DRN-5076957

The complaint

Mr F has complained through a representative that Marks & Spencer Financial Services Plc ("M&S") gave him loans without carrying out proportionate affordability checks. Had better checks been made than M&S would've discovered the loans weren't affordable.

What happened

M&S advanced two loans to Mr F and a summary of his borrowing can be found below.

loan number	loan amount	total to repay	agreement date	repayment date	number of monthly instalments	highest repayment per loan
1	£8,000	£8,975.16	06/03/2022	22/01/2024	36	£249.31
2	£5,000	£5,759.76	05/08/2023	22/01/2024	24	£239.99

Loan 2 ran concurrently with loan 1, meaning that from August 2023 Mr F was required to make total monthly repayments of £489.30. to M&S

Following Mr F's complaint M&S wrote to him to explain before each loan it performed a creditworthiness and an affordability assessment. It therefore didn't uphold the complaint. Unhappy with this response, Mr F's representative referred the complaint to the Financial Ombudsman.

The complaint was considered by an investigator, who upheld the complaint about both loans. Loan 1 was upheld because M&S' own calculations showed Mr F had £214 per month in disposable income which wasn't sufficient to make the loan repayments of around £249.

For loan 2, while M&S' checks showed he had £250 per month in disposable income, the investigator didn't consider leaving a consumer with £10 per month for up to two years was sufficient or reasonable to cover an unexpected spike in expenditure.

Mr F agreed with the proposed outcome, but M&S didn't agree with the investigator's assessment saying and I considered what it said.

As no agreement could be reached the complaint was passed to me. After considering the case, I then issued a provisional decision where I explained that I thought Mr F's complaint should be upheld about loan 2 only.

Both parties were asked to provide any further submissions as soon as possible, but in any event, no later than 9 October 2024.

Mr F's representative appear to have agreed with the outcome reached for loan 2, but in relation to loan 1 it said;

- The outcome for loan 1 relies on Mr F's actions after the loan was granted rather than what M&S could see about his finances at the time.
- The income and expenditure information has been interpreted to make the loan

appear affordable.
- Mr F's outgoings at the time the loan was approved showed it to be unaffordable.
- The loan was unaffordable at the time it was granted and M&S couldn't have predicted or have known that Mr F's disposable would've increased after the loan.
- It has also raised concerns about the evidence the representative may wish to submit about the changing financial position of a customer after a loan is granted.

Later, Mr F then made further comments including that that he was only able to repay these M&S loans by taking further borrowing that has meant he is now further in debt.

M&S did not respond to my provisional decision or ask for any additional time to do so.

A copy of the provisional findings follows in smaller font this and form part of this final decision.

What I said in the provisional decision

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 all of the relevant rules, guidance and good industry practice - on our website. And I've used this approach to help me decide Mr F's complaint. Having carefully considered everything I've decided to partly uphold Mr F's complaint. I'll explain why in a little more detail.

M&S needed to make sure it didn't lend irresponsibly. In practice, what this means it needed to carry out proportionate checks to be able to understand whether Mr F could afford to repay any credit it provided.

Our website sets out what we typically think about when deciding whether a lender's checks were proportionate. Generally, we think it's reasonable for checks to be less thorough – in terms of how much information is gathered and what is done to verify it – in the early stages of a lending relationship.

But we might think more needed to do be done if, for example, a borrower's income was low or the amount lent was high. And the longer the lending relationship goes on, the greater the risk of it becoming unsustainable and the borrower experiencing financial difficulty. So, we'd expect a firm to be able to show that it didn't continue to facilitate a customer's loans irresponsibly.

I've carefully considered all of the arguments, evidence and information provided in this context and what this all means for Mr F's complaint. Having looked at everything I have decided to partly uphold Mr F's complaint and I've explained why below.

Loan 1

M&S says for this loan, Mr F declared an annual income of £26,000. It then carried out a creditworthiness assessment which didn't show any indicators that Mr F has experienced any recent financial difficulties such as missed payments or defaults.

M&S also conducted an affordability assessment that used data from various models as well as taking the mortgage payment from the credit file. This result of this automated assessment indicated that Mr F may not have had sufficient disposable income in which to be able to afford the repayments. The automated checks showed that Mr F potentially had around £215 per month whereas, he needed more than £249 in order to meet his repayments.

Clearly the loan wasn't affordable on the results of the automated assessment. As a result of this, – M& S says the application was passed to an underwriter for a manual assessment of affordability to take place. M&S has explained that the manual underwriting process used actual current account information to determine Mr F's outgoings rather than its modelling – given the results of the automatic check I do consider this approach to be prudent. This does suggest that M&S reviewed Mr F's bank statements or discovered his expenditure in some other way.

I've considered the summary of information M&S provided from its underwriter – because the underwriter has noted the direct debit and standing order amounts and what these relate to. Mr F has also provided me with his copy bank statements, so I've considered these to ensure that the information M&S used when deciding the manual underwriting process was accurate – given what it likely received.

