DRN-4966691

Financial Ombudsman Service

The complaint

Mr C and Mrs C complain that Evolution Lending Limited (Evolution) lent to them irresponsibly.

What happened

Mr C was referred to Evolution by a broker who is not a respondent to this complaint. He was initially seeking a £10,000 loan in his sole name across a five-year term to consolidate his existing debts and get out of a payday loan cycle.

During discussions with Evolution, Mr C was told it may be more suitable for him to consolidate more of his debts and take out the maximum loan he could. Evolution provided a quote on this basis but later realised Mr C did not have enough equity in his property for a loan of this size.

Ultimately, Evolution recommended Mr C take out a £15,000 loan across an eight-year term with a monthly payment of £416.18. But as Mr C did not pass the affordability checks for this loan, it was suggested that Mrs C be party to the loan so her income could also be considered. Mrs C agreed and the loan was taken in joint names.

Mr C and Mrs C say the loan was unaffordable for them and Mr C's family repaid the loan for them as they could not manage the payments. Their representative has also said that Mr C lacked the mental capacity to take out the loan and this ought to have been apparent to Evolution when it was deciding whether to lend. He has also questioned whether it was appropriate to lend to Mrs C who is not a UK citizen and does not own the house the loan was secured over.

Dissatisfied with Evolution's decision to lend, Mr C and Mrs C raised a complaint via their personal representative.

Evolution responded to the complaint to say that Mr C did not disclose any physical or mental health conditions despite having the opportunity to do so and that he appeared to fully understand what it was that he and Mrs C were agreeing to. In addition, it considers the lending to have been affordable for them and cites that the loan was kept in good order and repaid early.

Unhappy with Evolution's response to the complaint, Mr C and Mrs C's representative referred their case to our service.

I issued a provisional decision upholding the complaint in July of this year. In summary I said:

- I was not persuaded Evolution ought to have picked up through its interactions with Mr C that he did not and could not understand the transaction he was entering or that there were any other flags about his mental or physical health that ought to have put a stop to the application.

- I did not agree Evolution had coerced Mrs C into taking out the loan. She discussed the loan with Evolution and understood that she would be jointly liable for its repayment and understood that it would be secured against Mr C's home.

- I did however think the case should be upheld on the basis that the lending appeared to be unaffordable for Mr C and Mrs C from the outset. I was not satisfied Evolution had taken a realistic view of their expenditure and I thought it ought to have had common sense grounds to doubt what it had been told based on the other information in its possession.

Evolution responded to say it had no further comments or information for me to consider.

Mr C and Mrs C's representative responded to say:

- Mrs C would not have been brought into the application without Evolution initiating her involvement.

- Mrs C was not eligible to have her name on the loan based on the fact the loan was secured on a property she does not own, she is not mentioned in the title deeds nor with the first charge mortgage lender.

- Mr C would have done anything to get himself out of the never-ending payday loan trap he was in, including agreeing to any terms and conditions set by Evolution. He questions why Evolution could not deduce that Mr C "had some kind of issue" given the number of payday loans he had taken out.

- There is no doubt that Mr C's compulsive buying disorder, heightened stressful condition, debt trap and his willingness to put his house up as security for the loan without having any external advice or attorney shows that Mr C was a vulnerable adult and that Evolution failed to carry out a risk assessment.

- Evolution took advantage of a vulnerable adult.

As both parties have now responded to my provisional decision and as the deadline to do so has now passed, it is appropriate for me to issue my final decision.

What I've decided – and why

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

In deciding whether to lend, a lender must consider whether the loan will be affordable and sustainable over the whole term of the loan. In doing so, it must obtain evidence of income and information about expenditure. A lender is entitled to rely on the information it is given unless there are common sense reasons to doubt it.

I set out in my provisional decision that I was satisfied Evolution took a reasonable view of Mr C and Mrs C's income. It obtained payslips for both and chose to discount Mrs C's self-employed income based on her describing it as very "unreliable" which was a reasonable approach to take.

To gain information about their expenditure, it discussed Mr C and Mrs C's outgoings with them over the phone and obtained bank statements as well as their respective credit files. Having done so, it deemed that by combining Mr C and Mrs C's income and expenditure and applying a stress test to the first and second charge lending at 2.43%, they would have £405 in disposable income if the new loan were in place. As such, it determined the lending was affordable for them and funds were released.

