

The complaint

Mr A and Mr P complain that Equifinance Limited gave them a secured loan without properly assessing whether it was affordable.

What happened

In May 2019, Mr A and Mr P took out a second charge secured loan with Equifinance for £159,790 – including broker and lender fees. The purpose of the loan was to repay an existing secured bridging loan. The loan was recommended by a third-party broker.

Mr A and Mr P complain that the loan was unaffordable and that Equifinance lent to them irresponsibly without carrying out adequate checks.

Equifinance has started legal action to repossess the mortgaged property and that action is ongoing.

I issued a provisional decision, upholding the complaint. I later issued a decision dealing with dismissal and jurisdiction. I found that the complaint was in jurisdiction and I did not have sufficient reasons to dismiss the complaint.

My provisional findings on the merits, which form part of this decision, were:

Rules

The relevant rules in this case are the Mortgages and Home Finance: Conduct of Business sourcebook (MCOB). I must take those rules, amongst other things, into account in deciding what I consider to be fair and reasonable in the individual circumstances of this complaint.

MCOB 11.6 covers responsible lending. Its requirements for lenders include:

- Before agreeing a mortgage, a lender must assess whether a customer will be able to pay the sums due under the mortgage and be able to demonstrate the mortgage is affordable.*
- A lender must take full account of the net income of a customer, their committed expenditure, and the basic essential expenditure and basic quality-of-living costs of the customer's household.*
- A lender may generally rely on any evidence of income or information on expenditure provided by a customer unless, taking a common sense view, it has reason to doubt the evidence or information. A lender must have evidence of income and take reasonable steps to obtain details of a customer's committed expenditure. A lender can either obtain details of a customer's expenditure or use statistical data.*
- If a lender is, or should reasonably be, aware from information obtained during the application process that there will, or are likely to, be future changes to the income and expenditure of the customer during the term of the mortgage, the lender must take them*

into account when assessing affordability.

Advice

Mr A and Mr P have also brought a complaint about the advice received from the broker to enter into the mortgage. We are proposing to uphold that complaint because the broker did not disclose all relevant information about Mr A's outgoings to the lender.

I do not consider that makes any difference to my proposed decision here. It reflects that my findings are that Equifinance should not have lent to Mr A and Mr P in the circumstances as Equifinance understood them to be – and that act is the cause of their financial loss rather than any omission by the broker

Lending decision

Equifinance said it had evidence of monthly net income from Mr A and Mr P that was broadly in line with the amount Mr A and Mr P declared. Equifinance said it had a tax calculation for the tax year ended April 2018 and three months bank statements from Mr A. And payslips and an employer reference for Mr P because he was still in the probation period for his new job.

I agree that the evidence Equifinance had supported Mr P's declared net income. The position with Mr A's income is less clear. There is a significant amount of money paid into Mr A's bank account over the three months. But I can see that Equifinance checked the source of the income and it was reasonable for it to decide that the evidence it had supported Mr A's income.

I also agree that on the face of it, it was reasonable for Equifinance to accept the day-to-day expenditure declared by Mr A and Mr P. Equifinance said the expenditure appeared realistic when assessed against Office for National Statistics (ONS) data.

The figures used by Equifinance for debt repayments was also reasonable – but I don't consider it went far enough. I say that because if Equifinance accepted that the figures for income and expenditure for Mr A and Mr P showed that their existing commitments were affordable, with room to take on another significant debt with monthly repayments over £1,600, then it was not clear why both Mr A and Mr P's credit files showed a lot of adverse information – including current and recent payment problems.

For example, at the time of application, Mr A had a significant default on a credit card in June 2018 and was over the limit on another credit card. There were also missed payments to the main mortgage and other credit during the previous 12 months. That is in addition to eight defaulted agreements from 2015 and 2016, five with current balances at the time totalling £9,354.

Mr P had taken around 13 short-term loans. He had current arrangements to pay in place on a credit card and two loans. Other credit showed recent missed payments. The evidence suggested Mr P was in an unsustainable cycle of debt.

I consider based on the information Equifinance should either have declined the application as the evidence it had did not support the mortgage was sustainable. Or taking a common sense approach, it had sufficient reason to doubt the information it had. So it ought to have asked for more information from Mr A and Mr P to understand more about their financial position.

I note that the evidence we have from the broker shows that out of around 16 lenders,

Equifinance was the only one where the application met its criteria and/or it had not been declined. I can also see that Equifinance had its own doubts about affordability. But that only supports that it should have taken additional steps to satisfy itself and to be able to demonstrate the mortgage was affordable.