The income used for the affordability check for loan 1, used the income Mr F received in February 2022, this was paid just over a week before the loan was advanced, so I think it was entirely fair and reasonable for M&S to have used this amount - £1.727.07.

The underwriter gathered details of Mr F's direct debits, standing orders and 50% of the mortgage payment – these totalled £1,021.44. It then seems further costs were added to this which led to monthly expenditure totalling £1,317.18. Which left over £400 disposable income each month in which to afford the loan.

I've been able to cross reference the direct debits and standing orders that Mr F had, and it would seem that M&S did indeed capture them. However, I can also see from the February 2022 statement that Mr F had further loan accounts that weren't covered by the direct debit and standing order figures provided by M&S – because these appear to have been paid via a continuous payment authority.

Mr F had a further loan payment to a payday lender of £145.99 (this was a £500 loan advanced in the middle of February 2022) and a further payment to a high-cost credit provider costing £280.36 per month. The later payment also appeared in the January 2022 statement as well.

So, while M&S concluded Mr F had around £400 of disposable income each month – before the loan repayment and £160 afterwards. I don't think this disposable figure was correct – as the two additional loan payments which were visible in Mr F's bank statements but not as far as I can see used by M&S as part of the affordability assessment.

These two additional loans have in effect wiped out the disposable income that M&S calculated before its payment was considered. As such, the further checks that it undertook ought to have led it to believe the loan was unaffordable due to Mr F's outstanding commitments.

But, in saying that M&S has said that the underwriters' figures were likely to be conservative – because Mr F took this loan for debt consolidation purposes. As far as I can see, as part of the application no details were taken on which debts may or may not be repaid or what Mr F's position would be after the loan was funded.

However, I've seen sight of the bank statements for the period of time after the loan was funded. In this case, I can see that Mr F did use the loan for debt consolidation purposes, and he repaid the high-cost credit provider loan which was costing just over £280 per month and then he repaid what is likely a vehicle agreement of just over £297 per month.

So, Mr F was in effect, taking out a loan that was costing him £250 per month and using some of the proceeds to repay loans that were costing him at least £577 per month – so Mr F was able to reduce his monthly outgoings by just over £300 by taking this loan.

In the circumstances of this case, while I accept that M&S did need to do more before the loan was approved because the automated process indicated the loan was unaffordable.

However, M&S did conduct further checks and these showed Mr F was able to afford his loan repayments. I am therefore intending to not uphold Mr F's complaint about this loan.

Loan 2

The investigator upheld Mr F's complaint about this loan, because the checks M&S conducted suggested that he only £10 per month left over after he would make his repayments to this loan and the investigator didn't think that was enough to cover any foreseen expenditure. I've considered what the investigator has said, I am intending to conclude this loan ought to not have been granted and I've explained why below.

As with loan 1, M&S carried out the same checks. Mr F declared he earned £28,000 per year and he once again told M&S that he needed this loan for debt consolidation purposes. I think again, this ought to have been a flag to M&S because he was returning for a further loan a little under 18 months after receiving a larger loan for debt consolidation purposes.

M&S says that the income was checked against a "…predetermined threshold…" taking account of the job title, location and other demographic information. Which doesn't seem unreasonable. A credit check was also conducted and apart from the missed payment in connection with loan 1 – which I come on to below, there wasn't any other adverse payment information for M&S to be concerned about.

In addition, to work out Mr F's monthly outgoings it used the information it received from the credit check results as well as modelling that take account of expenditure such as utilities, council tax and insurance to name a few. M&S calculated that Mr F had £250 of disposable income in which to afford the monthly repayments of around £240. It therefore concluded the loan was likely affordable.

However, when loan 2 was granted Mr F was still repaying loan 1 and so Mr F wasn't a new borrower and I would reasonably have expected it to factor this into its assessment of affordability. Furthermore, M&S was aware that once loan 2 was approved, Mr F's commitment to it each month would be nearly £490.

I've looked at the repayment history of loan 1 up to the point this loan was granted to see whether there were any indicators that ought to have M&S to conclude that Mr F had problems repaying the first loan and so ought to not be advanced any further funds. Mr F's April 2023 direct debit was returned as unpaid. Mr F hadn't made up the payment and so M&S was reporting adverse payment information each month. In my view, although this was only one missed payment, the fact that Mr F still hadn't made it up some four months later – was a sign that he might have been having difficulties and in these circumstances, it was incumbent upon M&S to carry out further checks in order to ensure that this wasn't the case.

I've thought about what M&S has said and I don't think it is necessarily wrong of it to used modelling to determine a customer's outgoings. But in a situation where the model shows that Mr F had very little money left over after making all his repayments. This ought to have led it to conduct further checks, rather than just approving the loan.