I set out in my provisional decision that having looked at the information available to Evolution at the time, I was not persuaded it took a realistic view of Mr C and Mrs C's expenditure. I thought it ought to have had common sense grounds to doubt what it had been told based on other information in its possession and should have checked that information against an independent source such as bank statements. Particularly since it already had these in its possession when making the decision to lend.

Having reviewed this case in full again, I remain of the opinion that Evolution did not take reasonable steps to ensure this lending would be affordable for Mr C and Mrs C.

I say this because when asked why he had taken out so many payday loans in the first instance, Mr C did not give a clear answer on what he needed the money for. Only that once he had taken them, he needed to take out more to repay the outstanding amounts. And he had only recently taken a large personal loan for debt consolidation less than a year prior to his conversation with Evolution and since then had taken out more borrowing, had run out of money for the month in question and was seeking to consolidate again.

Comparing Mr C's declared income and expenditure against his decision to take out so many high-cost payday loans and the need to reconsolidate less than a year after taking out a previous loan for consolidation, ought to have made Evolution question the information it had been given.

And in any event, Evolution had already requested and received bank statements when carrying out its affordability assessment. Which means it had important and relevant information about Mr C and Mrs C's expenditure in its possession. It should have taken the full contents of these into account when determining if this loan would be affordable and sustainable for them over the full loan term. Had it done so, I am not persuaded it would have concluded that this lending was affordable for Mr C and Mrs C.

For example, Mr C and Mrs C declared they spent just over £79 per month on train travel but their bank statements, which Evolution had at the time, show they were spending between £290 and £330 per month on train travel and taxis alone.

In addition, Mr C and Mrs C were spending an average of around £390 per month with a particular online retailer (the figure increases significantly if I include average spends to two other online retailers and payment services). As Evolution chose not to ask Mr C and Mrs C about this regular and extensive spending, I am unable to determine if this is essential spending or non-essential spending that they would have been willing and able to cut out should the lending be approved. As a result, I am unable to discount it. Given Mr C felt the need to take out multiple payday loans in one month and was unable to set out what it was he was spending the money on, yet as a couple, they were spending this much with online retailers each month, I think Evolution ought to have queried this expenditure and certainly factored it into its assessment.

In addition, Mrs C declared during her call with Evolution that she spent money on circus training and that they should list approximately £50-60 pounds per month on clothes. Neither of which Evolution factored into the affordability assessment. The bank statements which it had at the time show Mrs C was spending an average of £260 per month on circus training and while some of this may have been covered by her self-employed income, she described this income as unreliable and not something that should be considered when determining if she could afford the loan.

Further, there are a significant number of transfers between accounts each month which is suggestive that Mr C and Mrs C were struggling to make ends meet and were having to move money multiple times a month to meet their outgoings. Evolution does not appear to have questioned this to determine where the funds were going and why such action was needed.

I also note that Evolution says it stress tested the repayments on Mr C's first charge mortgage and the second charge loan to ensure it remained affordable. It appears to have done this at a percentage of 2.43%. However, the rules refer to lenders taking into account the recommendations of the Financial Policy Committee. The recommendations at the time of the application set out that, when assessing affordability, lenders should apply an interest rate stress test to assess whether borrowers could afford their mortgage if the interest was 3% higher. Whilst Evolution was not bound by this as it was a recommendation, this would have been good industry practice at the time so I would expect to see a detailed and robust reason as to why that recommendation was not followed. But I have not been provided with such an explanation.

For all these reasons, I think the income and expenditure information Evolution used to assess Mr C and Mrs C's affordability significantly underestimated their expenditure and I disagree with its conclusion that after consolidation Mr C and Mrs C would be left with a disposable income of around £405. Instead, using the information Evolution had in its possession at the time it decided to lend, it appears Mr C and Mrs C would still have been exceeding their income even after the loan with Evolution.

And based on that information, I am satisfied its more likely than not that the loan was not affordable for Mr C and Mrs C, and that Evolution did not carry out a sufficiently robust affordability assessment.

That is enough for me to uphold the complaint and say that Evolution should not have lent this loan. But there are further factors which lead me to question whether it was responsible to lend.