In an email to the broker Equifinance said:

2. The customer has a large amount of accumulated debt not being consolidated , what has the customer used this credit for ? .
3. this new loan would increase the customers outgoings further and the credit search shows they've been missing payments and defaulting on credit.
4. What provisions can the customer show they've put in place to be able to avoid any further financial strain.
5. What is the longer-term intention to their financial situation ? for example , when will they be able to re-mortgage and settle our proposed 2nd charge and will they be able to capital raise enough to settle the 2nd charge and consolidate the unsecured credit currently in place. I ask this question as if there is a logical rational for a stepping stone route back to the high street and credit repair this would be a merit to the case.

It appears that Equifinance accepted an explanation from Mr A around his personal circumstances. But I don't see how that adequately addressed the significant issues around the sustainability of the mortgage.

I consider that the information shown on Mr P's credit file ought, on a common sense basis, have led Equifinance to question Mr P's expenditure further. That in turn ought to have led it ask for bank statements to verify expenditure – from which it would have discovered these matters.

I don't consider any reasonable lender would have approved this mortgage had it seen Mr P's bank statements. They show that he could not afford his current commitments without using short term credit, using his overdraft and exceeding the agreed overdraft limit. That was clearly unsustainable. Especially when this mortgage would increase his outgoings.

I understand that while Mr P lived with Mr A, it was Mr A that owned the property in his sole name. The mortgage was clearly unaffordable in just Mr A's sole name. And I don't consider a reasonable lender, who had gathered sufficient information to assess the application, could reasonably have concluded that the mortgage was affordable or sustainable in joint names. There was little evidence to support that Mr A and Mr P could manage their existing commitments, let alone over £1,600 a month on top of that. So I don't consider the decision to lend to Mr A and Mr P was fair or reasonable.

Putting things right

I'm afraid that I am going to disappoint Mr A with my proposed redress. That is not to dispute what he and Mr P have gone through. It reflects that I am independent and impartial and I can only award redress to compensate Mr A and Mr P for the impact and any financial losses directly caused by Equifinance's unfair lending decision. After carefully looking at their responses, my proposed award is significant, but less than Mr A and Mr P want.

I also recognise, that because my decision does not go as far as writing off any of the capital balance, it has potentially significant consequences for Mr A and Mr P.

I've found that Equifinance's decision to grant Mr A and Mr P a mortgage was not fair or reasonable. Where I've found that a business has not acted fairly or reasonably, I usually look to put the affected parties back in the position they would have been in had they been treated fairly. So I need to consider what is likely to have happened had Equifinance declined the application.

I am satisfied if Equifinance had correctly declined Mr A and Mr P's application they would not have been able to obtain a mortgage elsewhere. I say that because any lender looking at the information it should have obtained from them could not have satisfied themselves that the mortgage was affordable and sustainable. We also have evidence from the broker that there were no other lenders prepared to lend.

So that would have left Mr A and Mr P in a position where they had a bridging loan, where the term had ended and the capital balance and rolled up interest was due to be paid, but Mr A and Mr P had no means to repay it. It seems likely therefore that if Equifinance had not granted the mortgage, that the bridging lender would have started action to repossess the property some time in 2019.

The evidence we have is that Mr A was considering taking his own legal action against the bridging loan company if this mortgage was not agreed. It is not clear that Mr A and Mr P had any claim or defence that had any reasonable prospect of success. But it seems likely that any legal action would have been at least as equally protracted as the possession proceedings here. In other words it is likely that there would have been a similar impact on Mr A and Mr P in relation to the distress and inconvenience of dealing with legal action where there was a chance they could lose their home. It also seems likely they would have incurred similar costs defending any action taken by the bridging lender or in bringing their own action.

My provisional conclusion is that, based on the evidence I have, it seems more likely than not that Mr A would have lost his home some years ago had Equifinance not granted this loan. I know Mr A considers there were other options available to him. But if there were genuinely viable alternatives to the mortgage, it is not clear why he did not take them either at the time in question or after the mortgage's inception.

That is not to criticise Mr A and Mr P. They have been mis-sold this mortgage. Rather it is to explain why I have reached the conclusions I have. I appreciate this will be hard for Mr A to hear, but I can't see any scenario where Mr A could have retained his home when he couldn't repay the bridging loan. And that feeds into the conclusions I have reached on what is a fair way to put things right.

I don't consider it would be fair for Equifinance to benefit from its unfair decision to lend to Mr A and Mr P. So I consider it should refund all of the interest it has applied to date to the mortgage balance – and I don't consider it would be fair for it to charge any further interest on the mortgage balance. It should also refund any late fees or other default charges and refund the lender's fee of £1,295, with interest, and write off any other fees that may become payable over the life of the mortgage.

I've read all of Mr A and Mr P's submissions. But Equifinance is not responsible for the capital balance of the mortgage. Almost all of that amount was to repay the bridging loan they took out that was due to be repaid. There might be links between that lender and Equifinance, but that does not mean I can hold Equifinance responsible for the decisions made by the other lender. Mr A and Mr P essentially had the "benefit" of the money that was lent. And it is fair and reasonable for Equifinance to get the original amount it lent back, albeit without any interest.

