

The complaint

Mr D complains Marks & Spencer Financial Services Plc trading as M&S Bank (M&S Bank) irresponsibly lent to him.

What happened

Mr D applied for a credit card with M&S Bank on 28 April 2018. The account was opened on 16 May 2018 with an initial limit of £2,000. His account was defaulted in April 2021.

Mr D complained to M&S Bank about its lending decision on 18 June 2024. He said the credit wasn't affordable and he already had significant exposure to credit. However, M&S Bank gave him more credit anyway. He explained he was young at the time and not in permanent employment. He said he had several accounts and had to enter arrangements which meant he can't get a mortgage.

M&S Bank responded to the complaint on 6 August 2024. It said it felt the complaint had been made too late and it was unable to respond in more detail because of the time that had passed since the lending decision was made. However, it did say the application was assessed based on details provided at the time. It also said, it sent letters following missed payments to find out more about Mr D's circumstances.

Mr D remained unhappy and asked our service to investigate. Our Investigator looked into matters. M&S Bank told him that it felt the complaint had been brought too late for us to consider under the complaint handling rules of the Financial Conduct Authority (FCA). Our Investigator didn't agree that the complaint had been brought too late, so went on to consider the complaint. However, he didn't think it should be upheld. Mr D didn't agree with our Investigator's view and was particularly concerned about the amount of credit he already had outstanding.

In summary, Mr D said:

- He was 24 years old at the time and it would have been reasonable to expect his costs to rise when he moved out of the family home.
- Our Investigator should have considered a payment of 5% to satisfy various credit cards. This gives a figure of around £1,136 per month as a minimum towards repaying his debt.
- The percentage of debt balances to his income is also incorrect. His post-tax income was £20,736. Therefore, the actual percentage is 110% based on him having a balance of around £22,000 in unsecured debts.
- Our Investigator found M&S Bank didn't gather enough information when it decided to lend. So, it's unclear why the conclusion is not that it was irresponsible for M&S Bank to lend.
- The statements provided for his current account show consistent overdraft usage which indicates further borrowing was unaffordable in the circumstances. Also, money was transferred out of the account and then back into it. This is why the

monthly income in the account summary shows a higher income amount. He transferred £1,200 out of his account but money was transferred back to support his outgoings. He paid £175 per month for his monthly board.

- The bank statements show his net monthly income was only £1,728. This is £366 short of the figure our Investigator used. This gives a disposable income figure of £428 which isn't sufficient as he was likely going to be trying to leave home.
- Had lenders completed proportionate checks and stopped providing credit then he wouldn't be in this cycle of debt.
- He used balance transfer offers to take advantage of the 0% interest rate promotion at the time. This in itself is indicative of debt cycling and a lack of affordability. He wouldn't have needed to transfer the balances from his other accounts if they were affordable.
- The way M&S Bank conducted its collections activity has no bearing on the affordability of the account.

As Mr D didn't agree, the complaint has been passed to me to decide.

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.

There are time limits for referring a complaint to the Financial Ombudsman Service, and M&S Bank thinks this complaint was referred to us too late. Our Investigator explained why he didn't think we could look at a complaint about the lending decision that happened more than six years before the complaint was made. But he also explained why it was reasonable to interpret the complaint as being about an unfair relationship as described in Section 140 of the Consumer Credit Act 1974, and why this complaint about an allegedly unfair lending relationship had been referred to us in time.

For the avoidance of doubt, I agree with our Investigator and think this complaint is one I can consider. I think this complaint can reasonably be considered as being about an unfair relationship as Mr D has explained the lending increased his overall indebtedness and has come at a great cost to him over the years. This may have made the relationship unfair. I acknowledge M&S Bank doesn't agree we can look at the complaint about the account, but as I don't intend to make any award to Mr D, I won't comment on this further.

In deciding what is fair and reasonable I am required to take relevant law into account. Because Mr D's complaint can be reasonably interpreted as being about the fairness of his relationship with M&S Bank, relevant law in this case includes Section 140A-C of the Consumer Credit Act 1974.

As our Investigator outlined, Section 140A says that a court may make an order under Section 140B if it determines that the relationship between the creditor (M&S Bank) and the debtor (Mr D), arising out of a credit agreement is unfair to the debtor because of one or more of the following, having regard to all matters it thinks relevant:

- any of the terms of the agreement;
- the way in which the creditor has exercised or enforced any of his rights under the agreement;
- any other thing done or not done by or on behalf of the creditor.

Case law shows that a court assesses whether a relationship is unfair at the date of the hearing, or if the credit relationship ended before then, at the date it ended. That assessment has to be performed having regard to the whole history of the relationship.

But the case law also says that the court may not make an award for an unfair relationship where the claimant had knowledge of the facts relevant to their claim but substantially delayed making it. So I've taken this into account when deciding a fair and reasonable outcome for this complaint.

The case law doesn't provide a fixed period that would constitute a substantial delay, but in the case of *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34, the Supreme Court approved the District Judge's comment that a court would be slow to remedy unfairness in a situation where the claimant delayed more than six years after knowing the facts.

