with forbearance and due consideration when he fell into arrears. So I've looked at the notes of contact between BMWFS and Mr H.

Mr H requested a payment deferral in June 2020 due to financial difficulties. A three-month deferral was granted and then extended to six months after a further request from Mr H. He'd told BMWFS that he was furloughed rather than having prolonged financial difficulties, and he restarted his payments in January 2021, also paying additional amounts for the deferred interest.

Mr H ran into problems again later in the agreement and after trying to contact him a few times, BMWFS issued a default warning in June 2022. I can't say that was unreasonable given the situation. Mr H made a payment to avoid the default and agreed to a repayment plan for the remaining arrears in September 2022. BMWFS appear to have been supportive and clear in their conversations with Mr H. Mr H later settled the agreement in full by selling the car to a third party. BMWFS provided settlement quotes promptly and refunded the amount overpaid to Mr H. Taking everything together, I don't think BMWFS acted unfairly during the course of their agreement with Mr H.

What was the impact on Mr H?

BMWFS said in their response to Mr H's complaint that he'd made all of his payments in full and on time and there was nothing in his file to indicate financial difficulty. However, as I've mentioned above, that doesn't seem to have been the case – their statement shows Mr H did miss some payments.

However, more significantly, I've looked at Mr H's credit report and this shows clearly how difficult Mr H's financial circumstances were. Having taken out seven loans and another hire purchase agreement during the course of 2019, he then proceeded to default on many of his credit commitments in 2020 – with around ten accounts defaulting in the twelve months following this agreement. His credit file also shows that Mr H went from occasional to sustained use of his overdraft after taking out this agreement.

In summary, at the time of this agreement, Mr H was already getting into financial difficulties and it seems clear that this agreement exacerbated that situation. So their

approval of his application created an unfair relationship as defined in section 140A of the Consumer Credit Act 1974.

Putting things right

As I'm inclined to say BMWFS shouldn't have lent to Mr H and in doing so created an unfair relationship, I need to consider what they should do to put things right. Fair compensation should aim to remedy the unfairness of Mr H and BMWFS's relationship arising out of BMWFS's failure to adequately assess the affordability of the agreement, but it shouldn't go further than it needs to or give Mr H a windfall.

Mr H has asked for a refund of all sums paid to BMWFS, a refund of all interest, refund of the deposit paid, and payment of simple interest at an equivalent rate to that under the credit agreement. I've thought about these and about whether Mr H has lost out in any other way as a result of the agreement.

Mr H had use of the vehicle and then sold it to settle the agreement, so benefitted from the whole use of it. I don't think it would be fair for him not to pay for the vehicle. But I don't think it's fair for BMWFS to receive interest or any charges under the agreement. So BMWFS should refund Mr H all amounts paid in relation to the agreement (including by the third party buyer) in excess of the cash price of £26,552.04 (including the deposit).

In addition, Mr H has had to borrow from elsewhere to make the repayments to BMWFS. So I'm inclined to say BMWFS should compensate him for the interest he's had to pay to other lenders which he wouldn't otherwise have had to pay. Mr H has suggested that the appropriate rate to use to calculate this would be the rate he paid to BMWFS. But the APR on this agreement was 3.9% APR, which is likely to have been lower than most other available lending at the time.

I haven't seen evidence of Mr H's actual interest costs spanning the whole relationship. There was no interest charge on his overdraft – instead the bank charged him a daily fee, which for the most part it's likely he'd have incurred irrespective of the repayments on this agreement. And Mr H's credit file suggests he didn't take out any further credit after the start of this agreement so I can't say there would have been additional interest costs from those. In the absence of any evidence to suggest the rate should be higher than the statutory 8% I'd usually use, I think BMWFS should apply interest at this rate to any overpayments.

In summary then, I'm inclined to say BMWFS should:

- *Refund all the payments made against the agreement (including the deposit) in excess of £26,552.04, being the cash price of the vehicle, adding 8% simple interest per year* from the date of each overpayment to the date of settlement.*
- *To the extent possible, remove any adverse information recorded on Mr H's credit file in relation to the agreement.*

**If BMWFS consider tax should be deducted from the interest element of my award they should provide Mr H a certificate showing how much they've taken off so that Mr H can reclaim that amount, assuming he is eligible to do so."*

Mr H accepted my provisional decision and BMWFS didn't respond.

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.

As neither party commented on my provisional decision I've nothing further to add any my decision is unchanged from my position as set out above.

My final decision

As I've explained, I'm upholding Mr H's complaint. BMW Financial Services (GB) Limited trading as Mini Financial Services need to:

- Refund all the payments made against the agreement (including the deposit) in excess of £26,552.04 (being the cash price of the vehicle), adding 8% simple interest per year* from the date of each overpayment to the date of settlement.
- To the extent possible, remove any adverse information recorded on Mr H's credit file in relation to the agreement.

*If BMWFS consider tax should be deducted from the interest element of my award they should provide Mr H a certificate showing how much they've taken off so that Mr H can reclaim that amount, assuming he is eligible to do so.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 15 July 2024.

Clare King
Ombudsman