As I've said, if Mr A and Mr P had not been able to repay the bridging loan – and I haven't seen any persuasive evidence how they could have done that without the mortgage from Equifinance – they would have been in default on the bridging loan. The full amount of capital and rolled up interest was payable. So it seems likely, that if Mr A and Mr P did not take the Equifinance mortgage, they would have found themselves in a similar position with the bridging lender as they do now with Equifinance – the lender would have started legal

action to take possession of the property.

I know that Mr A and Mr P consider that Equifinance has not treated them fairly by continuing possession action while they pursued their complaints. But looking at the evidence it is likely that they would have incurred similar costs had Equifinance not agreed the loan. So I don't consider Equifinance should refund any legal costs it has incurred and passed on to Mr A and Mr P. Mr A and Mr P can challenge those costs in court. But to be clear, my proposed decision is not to refund any solicitors' fees that Equifinance has added to the mortgage balance – only the interest on those fees.

When the interest is refunded, Mr A and Mr P will be left with a capital balance to repay. I don't know how much that will be – but it will be higher than Mr A understands. Equifinance should not apply any more interest or fees, such as arrears management or discharge fees. It can continue to hold a charge over the property until the capital balance is repaid.

The debt should be rescheduled over the original term with the capital balance repayable over equal monthly instalments. So Equifinance should work out a payment schedule from the start date of the mortgage, based on the original amount borrowed divided by the total number of months the mortgage was expected to run. It should then apply the payments that have been made to the balance and calculate how much Mr A and Mr P will need to pay each month to clear the remaining capital balance over the remaining term.

Based on the information available to me, I consider it likely that even if the mortgage was rescheduled in line with the above, it would still remain in arrears, even with all of the interest removed from the mortgage. But I would ask Equifinance to provide a suitably detailed breakdown in response to my provisional decision.

While I cannot require it to do so, I recommend that Equifinance seek an adjournment or stay of the possession proceedings until after my final decision so that, if proceedings are still justified, the court is able to proceed on the basis of the correct and fair outstanding balance. It is my understanding that the court is not considering the fairness of the original lending; it is only concerned with whether possession is justified in light of the arrears balance as presented by Equifinance. In my view, it would be appropriate to adjourn matters so that the court can proceed on the correct balance following the outcome of this complaint rather than the balance asserted by Equifinance prior to this complaint. As I say, I cannot require Equifinance to adjourn the proceedings. But if no agreement can be reached about this, Mr A and Mr P can show the court a copy of this provisional decision.

Mr A has claimed significant consequential losses relating to this matter. He considers the granting of the unaffordable mortgage has caused him to lose his career and a property abroad. But we also know that both his and Mr P's financial situation was far from settled when they took out this mortgage.

There is also evidence of other significant factors that have impacted Mr A and Mr P during the time in question. I am not sufficiently persuaded that the mortgage that Equifinance granted was the sole or main cause of all of the problems that Mr A and Mr P have set out. That is not to diminish what they have been through. Rather it reflects that I do not consider I could fairly and reasonably conclude that Equifinance's decision to grant the mortgage was the cause of the losses Mr A in particular has claimed, for example for loss of earnings and the loss of the property abroad.

Equifinance should correct Mr A and Mr P's credit files in line with the above revising and rescheduling of the mortgage balance. That reflects that I do not consider that it would not be in Mr A or Mr P's interests for this debt not to show to any potential lenders on their credit files.

That leaves compensation for distress, inconvenience and suffering caused to Mr A and Mr P by the decision to lend to them irresponsibly. For the same reasons I am not making an award for the solicitors' fees, I am not proposing that Equifinance should compensate Mr A and Mr P for the impact of the legal action on them. That is because it is likely the bridging finance lender would have taken similar action if this mortgage had not been taken.

But it is clear that Mr A and Mr P have been caused a substantial amount of upset, suffering and inconvenience as a result of the loan being granted. They've been left to support an unaffordable mortgage for almost five years. Mr A has given us evidence that his financial situation has severely affected his mental health. The Equifinance mortgage was not the sole source of that – but the evidence shows it was a significant factor. Had this loan not been lent, and the bridging loan provider taken action in 2019, that further five years would have been avoided.

Looking at the evidence we have the impact on Mr A was greater than it was in Mr P. Mr A has provided more detailed explanations about the impact of this matter on him, supported by independent evidence.

Our guidance says that an award between £1,500 and £5,000 is appropriate where the business's mistakes cause sustained distress, potentially affecting someone's health, or severe disruption to daily life typically lasting more than a year. Examples at the higher end could include where the effects of the business's mistake have a lasting impact on someone's health or even resulted in a personal injury. Once a person's health is affected, or an injury is sustained, we consider making an award for pain and suffering.