S.140B sets out the types of orders a court can make where a credit relationship is found to be unfair – these are wide powers, including reducing the amount owed or requiring a refund, or to do or not do any particular thing.

Given what Mr D has complained about I need to consider whether M&S Bank's decision to lend to him, or its later actions, created unfairness in the relationship between him and M&S Bank such that it ought to have acted to put right the unfairness – and if so whether it did enough to remove that unfairness.

There are key questions I need to consider in order to decide what's fair and reasonable:

1. Did M&S Bank carry out reasonable and proportionate checks to satisfy itself that Mr D was in a position to sustainably repay the credit?
 - If so, did it make a fair lending decision?
 - If not, what would reasonable and proportionate checks have shown at the time?
2. Did M&S Bank act unfairly or unreasonably towards Mr D in some other way?

M&S Bank had to carry out reasonable and proportionate checks to satisfy itself that Mr D would be able to repay the credit sustainably. It's not about M&S Bank assessing the likelihood of being repaid, but it had to consider the impact of the repayments on him.

There is no set list of checks that it had to do, but it could take into account several different things such as the amount and length of the credit, the amount of the monthly repayments and the overall circumstances of the borrower.

Did M&S Bank carry out reasonable and proportionate checks to satisfy itself that Mr D was in a position to sustainably repay the credit?

M&S Bank has provided a copy of the application details. This shows Mr D declared he was living at home with parents, was in full-time employment and received a gross annual salary of £31,980.

M&S Bank has explained it carried out a credit check to consider Mr D's financial circumstances at the time. It found Mr D had unsecured debt balances of around £22,728. I note Mr D has raised concerns about the calculations around his indebtedness. However, for the purposes of considering the checks carried out by M&S Bank, it established his unsecured debt amount was around 71% of his gross annual income.

The credit check also didn't show any signs of adverse information such as missed payments or arrears. Although, I do note Mr D did have high credit utilisation as he had utilised 93% of his available credit for the 12 months preceding the lending decision. M&S Bank established Mr D was living at home with parents but I'm not aware of what else it did to consider his other non-discretionary spend and ensure the lending was affordable.

Overall, I'm not satisfied M&S Bank's affordability checks went far enough in the circumstances. Although I recognise Mr D had a clear repayment history, he did show signs of high credit utilisation, and he already had over £22,000 of other debt to repay. I think in the circumstances M&S Bank ought to have verified Mr D's income and also obtained further information about his non-discretionary spending. Without this information, I'm not persuaded it could fairly ensure Mr D could sustainably afford to repay the credit.

Would reasonable and proportionate checks have shown Mr D was in a position to sustainably repay the credit?

In response to the view, Mr D said the complaint should be upheld because the checks carried out didn't go far enough. At this point, I'd like to explain our approach. We may find the checks carried out at the time of the lending weren't reasonable and proportionate, but it doesn't automatically follow that the complaint should be upheld. Instead, I must go on to consider what reasonable and proportionate checks were likely to have shown at the time. After all, if reasonable and proportionate checks would have likely revealed that the lending was affordable, I couldn't fairly say that M&S Bank had made an unfair lending decision.

In order to do this, I have considered bank statements which cover the two-month period leading up to the lending decision. Mr D has confirmed the bank was unable to provide him with any older statements given its retention policy. For clarity, I'm not saying M&S Bank needed to obtain bank statements to complete reasonable and proportionate checks. However, the bank statements do give a good indication of what information was likely to have been obtained had such checks been carried out.

The statements show Mr D had a net monthly income of around £1,728. I'm satisfied reasonable and proportionate checks were likely to have revealed Mr D's net monthly income. I appreciate this reasoning is slightly different to that of our Investigator's explanation, but I'm satisfied it doesn't change the overall outcome.

I've also thought about the committed spend. As noted by our Investigator, Mr D transferred £1,200 out into another account. However, Mr D has confirmed he has provided statements for the account his bills and expenses came from, and he transferred funds back in when he needed to. I can see money being transferred back into the account which is consistent with Mr D's testimony. Mr D has confirmed he had to pay £175 to his parents each month because he was staying with them. I can see payments which corroborate this on the statements.

In response to the view, he also explained the necessary payments towards existing credit would be around £1,136 each month. He has calculated this based on his existing credit balance. Mr D's overall credit balance at the time of the lending is not disputed and I'm mindful some of this balance was made up of his overdraft. I'm satisfied M&S Bank would have needed to consider a sustainable repayment amount. Taking into account a reasonable repayment period and what I can see on the statements, I'm satisfied the amount outlined by Mr D isn't unreasonable.

So, thinking about Mr D's income and this expenditure, he would be left with around £416 disposable income each month. I can see some other expenses from the statements but

overall, I'm satisfied this is sufficient disposable income to suggest the lending would be affordable.