Given how tight the affordability margin of the loan was and the automated process will not have accounted for Mr F's actual committed expenditure (it would only have estimated this), I think that it ought to have taken similar steps to what it did for loan 1 – particularly as it was now repeat lending to Mr F. I think that M&S needed to find out about Mr F's actual monthly outgoings, with reference to his income and the direct debits and standing orders that he had.

Had further checks been conducted, then M&S would've likely discovered Mr F's income was around £1,700 per month. It also would've discovered that he had three outstanding payday loans, a credit union loan and costs associated with running a vehicle including tax, insurance and what looks to be vehicle finance. Mr F had returned to M&S for further funds in the position where he already owed more and despite having been provided with a consolidation loan only 18 months earlier.

The monthly costs of just the standing orders and the direct debits comes to £1,584 – and there are other essential costs within the statement that I've not factored in including food. Clearly, with the cost of the loan at nearly £240 Mr F didn't have sufficient funds to afford the repayments. I am therefore intending to uphold Mr F's complaint about loan 2 only.

It therefore follows that Mr F was expected to pay interest, fees and charges on a loan that he shouldn't have had. So, I'm satisfied that Mr F has lost out and M&S should put things right for him as set out below.

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.

Firstly, I'm sorry to hear that repaying these loans provided to be difficult for Mr F and he's told us he was only able to do so by taking another loan. Unfortunately, that other loan isn't subject a review in this decision because I can't hold M&S liable for any further interest and charges he may have to pay as a result of taking out a loan from another provider. If Mr F is unhappy with anything to do with the loan, he used to repay these M&S loans he will need to approach that provider as a separate matter.

I've considered what Mr F's representative have said but I'm not persuaded to change my mind about the outcome for loan 1. As I said in the provisional decision, the loan was just about affordable for Mr F – even though M&S' automated checks suggested the loan may not have been affordable.

However, following the initial assessment M&S then prudently took it upon themselves to conduct a more detailed manual analysis of Mr F's financial position to ensure that the loan was affordable. The checks it did, minus the two loans that I discovered may have led it to conclude the loan was unaffordable. But, as I stated in the provisional decision, I can't be sure exactly what other information M&S gathered from Mr F prior to granting loan 1, to establish the direct debits he had and what it considered.

Mr F's representative has queried whether there was any communication from Mr F confirming that he was going to use the funds to consolidate existing borrowing. In the first instance, M&S has said it was told the loan was for debt consolidation at the time of Mr F's application. This is recorded as the loan purpose within its system notes. So, I do think, for the first loan that it was reasonable for M&S to rely on what Mr F said and expect that he would use the loan for the intended purpose of repaying other debt – and so while Mr F was taking on new debt for loan 1, he wasn't overall likely to be increasing his liabilities.

Indeed, the bank statements provided, show that Mr F did use the proceeds from the first loan to consolidate other borrowing in the way that he said. So not only did Mr F provide M&S with an undertaking in relation to the purpose of the loan but he also did what he said would. Therefore, his actions once being provided with the funds support what he said he would do.

I've also considered the broader point Mr F's representative has made about the submission of evidence and what may happen to a consumer after any finance is agreement is entered into. A representative, or customer, is of course free to submit whatever it wishes on any given case in relation to the consumer's financial position. But the relevance of the information as well as the weight I, or any other decision maker will place on the submissions will depend on the facts and circumstances of the individual case.

Taking everything together, Mr F told M&S that he would use this loan to consolidate other debts. As this was a first loan M&S was entitled to rely on this declaration and, in any event, Mr F's bank statements show this is in fact what he did. This means that there was always an expectation that Mr F's monthly disposable income would improve.

No new comments have been made in relation to loan 2, and I still think, that the loan ought to not have been granted for the reasons I've given in my provisional decision. So, I am still upholding Mr F's complaint about loan 2 only. And, in relation to loan 2, M&S will be directed to refund any interest, fees and charges that Mr F paid it.

I've also considered whether the relationship might have been unfair under s.140A of the Consumer Credit Act 1974. However, I'm satisfied the redress I have directed below results in fair compensation for Mr F in the circumstances of his complaint. I'm satisfied, based on what I've seen, that no additional award would be appropriate in this case.

Putting things right

Having thought about everything, M&S should put things right for Mr F for loan 2 only by:

- moving all interest, fees and charges added to Mr F's second loan from the outset. The repayments Mr F made, to M&S, should be deducted from the new starting balance – the £5,000 originally lent. As Mr F has already repaid M&S more than £5,000 that it lent, it should treat any extra as overpayments and these overpayments should be refunded to Mr F;
- M&S should also add interest at 8% per year simple on the overpayments, from the date they were made by Mr F to the date of settlement†
- Finally, M&S should remove any adverse information it has recorded about this loan from Mr F's credit file.

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

My final decision

For the reasons outlined above and in the provisional decision I am upholding Mr F's complaint in part.

Marks & Spencer Financial Services Plc should put things right for Mr F as directed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F to accept or reject my decision before 22 November 2024.

Robert Walker
Ombudsman