I accept that Equifinance's decision to lend to Mr A has contributed to – but was not the sole cause – of pain and suffering he has experienced due to his mental health, over a period of almost five years, with ongoing effects. There was also the stress and inconvenience of dealing with the lender when it has attempted to recover the debt – and in attempting to engage with the lender in regard to the arrears. That would not have happened had the mortgage not been granted. There was however some benefit to Mr A as he has been able to remain in his home for longer than he otherwise would have., which I must also take into account,

Looking very carefully at the overall circumstances, and considering what Mr A has told us, I consider it would be fair and reasonable for Equifinance to pay him £4,500 to reflect the distress, inconvenience, pain and suffering its decision to lend has caused to him over almost five years.

For Mr P, he was already named on the bridging loan despite not owning the mortgaged property. He said the mortgage had caused him to live in a "constant state of stress" for over four years and has damaged his mental health. But Mr A appears to have had less to do with the mortgage – so the amount of inconvenience has been limited. And from what he has explained the impact on him has not been as severe as Mr A.

In all the circumstances, I consider it would be fair for Equifinance to pay Mr P £2,000 to reflect any distress, inconvenience and suffering this matter has caused to him over a period of five years.

I proposed that Equifinance should:

- 1. Refund all interest and fees that were applied to the mortgage to date of settlement – but not any solicitors fees.*

2. *If the mortgage is still in place at date of settlement, reduce the capital balance by the amount in step 1.*
3. *If, after step 2, there remains an outstanding capital balance, it should not apply any future interest or fees, other than solicitors' fees, to the mortgage balance.*
4. *Reschedule the mortgage – as set out above – as if only the original capital balance – less the lender's fee – was payable over the originally agreed term, with equal monthly instalments.*
5. *Deduct the total amount of payments made to the mortgage by Mr A and Mr P since inception from the revised capital balance.*
6. *Provide a breakdown of the revised position of the mortgage to Mr A and Mr P once the above steps have been carried out, including any revised arrears balance.*
7. *Correct Mr A and Mr P's credit files to in view of the revised payment schedule and arrears position.*
8. *Pay Mr A £4,500 directly.*
9. *Pay Mr P £2,000 directly.*

If the mortgage has been repaid by date of settlement, then Equifinance Limited should, in addition to steps 7, 8 and 9:

10. *Recalculate the amount needed to repay the mortgage less any interest that was applied.*
11. *Refund the difference to Mr A and Mr P between the amount paid to redeem the mortgage and the amount in step 10.*
12. *Pay interest at 8% simple per year from date the mortgage was repaid until date of settlement in the amount refunded as a result of step 11.*

Mr A and Mr P did not accept my provisional findings. They made a number of points, including:

- The compensation for distress and inconvenience should be raised to £9,750 for Mr A and £4,250 for Mr P. They pointed out an example from our website where we made a higher award than I proposed in my provisional decision in this case.
- The legal action taken by Equifinance went against the FCA's Principles for Businesses, guidance on vulnerable customers, MCOB, and the Consumer Credit sourcebook CONC. And also the law, sections 140A to 140C of the Consumer Credit Act 1974 the Unfair Terms in Consumer Contract Regulations 1999 (UTCCR) and its successors.
- The legal fees directly result from legal action taken by Equifinance in respect of a mis-sold unaffordable loan.
- Equifinance decided to take legal action rather than negotiate a solution with Mr A or to allow our service to deal with the complaint. That has imposed a financial burden on Mr A and Mr P contradicting the principles of fairness and justice.

- Equifinance chose to use “high cost” legal representation from 2020 shows how inequitable it was to expect Mr A and Mr P to bear those costs. It instructed a barrister and full legal team against a litigant in person. It was unjust to expect them to take on the financial burden of its decision – especially when alternative dispute resolution was available.
- The legal costs are inextricably linked to the initial harm caused by the mis-sold and unaffordable loan. Excluding those costs from the remedy means that they have not been put back in the position they would have been in, but also lets Equifinance profit from its regulatory violations. A fair remedy would include all of the costs, including legal fees, incurred because of the lender’s actions.
- The broker did not disclose all of the information it should have to Equifinance. That raises questions about the due diligence carried out by Equifinance. If Equifinance has suffered losses it should claim those from the broker, rather than imposing the costs of a mis-sold loan on them.
- If the loan was rescheduled in the way set out in my provisional decision, it is essentially a remortgage. So it would not be fair to say that the loan was in arrears after it was rescheduled. The arrears only arose because of the unaffordable loan with an interest rate of 10.75%.
- Maintaining the arrears after the loan has been rescheduled would result in an unjust enrichment of the lender and open up the immediate prospect of litigation. We should consider that to be inappropriate. The restructured loan should be a fresh start.
- The principle of fairness means that remedies should address not only past injustices but also forestall future inequities. The notion of “phantom arrears” turns counter to that principle, punishing them for charges invalidated by our decision.
- If the loan was reset, with an interest rate of 0%, the original term of 20 years from the point when the loan was restructured and a “no profit/no benefit” policy applying to it, the concept of arrears requires a new definition. The balance should solely reflect the unpaid principal discounted by any payments made and the removal of the loan issue fee. So there should be no arrears. They will be included in the revised capital balance. Separating arrears is “redundant and misleading”.
- MCOB (particularly MCOB 13) and the FCA’s Principles support that adjusting the treatment of arrears is fair. They also referred to CONC, UTCCR and section 140A of the Consumer Credit Act 1974.
- If the loan was restructured in the way they want, with no arrears, the lender would have no possession claim but with no loss or harm to the lender.
- The lender should allow Mr A 12 months before he needs to start making payments, so that he can recuperate and be in a position to meet the revised loan payments.
- The lender should remove the adverse information it has recorded on his credit file as it is preventing Mr A from obtaining work.
- Equifinance’s action has resulted in lost earnings and employment opportunities for Mr A. He considers he should be compensated for the lost earnings. He said that the equivalent wage of a paralegal would be around £28,000.

