

The complaint

Mr B complains that without informing him, Zilch Technology Limited converted his existing buy now, pay later account into a regulated credit agreement and went on to record adverse payment information on his credit file. He says this led to financial loss when he sought to move his mortgage to a better interest rate.

Background

I recently issued my provisional conclusions setting out the events leading up to this complaint, and how I thought Zilch should resolve it. I've reproduced my provisional findings below, which form part of this final decision.

What happened

Mr B was a Zilch customer, having opened a buy now, pay later account in May 2022. The way in which the buy now, pay later arrangements worked meant it was not subject to regulation either under the Consumer Credit Act 1974 ("CCA") or by the Financial Conduct Authority ("FCA"). Mr B says he used the account infrequently.

After several months, Zilch introduced changes to the account arrangements, including fees that would apply to certain transaction activity, and which brought the account within the scope of a regulated credit agreement¹. Mr B says he only became aware of the changes in early 2024 when he was looking to rearrange his mortgage. He found that Zilch had recorded missed payment information on his credit file in respect of transaction fees totalling £9, relating to a £9.40 transaction in September 2023.

Mr B disputed the £9.40 transaction and associated fees. He was unhappy that he'd not been notified of the change and hadn't consented to it. He drew a connection between the change to a regulated credit agreement and the reporting of information on his credit file. Mr B said that because of the adverse data his mortgage broker had been unable to secure him the most advantageous interest rate. He provided an estimation from his broker of the extra cost to him, being just over £1,000 over a five-year term.

Zilch didn't consider the transaction to be unauthorised. And – initially, at least – it said the fees and reporting information were all part of the agreement Mr B had entered into. It later told us that due to a system error Mr B was never provided with the regulated credit agreement. While Zilch said it had sent Mr B emails about reporting to credit reference bureaux, which was also in its terms of use, it said it would be willing to remove the entries on Mr B's credit file.

Our investigator thought this was a fair outcome overall. She wasn't persuaded that Zilch was liable to Mr B for the claimed loss on the mortgage rate. But Mr B didn't agree. He reiterated that he'd never signed up to a regulated credit product, and that the changes made by Zilch were disadvantageous to him. He maintained that the reason he was

¹ As defined in Chapter 14A of The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("the Regulated Activities Order")

ineligible for the cheaper mortgage rate was due to the information Zilch had recorded, as shown by correspondence from his broker. He asked for this review, as he's entitled to under our rules.

What I've provisionally decided – and why

While I've noted Mr B has said he didn't have a credit agreement, his buy now, pay later account undoubtedly provided him with a form of credit. According to the 2022 terms of use², the account provided for Zilch to make payment to a seller of goods and/or services on its customer's behalf, with the customer repaying the balance to Zilch within 42 days.

However, it's common ground that Mr B's buy now, pay later account was a product that wasn't subject to FCA or CCA regulation. At the time it was taken out, the account operated in such a way that it met the definition of an exempt agreement set out in Article 60B of the Regulated Activities Order, by virtue of the credit meeting the requirements in Article 60F.

From what I can see, the buy now, pay later account became subject to regulation – that is, it became a regulated credit agreement – when the introduction of fees meant the Article 60F exemption could no longer apply. It's again common ground that Zilch failed to inform Mr B of this change before or at the time it took place.

The change from an unregulated to a regulated product was undoubtedly a material change to the nature of Mr B's agreement with Zilch. Although there was no change to the basis on which credit was repayable, it introduced an option to repay over a three-month period, as well as fees that applied to certain transactions. Considering section 60 of the CCA, Mr B should have been made aware of key information in connection with entering into a regulated credit agreement. As Zilch has acknowledged, that didn't happen.

I'm also conscious of the requirement under section 61 of the CCA that a regulated agreement isn't properly executed unless signed by the debtor³. Mr B has asked Zilch for a copy of the executed agreement, but presumably no such document can exist in light of Zilch's acknowledgement that a system failure meant it never sent Mr B an agreement to sign.

None of this has any bearing on whether the changes had the effect of making the existing arrangements between the parties a regulated credit agreement. That, as I've noted, operated as a matter of course because of the changes to the arrangements. It is perhaps worth noting that otherwise there might be a question of whether the complaint falls within the jurisdiction of our service⁴. But an improperly-executed credit agreement does not prevent the agreement from being a regulated credit agreement, and so I'm satisfied I can deal with the complaint.

The mere fact of whether a credit agreement is regulated or unregulated isn't the reason

² The terms of use have since been updated with the changes that have led to this complaint, but the 2022 version is still capable of being viewed online using an internet archive site such as Wayback Machine.