Mr C and Mrs C were consolidating unsecured debt, most of which Mr C had taken out very recently – a sizeable personal loan for consolidation less than a year earlier and an escalating cycle of payday lending. And Mr C told Evolution that he needed to borrow more than what it was offering him as he was going to be unable to make it through the month before the funds from Evolution were released. Suggesting that Mr C and Mrs C may end up taking out further unsecured debt alongside this loan.

The bank statements, credit file and Mr C's own comments on the call confirm he was in a cycle of payday loans – paying a lender off and borrowing higher amounts from multiple payday lenders in the same month. And when asked by Evolution what this was for, Mr C's response was "I just needed some money for things…" and he goes on to say he had also taken payday loans previously that he was repaying with new loans. I would have expected the adviser to press more here to gain a better understanding of what Mr C was using the multiple payday loans for.

In my view, having taken out repeated payday loans and consolidating a loan which was itself a consolidation loan ought reasonably to have led Evolution to be concerned that Mr C and Mrs C were in a pattern of increasing debt. In addition to this, both were heavily utilising their overdrafts, incurring overdraft fees and were either at the limit of or very close to the limit on all of their credit cards.

And that, coupled with what it should have considered about their expenditure above, ought to have led Evolution to question whether this loan would have been sustainable for them.

And in those circumstances, I am not persuaded it was appropriate or responsible to allow Mr C and Mrs C to secure spiralling debt they were not managing properly to Mr C's property, further increasing their indebtedness. So, I uphold this complaint.

I am also concerned that during the discussions about Mr C and Mrs C's finances, the advisor told Mr C that Individual Voluntary Arrangements (IVAs) and Debt Management Plans (DMPs) were "deadly" and should be "avoided". I would suggest that making such a comment strays into the territory of giving debt advice. And in contrast to the adviser's personal opinion on such debt solutions, had Mr C entered into a DMP at the time, he may not have secured previously unsecured debt to his house, Mrs C may not have become jointly liable for Mr C's debts, and he may well have ended up in a position where he was paying little to no interest to his creditors and much lower repayments.

I am aware Mr C and Mrs C's representative believes Mrs C to be ineligible for this loan given her lack of homeowner status and her residency. But this is not the case. Mrs C does not need to jointly own the property over which the debt is secured, nor does she need to be on the title deeds to be added to this second charge loan. Nor does her residency status alone mean her addition to this loan was invalid or in someway incorrect. So, these arguments do not change my conclusions on this case.

I also note Mr C and Mrs C's representative has sent in further comments as to why he thinks Evolution should not have lent to Mr C given his spending habits, state of mind and his physical and mental health.

As I set out in my provisional decision, a lender is not obligated to carry out a full physical and mental assessment of prospective customers. And all adults are presumed to have capacity to make decisions for themselves unless it is shown they are unable to make them.

I am not persuaded in this case that Evolution ought to have realised that either Mr C or Mrs C lacked capacity to understand the transaction they were entering into. They were both able to engage fully with the questions and conversations with Evolution on several occasions.

In response to the representative's comments that Evolution ought to have known from Mr C's spending habits that something might be wrong, I have already commented on this point above when concluding that Evolution should not have lent on this occasion. So, I do not need to comment on these points any further.

Putting things right

In the circumstances I have set out above, I don't think it is fair or reasonable for Evolution to have charged Mr C and Mrs C interest or fees for lending they should not have been given.

It is fair that they repaid the capital since they had the benefit of that and if I were to ask Evolution to refund the capital too that would mean Mr C and Mrs C would effectively have the consolidated debts written off – which would leave them in a better position than they would have been in had this lending not happened.

Instead, Evolution should:

- Calculate the total amount Mr C and Mrs C paid in respect of this loan, including all fees, monthly payments and the redemption figure;

- Calculate the total amount of capital Mr C and Mrs C borrowed, disregarding interest and all fees; and

- Pay Mr C and Mrs C the difference between those two figures, adding simple annual interest of 8%* running from the date the loan was redeemed to the date of settlement.

**Evolution may deduct income tax from the 8% interest element of my award as required by HMRC. But it should tell Mr C and Mrs C what it has deducted so they can reclaim the tax if they are entitled to do so.*

My final decision

For the reasons detailed above, I uphold this complaint and direct Evolution Lending Limited to compensate Mr C and Mrs C as I have directed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C and Mrs C to accept or reject my decision before 19 September 2024.

Lucy Wilson
Ombudsman