- We should appoint an independent party to oversee the implementation of the decision and establish a mechanism for addressing any future disputes. Equifinance should be forbidden from trying to use the contract to recover any part of the remedy.

Equifinance initially did not respond to my findings on the merits of the complaint. I wrote to Equifinance and explained that by issuing a provisional decision I believed I had given it adequate opportunity to make representations before I made a final decision. Nevertheless, to overcome any misunderstanding, I invited it to make submissions regarding the merits of the complaint, if it wished to do so. Equifinance responded to say, in summary:

- Mr A and Mr P had a bridging loan that had expired or was approaching expiry. The consequences of not repaying this loan were serious, including repossession and penalties. Given the urgency of this matter, Equifinance believed that refinancing was in Mr A and Mr P's best interests.
- Mr A and Mr P's credit history was acceptable and they provided reasonable explanation for any adverse information.
- Equifinance assessed Mr A's income to be £3,999 a month and Mr P's £2,734 and obtained evidence to support those figures. It benchmarked outgoings against the Office for National Statistics figures. Transport costs came out lower than expected, but that was explained because Mr A worked from home.
- Equifinance used the net income of both applicants, applied a stress test of 3% and included the costs of loans that Mr A disputed. That showed a surplus of £943.19 and a stressed surplus of £121.53. Its assessment was in line with the requirements of MCOB.
- It was incorrect to say that the adverse credit information and recent payment issues were sufficient for Equifinance to doubt the information it had been given. It had carried out a comprehensive credit assessment acknowledging and addressing past payment issues. The income and expenditure was correctly assessed and that produced a surplus income of £943.19, which was within its lending policy. It took reasonable steps to obtain detailed information about the applicants' financial situation and used common sense in interpreting the information. So it was unfounded to say Equifinance should have declined the application or sought further information.

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 appreciate that Mr A will not be familiar with our processes or rules and that he does not intend to interfere with my decision making. But for the avoidance of any doubt I am independent and impartial. I do not represent Mr A, Mr P or Equifinance. It is for me to decide what is fair and reasonable in the circumstances of the complaint and to issue a final decision setting out the reasons for my conclusions. While I have taken into account all of the parties' submissions, it is not for any party to tell me what to say or how to present my findings. I have set out my decision as I would in any other complaint.

Once I have issued my final decision that is the end of our involvement of this matter. If Mr A and Mr P accept this decision, then it is binding – Equifinance will be required to do what it says. If Mr A and Mr P accept the decision and do not consider that Equifinance has done what the decision ordered it to do, then they would need to enforce the decision in court.

Mr A has referred to a number of rules, regulations and law in his responses. I haven't

referred to each of them, but I have taken them into account where relevant in deciding what I consider is fair and reasonable in all the circumstances. But I'm afraid some of the rules and laws he's referred to do not apply here.

This is a regulated mortgage contract. They are exempt from the Consumer Credit Act 1974 and CONC does not apply. The Consumer Rights Act 2015 replaced the UTCCRs.

Merits

Equifinance has now provided its file. We already had a lot of that evidence from Mr A, Mr P and the broker who gave them advice. And after reviewing everything again, it does not lead me to change the findings I reached in my provisional decision.

I agree that it was reasonable for Equifinance to accept the income figures for Mr A and Mr P. While the expenditure might appear reasonable at face value, I consider that a responsible lender acting reasonably would have done more bearing in mind the information on Mr A and Mr P's credit file.