³ An agreement may be signed manually or electronically: *Bassano v Toft and others* [2014] EWHC 377 (QB)

⁴ Our compulsory jurisdiction, to which Zilch is subject, does include lending money (excluding restricted credit where that is not a credit-related regulated activity). I mention this as an example of certain circumstances in which I can deal with complaints that might involve unregulated credit, though in light of my intended conclusion that Zilch was carrying on regulated lending activity, I've not found it necessary to look further into the question of whether it was providing restricted credit.

account conduct might appear on a person's credit file. Mr B has submitted his own credit file in evidence, and he would I'm sure readily acknowledge that it contains information in relation to his financial standing not just in terms of credit, but in relation to telecoms suppliers and utility companies. And as I've already noted, according to the terms of use of Mr B's buy now, pay later account, Zilch was entitled to share payment information with credit reference bureaux.

That's not the whole story, however. Prior to the change, Zilch wasn't reporting information on the conduct of Mr B's account. It started doing so when the status of the account changed to that of a regulated credit agreement. Presumably then, Zilch only exercised the power to report information when the credit agreement was regulated. It follows that the change was a material factor in later events. I've no reason to think that Zilch would have simply started reporting data from that point were it not for this.

There was clearly a link between the change to a regulated credit agreement and Zilch's reporting of information to his credit file. I think Mr B makes a fair point that he was disadvantaged by the failure to inform him of the change. Had Mr B been properly informed he might have been able to avoid the impact on his credit file; for example, by closing his account.

However, I'm not minded to conclude that it should follow that Zilch should compensate Mr B for his inability to obtain the mortgage interest rate originally proposed by his broker. For a start, it hasn't been demonstrated that the information was factually inaccurate. In addition, while an improperly-executed credit agreement is enforceable against a debtor only on the order of the court⁵, that doesn't in itself prevent the recording of information on the debtor's credit file, as the High Court has found that this doesn't amount to enforcement action⁶.

Finally, the broker's statement doesn't provide any basis for arriving at the calculated sum, such as a comparison of the rate Mr B might have got and the rate he did actually proceed at. Although I have reviewed the published⁷ mortgage rates of the provider in question at the material time, I've been unable to locate an equivalent mortgage product that offered a lower interest rate than the one he ended up taking. I don't consider in such circumstances that I can accept the evidence Mr B has offered as demonstrative of any financial loss.

That's not to say Zilch's proposal to remove the information is a fair way to resolve matters. I don't think it goes far enough. Even if the evidence Mr B has provided is insufficiently persuasive of the claimed loss, he has clearly been caused material distress and some degree of inconvenience in efforts to rectify the situation. And I've no doubt he was to some extent frustrated in his efforts to proceed with his remortgage. In my view, it's appropriate that Zilch also pays Mr B compensation for the problems he was caused arising from its failure to inform him of the change (and the consequences of that change, in light of its reporting policy) to a regulated credit agreement. Having considered all that's been said, I propose to require Zilch to pay Mr B £400 in recognition of his trouble and upset.

I invited both parties to let me have any further comments they wished to make in response to my provisional conclusions.

Responses to my provisional decision

⁵ See CCA Section 65(1)

⁶ *McGuffick v The Royal Bank of Scotland plc* [2009] EWHC 2386

⁷ Source: Moneyfacts Issue 423 (January 2024) and Issue 424 (February 2024)

Zilch accepted my intended conclusions and had no further comments to make. Mr B also expressed satisfaction with my findings, but he didn't agree with the level of compensation I'd proposed. He felt that the time taken to get to this point – over a year – warranted an amount of £500, rather than the £400 I'd proposed.

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.

Both parties have accepted the general premise of my findings and I've no reason to change any of those, or the conclusions I outlined in my provisional decision. I therefore adopt them in full in this final decision. The only issue in contention is the appropriate level of compensation Mr B should receive.

I don't doubt that Mr B has found the situation frustrating, and that dealing with matters has consumed a large amount of his time. As I've said, it's only fair that Zilch compensates Mr B for this. However, when I issued my provisional decision I took into account the amount of time and trouble to which Mr B was put. I appreciate Mr B feels the matter is worth slightly greater compensation than I proposed, but that isn't a basis on which I can properly require Zilch to pay a higher amount. I remain satisfied that £400 is a fair sum for Zilch to pay him in this regard.

My final decision

My final decision is that I uphold this complaint. To settle it, Zilch Technology Limited must, within 28 days of receiving Mr B's acceptance of this decision, take the following steps:

1. Remove any adverse payment information it recorded on Mr B's credit file in relation to the account (as it has already proposed); and
2. Pay Mr B £400

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 17 March 2025.

Niall Taylor
Ombudsman