I note Mr D's comments that M&S Bank ought to have considered he would want to move out from his parents' house and the expenses which this would have incurred (such as bills and so on). I can see from the contact notes it does appear he did move out as he explains his partner was out of work. However, the statements do not reveal any expenses had been incurred in relation to this at the time of the lending decision and he declared he was living at home with parents. I need to consider what M&S Bank would likely have discovered had it completed proportionate checks at the time and whether changes in circumstances were reasonably foreseeable.

Whilst it's certainly not an unusual sentiment for young people to think about moving out on their own, it's not a certainty and timescales can vary drastically based on the individual. Thinking carefully about the circumstances, I'm unable to conclude M&S Bank was likely to have discovered Mr D had plans to move out had it completed reasonable and proportionate checks.

I've also thought about Mr D's overall indebtedness. I appreciate he has explained he had indebtedness of 110% based on his take-home pay. I do agree he had a high level of indebtedness, and a large portion of his net monthly income would be needed for sustainably repaying his credit commitments. However, I'm mindful he was living at home at the time of the lending. Also, his repayment history had been clear and there were no signs of missed payments or arrears. Additionally, I'm satisfied proportionate checks were likely to have shown he had sufficient disposable income to afford the credit.

Importantly, M&S Bank provided an introductory offer on balance transfers made within 90 days of account opening and it charged 0% interest for 32 months from the date of transfer. Whilst Mr D did have a high level of indebtedness at the time, he had the opportunity to transfer some of the balance to his M&S Bank credit card. This would have allowed a period where no interest was being charged, where it otherwise would have been, which would have enabled him to bring down the balance. Whilst Mr D did have high utilisation and indebtedness, I don't think it was irresponsible to lend to him in these circumstances.

In response to the view, Mr D asked me to consider why he needed to complete the balance transfers if the credit he had was affordable. I understand his comments here. However, it's not unusual for consumers to take advantage of promotional offers and particularly those with 0% interest on balance transfers. There can be many benefits of this. Importantly, it enables consumers to transfer balances from one account where interest is likely being applied and gives them an opportunity to reduce the overall balance within the promotional period without incurring additional interest. This can enable consumers to pay off debt more quickly. It also isn't necessarily indicative of trouble managing funds elsewhere.

I appreciate Mr D will be disappointed by my decision and I want to provide assurance that I've thought carefully about his financial circumstances at the time. However, for the reasons outlined above, I don't think M&S Bank created unfairness in the relationship when it decided to provide him with a credit card. Whilst I have found reasonable and proportionate checks weren't carried out, I'm unable to say such checks were likely to have shown the lending was unaffordable or irresponsible. Whilst Mr D did have a high level of indebtedness, I think it's likely the repayments would have seemed affordable and the interest-free period on balance transfers would have enabled him to reduce some of the debt more easily.

Did M&S Bank act unfairly or unreasonably towards Mr D in some other way?

I appreciate Mr D's concerns that M&S Bank's conduct when he fell into difficulties does not speak to whether it was irresponsible to lend to him in the first place. As explained above, I don't think M&S Bank made an irresponsible lending decision which created unfairness in the relationship. But it's important, given what Mr D has set out in his complaint, that I consider the entire relationship and whether M&S Bank created unfairness.

Mr D first struggled to make repayments in 2020. The statement of 25 August 2020 showed Mr D was £50.68 in arrears and this rose to £101.68 by the September 2020 statement. I've seen from the contact notes that Mr D had to cover the cost of all the bills as his partner had been out of work due to the Covid-19 pandemic. At this point M&S Bank was informed he was dealing with a debt support company, and it added breathing space for 60 days. In November 2020, the breathing space expired and I can see M&S Bank wrote out to Mr D explaining he could contact it for further support.

On 4 February 2021, the contact notes show Mr D had told M&S Bank his circumstances had improved. It agreed to complete an income and expenditure assessment with him and, because he was at work, it wrote out to him. The contact notes don't show further action was taken in relation to this and a default notice was sent to Mr D on 15 February 2021. It asked Mr D to pay £239.86 within 21 days. A final demand was sent on 16 March 2021. The account was subsequently defaulted when arrears weren't made up by the deadline. I understand the collections are now being managed by debt collectors.

Having considered the relationship, I'm satisfied it seems M&S Bank supported Mr D when arrears started to build and, after some breathing space, the account was defaulted when arrears remained outstanding. M&S Bank also sought to contact Mr D about the arrears and to provide support. From the evidence I have, I'm unable to conclude M&S Bank created unfairness in the relationship and that the relationship is currently unfair.

Summary

Overall, and based on the available evidence I don't find that Mr D's relationship with M&S Bank is unfair. It's not clear enough to me that M&S Bank created unfairness in its relationship with Mr D by lending to him irresponsibly initially, or in respect of the support it showed to him when he fell into difficulties managing the account. I don't find that M&S Bank treated Mr D unfairly in relation to this matter based on what I've seen.

My final decision

For the reasons outlined above, I'm not upholding this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 26 June 2025.

Laura Dean
Ombudsman