At the time in question, Mr A's credit file showed:

- A default from March 2015 for £1,587 with a balance of £1,976.
- A default from February 2015 for £5,045 with zero balance.
- A default from June 2018 for £5,276 with a current balance of £5,343.
- A credit card with three missed payments in the last 12 months.
- A default from December 2016 on a secured loan for £33,247, with a current balance of £49,000.
- A credit card with over six missed payments in the last 12 months.
- A default from October 2015 for £1,202 with a current balance of £1,327.
- A mortgage with up to six months arrears from around two years prior to the application.
- A default from September 2016 for £4,695 with a current balance of £4,545.
- A "public utility" provider with over five missed payments in the past 12 months.
- A default from May 2015 for £4,695 with zero balance.
- A credit card with a limit of £6,700 with a current balance of £7,410 with over four missed payments in the past 12 months.
- A credit card with a one missed payment in the last 12 months.
- A default from May 2015 for £5,045 with a current balance of £5,045 *
- A default from February 2015 for £13,951 with a current balance of £13,950 *
- A default from a "public utility" from July 2016 for £88 with a current balance of £252.
- A County Court judgment (CCJ) from October 2016 for £1,897

The entries with the asterisks stated "[a lender's] *loans unenforceable pls see client email and [lender] documentation*". That reflects that Equifinance had accepted an explanation with evidence from Mr A that those defaults related to debt that had been taken fraudulently in Mr A's name.

Equifinance said it asked Mr A about the other reasons for the adverse information. It said it relied on an email from Mr A where he explained that because a close relative had died in 2016 he'd not been able to work as much resulting in a reduced income. It also said that Mr A had been providing financial assistance to his mother – but would not need to do so in the future. Mr A also said that he had an issue with a credit card the previous year.

Mr P's credit file showed at the time the application was considered:

- A credit card with over seven missed payments in the past 12 months.

- A credit card taken out in October 2018.
- A short term loan taken out in May 2018 for three months, with a payment arrangement in place.
- A loan that had been in a payment arrangement in the past 12 months and that was currently two months in arrears.
- A credit card with a limit of £450 with a current balance of £459 and one missed payment in the past 12 months.
- A credit card with a credit limit of £2,200 with a current balance of £2,352. A payment arrangement was in place.
- A credit card with over four missed payments in the past 12 months.
- A default from December 2017 for £1,737 with a current balance of £1,737.
- A loan with an arrangement to pay in place.

Equifinance said it questioned some of Mr P's credit information and was told with some proof that at least one of the debts had been settled because of a redress payment.

I do not consider that was adequate in the circumstances. This was a joint loan. It required Mr P's income to be affordable. To properly assess the affordability of the loan, Equifinance ought to have considered Mr P's expenditure, outgoings and creditworthiness to determine if the loan was affordable and sustainable.

Equifinance's affordability assessment showed that Mr A and Mr P had disposable income of over £900 a month. But a responsible lender acting reasonably ought to have questioned why a borrower with that amount of surplus income could not afford to manage their existing credit commitments – to the extent that a number of credit cards were over their limit and there were three debts where Mr P was in a payment arrangement. That meant that Mr P had to enter into an arrangement with his creditors.

I consider the above facts meant that a responsible lender acting reasonably – and taking a common sense view – had reason to doubt the information it had been given. If Mr A and Mr P's expenditure was as declared they should have been able to manage their existing expenditure without any problems. It was clear that Mr P in particular was not doing so. That meant Equifinance had reason to doubt the information it had and should have done more to consider Mr P's expenditure. In my experience, good practice would require a lender in those circumstances to look at a potential borrower's recent bank statements.

We have copies of Mr P's bank statements from 1 February 2019 to 2 May 2019 when the credit search was carried out. So for around three months prior to this mortgage being agreed. The statements show that Mr P was being charged each month for an unarranged overdraft. He also took out or utilised short term credit facilities seven times during that period – borrowing a total of £2,449.30. I don't consider that a responsible lender acting reasonably would have agreed to lend if it had that information.

I say that because it was clear that Mr P was struggling to manage his existing commitments. He had payment arrangements on his existing debt and was reliant on short term credit and his overdraft to manage. There was no spare income to be able to pay or contribute towards the new loan payment. I do not see how any responsible lender could have agreed a new secured loan on that basis.

Therefore, I see no reason to reach a different outcome than I did in my provisional decision – Equifinance did not act fairly or reasonably in its consideration of Mr A and Mr P's loan application. If it had done so, it would have asked to see Mr P's recent bank statements – and they would not have supported that the proposed loan was affordable or sustainable and would have declined the application.

Putting things right

I've thought carefully about what Mr A and Mr P and Equifinance have said in response to my provisional decision. But having done so, I see no reason to reach a different outcome. I will address Mr A's points to explain why.

Legal fees

It was reasonable for Equifinance to start legal action against Mr A and Mr P in view of the level of arrears on the mortgage. I don't agree that because Equifinance gave Mr A and Mr P referral rights to our service that it would prevent it taking legal action. The Pre-action Protocol for Possession Claims based on Mortgage Arrears in Respect of Residential Property says that a lender must "consider" whether to postpone the start of a possession claim where the borrower has made a genuine complaint to us about the possession claim. But that does not mean that a lender must postpone such action – and ultimately it is for the court to decide whether to wait for a decision from us or not.

In saying that, Equifinance should have explained to Mr A and Mr P that it did not intend to wait for our decision and its reasons for that. But again, it was for the court to decide to allow the possession claim to continue – I can't change that decision.

I accept that the position might have been different had the loan been restructured as I am proposing. And if the mortgage had not been granted, obviously there would have been no action for Equifinance to take. But in view of the position of the mortgage at that time it was reasonable for it to take the action it did.

The court proceedings are ongoing. I do not have the power to overturn any of the court's orders or say that the court proceedings should stop. It is either for Equifinance to decide to drop the proceedings or the court to decide what to do.

Bearing in mind that the court proceedings are ongoing and it was reasonable for Equifinance to take the action it did, it follows that it would be entitled to pass on its costs to Mr A and Mr P. This is a standard term in most mortgage contracts, I don't consider such a term is unfair as long as it is only the costs it incurred that it is passing on. It is legitimate for a lender to pass on its costs in such circumstances. As the court action resulted in the court granting a possession order and as it is ongoing, the court will be better placed to make a decision on those costs.

I also have to take into account, that if Mr A and Mr P did not take this mortgage, it is likely they would have faced similar legal action from the bridging loan lender. I say that because the evidence I have does not support that there was any other lender willing to refinance that loan. Mr A has put forward other options such as selling or refinancing a foreign property. But if they were genuinely viable and realistic plans then I do not see why he did not take that action rather than take out this loan – his actions at the time do not support that was likely.

On balance, if they had not taken this loan, I consider it is likely that Mr A and Mr P would have been involved in similar legal action but with the bridging loan lender rather than Equifinance. It is likely that the legal fees incurred would have been similar as it is likely that Mr A and Mr P would have defended that action too.

Overall, I consider that the legal fees are something that would be better dealt with in court. The court is best placed to decide who is liable for the legal costs incurred.

Loan restructure

Mr A considers that the loan should be restructured differently than I proposed in my provisional decision. He believes that it would be unfair for the loan to be restructured only for it to be considered in arrears straight away. He thinks any “arrears” should be capitalised and the payments for the loan rescheduled over a new term of 20 years.

It isn't clear that there will be any arrears remaining when the loan is restructured. If there are, then Mr A is correct that MCOB sets out various types of forbearance that a lender must consider in those circumstances – that can include adding the arrears to the main mortgage balance (capitalisation) and/or extending the term of the mortgage.

I've thought carefully about what Mr A has said. But I don't consider it would be reasonable for me to say that Equifinance should further restructure the loan in the way he wants. I say that as capitalising the arrears will increase the amount that Mr A and Mr P need to pay each month. If arrears remain it is usually in a borrower's best interests to work out an arrangement to clear the arrears as quickly as possible by way of a payment arrangement.

Bearing in mind what Mr A has told us, it is likely that any term extension would run into his anticipated retirement. So it would be reasonable for Equifinance to consider whether that was affordable in retirement and in his best interests or not before agreeing to that. I don't consider it would be right for me to extend the term of the mortgage without knowing more about Mr A's circumstances – and ultimately I think it is reasonable for the lender to be given the opportunity to consider such a request itself.

Any forbearance option would require a lender assessing a borrower's income, expenditure and circumstance to decide what – if any – forbearance is appropriate. It might be that there is no solution to get the mortgage back on track – the borrower might not be able to afford to repay the arrears. In that case, it would be reasonable for the lender to take further action.

The difficulty in this case is that Equifinance has already obtained a possession order and legal proceedings are ongoing. Again, I don't have the power to tell the court what to do and I do not want to interfere in its decision making. But Equifinance is a regulated business and is required to act in line with MCOB and the FCA's principles. It might be that if Mr A and Mr P accept my decision and the loan is restructured continuing with the legal action is the right thing to do. But I would have thought that to make that decision Equifinance would first have to review Mr A and Mr P's income, expenditure and circumstances to determine if there are any viable forbearance it can offer Mr A and Mr P in the new circumstances of the restructured balance and revised arrears position.

I understand that Mr A and Mr P are worried that Equifinance will not treat them fairly. But I can't pre-judge what it will do or prevent it taking legitimate action to recover the secured debt if that is genuinely the last resort.

I can't see how I could fairly say that Equifinance should allow Mr A and Mr P not to make any payments to the mortgage for a further 12 months. It should review their circumstances and offer forbearance if appropriate. But in my experience it would be unusual for a lender to agree to pause payments for that long – and I don't consider there are any valid reasons to do so in this case based on what Mr A has told us.

The method for restructuring the mortgage is the same as I would award in similar complaints. I can't see any reason to do things differently in this case. There is no basis for me to say the Equifinance should pause payments for Mr A and Mr P.

Adverse credit information

I don't consider it would be fair or reasonable for Equifinance to remove any information from Mr A's credit file. I do not consider it would be in his best interests overall for the loan to be removed when it will remain a significant outgoing for him. And while I sympathise with the impact the adverse information will have on his ability to obtain work, that has to be balanced against the fact that it is relevant information for any prospective lender about his credit worthiness. However as part of the loan restructuring Equifinance will need to amend his and Mr P's credit files consistent with the restructured position.

Looking at Mr A's credit history, I think it would be difficult to find that it was solely the arrears from the Equifinance loan that prevented him finding any work. And while I appreciate the time that Mr A has spent dealing with this matter, I don't consider I could fairly say that Equifinance should compensate him for what he considers to be lost earnings.

Distress and inconvenience

If Equifinance had not granted the loan, I've already found it was likely that Mr A and Mr P would have faced similar legal action from the bridging loan lender. It follows, that it is likely that Mr A and Mr P would always have had the significant impact of legal action and the threat of Mr A losing his home to deal with. So I don't consider I could fairly say that Equifinance is solely responsible for the impact of the legal action on them. The underlying debt relates to borrowing taken out by Mr A and Mr P with another lender – and it is important to remember that they had the benefit of those funds.

But it is clear that Mr A and Mr P have been caused a substantial amount of upset, suffering and inconvenience as a result of the loan being granted. They've been left to support an unaffordable mortgage for almost five years. Mr A has given us evidence that his financial situation has severely affected his mental health. The Equifinance mortgage was not the sole source of that – but the evidence shows it was a significant factor. Had this loan not been lent, and the bridging loan provider taken action in 2019, that further five years would have been avoided.

I note the example given by Mr A of awards we have made in other cases. But I am determining what I consider to be fair and reasonable in all the circumstances of this complaint. We have guidelines for how to approach making award for distress, inconvenience, pain and suffering. Having carefully considered what Mr A and Mr P have told us and what our guidelines say, I still consider the amounts I proposed are fair – for the reasons set out in my provisional decision.

Our guidance says that an award between £1,500 and £5,000 is appropriate where the business's mistakes cause sustained distress, potentially affecting someone's health, or severe disruption to daily life typically lasting more than a year. Examples at the higher end could include where the effects of the business's mistake have a lasting impact on someone's health or even resulted in a personal injury. Once a person's health is affected, or an injury is sustained, we consider making an award for pain and suffering.

Mr A has made a late submission. He said that he was unable to maintain payments to his foreign mortgage because of this matter. He said he was unable to let the property as he had been while pursuing this matter. As a result, the foreign lender was threatening to seize the property – so Mr A sold it for what he considers to be undervalue. Mr A considers that the unaffordable lending by Equifinance is the reason he lost that property.

I don't consider the sale of the foreign property and any losses that Mr A might have incurred as a result flowed from Equifinance's unaffordable lending. It was for Mr A to decide whether to let the property or not. And looking at what we know about Mr A's overall financial situation, I think it would be difficult for me to find that it was solely the Equifinance loan that

meant he was unable to maintain the foreign mortgage. While Equifinance might not have been aware of the full picture regarding the cost of that property – neither Equifinance or the broker had any reason to doubt that he would continue to let the property – and it was his decision whether to do so or not.

Overall, I see no reasons to reach a different outcome than I did in my provisional decision.

My final decision

My final decision is that Equifinance Limited should:

1. Refund all interest and fees that were applied to the mortgage to date of settlement – but not any solicitors fees.
2. If the mortgage is still in place at date of settlement, reduce the capital balance by the amount in step 1.
3. If, after step 2, there remains an outstanding capital balance, it should not apply any future interest or fees, other than solicitors' fees, to the mortgage balance.
4. Reschedule the mortgage – as set out above – as if only the original capital balance – less the lender's fee – was payable over the originally agreed term, with equal monthly instalments.
5. Deduct the total amount of payments made to the mortgage by Mr A and Mr P since inception from the revised capital balance.
6. Provide a breakdown of the revised position of the mortgage to Mr A and Mr P once the above steps have been carried out, including any revised arrears balance.
7. Correct Mr A and Mr P's credit files to in view of the revised payment schedule and arrears position.
8. Pay Mr A £4,500 directly.
9. Pay Mr P £2,000 directly.

If the mortgage has been repaid by date of settlement, then Equifinance Limited should, in addition to steps 7, 8 and 9:

10. Recalculate the amount needed to repay the mortgage less any interest that was applied.
11. Refund the difference to Mr A and Mr P between the amount paid to redeem the mortgage and the amount in step 10.
12. Pay interest at 8% simple per year from date the mortgage was repaid until date of settlement in the amount refunded as a result of step 11.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A and Mr P to accept or reject my decision before 20 August 2024.

Ken Rose
Ombudsman