

Complaint

Mr S has complained about a credit card Marks & Spencer Financial Services Plc (trading as "M&S Bank") provided to him. He says that the credit card and the subsequent limit increases were unaffordable for him and left him severely in debt which he has struggled to pay off ever since.

Background

M&S Bank provided Mr S with a credit card with an initial limit of £6,000.00 in February 2006. Mr S' credit limit was then increased to £8,000.00 in September 2006, £10,000.00 in April 2007 and after the credit limit had been decreased to £7,150.00 in October 2007 the limit was increased to £12,150.00 sometime prior to June 2010¹.

As I understand it Mr S' account was defaulted in January 2013. However, M&S Bank retained the debt. At the time M&S Bank provided its file of papers to us, Mr S' debt stood at £5,282.09.

In October 2023, Mr S complained saying that the credit card and the limit increases M&S Bank provided to him were unaffordable for him and left him severely in debt which he has struggled to pay off ever since.

M&S Bank did not uphold Mr S' complaint. It didn't believe that it had acted unfairly towards Mr S. It also believed that his complaint may have been made too late. Mr S remained dissatisfied at M&S Bank's response and referred his complaint to our service.

When responding to our request for its file on Mr S' complaint, M&S Bank told us that it believed Mr S had complained too late.

One of our investigators reviewed what Mr S and M&S Bank had told us. And she thought M&S Bank hadn't done anything wrong or treated Mr S unfairly in relation to providing the credit card or increasing Mr S' credit limit on the occasions that it did. So she didn't recommend that Mr S' complaint be upheld.

Mr S disagreed and asked for an ombudsman to look at the complaint.

My findings

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

Basis for my consideration of this complaint

¹ M&S Bank can only confirm that Mr S' limit was increased for the final time sometime prior to June 2010. However, I've noted that its final response states that Mr S didn't use his card between July 2009 and May 2010 and that when Mr S did start using his card again his balance increased from £9,053.51 to £10,602.27. It has also separately stated that Mr S never exceeded his credit limit. Taking all of this together suggests that it is more likely than not that Mr S' credit limit was increased from £7,150.00 to £12,150.00 sometime between October 2007 and July 2009.

There are time limits for referring a complaint to the Financial Ombudsman Service. M&S Bank has argued that Mr S' complaint about the initial decision to provide the card and the first credit limit increase was made too late because he complained more than six years after these lending decisions; as well as more than three years after he ought reasonably to have been aware of his cause to make this complaint.

Our investigator explained why it was reasonable to interpret Mr S' complaint as being one alleging that the relationship between him and M&S Bank was unfair to him as described in s140A of the Consumer Credit Act 1974 ("CCA"). She also explained why this complaint about an allegedly unfair lending relationship had been made in time.

Having carefully considered everything, I've decided not to uphold Mr S' complaint. Given the reasons for this, I'm satisfied that whether Mr S' complaint about the specific lending decisions was made in time or not has no impact on that outcome.

I'm also in agreement with the investigator that Mr S' complaint should be considered more broadly than just the lending decisions. I consider this to be the case as Mr S has not only complained about the respective decisions to lend but has also alleged that this account unfairly left him severely in debt which he has struggled to pay off ever since.

I'm therefore satisfied that Mr S' complaint can therefore reasonably be interpreted as a complaint about the overall fairness of the lending relationship between him and M&S Bank. I acknowledge M&S Bank may not agree that we can look at parts of Mr S' complaint, but given the outcome I have reached, I do not consider it necessary for me to make any further comment, or reach any findings on these matters.

In deciding what is fair and reasonable in all the circumstances of Mr S' case, I am required to take relevant law into account. As, for the reasons I've explained above, I'm satisfied that Mr S' complaint can be reasonably interpreted as being about the fairness of the lending relationship between him and M&S Bank, relevant law in this case includes s140A, s140B and s140C of the CCA.

S140A says that a court may make an order under s140B if it determines that the relationship between the creditor (M&S Bank) and the debtor (Mr S), 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. S140B 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 Mr S' complaint, I therefore need to think about whether M&S Bank's decision to initially lend to Mr S, increase his credit limit on the occasions it did, or its later actions resulted in the lending relationship between Mr S and M&S Bank being unfair to Mr S, such that it ought to have acted to put right the unfairness – and if so whether it did enough to remove that unfairness.

Mr S' relationship with M&S Bank is therefore likely to be unfair if it didn't do enough to enquire into Mr S' ability to make his repayments in circumstances where doing so would have revealed the credit card or the limit increases to be unaffordable for him. And if this was the case, M&S Bank then didn't somehow then remove the unfairness this created.

I've considered Mr S' complaint in this context.

Preliminary matters

I've read and considered everything provided. I accept and acknowledge that Mr S has raised a number of issues which extend past M&S Bank's decisions to lend. For example, he has referred to M&S Bank's conduct during his complaint. However, as this is a complaint about the fairness of the lending relationship and complaint handling isn't an activity that I am permitted to consider a complaint about, I've focused on what I am able to consider and the actions which I think are relevant and important in order for me to reach what I think is the right outcome.

I also want to reassure Mr S that where I haven't commented on a specific issue he has referred to, or a comment that he may have made, it's not because I've failed to take it on board and think about it. The reason I will not have commented on the issue is because I'm satisfied that I don't need to do so in order to reach what I consider to be a fair and reasonable outcome. For the sake of completeness, I would add that our complaint handling rules, which I'm required to follow, permit me to adopt such an approach.

It may also help for me to explain that I will reach my decision on the balance of probabilities. Where the evidence is contradictory, inconclusive or incomplete (as a lot of it is here), I must reach my conclusion based on what I consider is more likely than not to have happened in light of the available evidence and the wider circumstances.

I'll now turn to considering the lending decisions.

Our general approach to unaffordable and irresponsible lending complaints

We do have an explanation about how we handle complaints about unaffordable and irresponsible lending on our website and I've referred to it where it is relevant for me to do so. However, the vast majority of our website guidance covers regulated lending.

In this instance, some of the lending decisions that M&S Bank made predate the regulation of consumer credit lending and all of the lending decisions appear to have been made prior to when the obligations, which our current guidance is based on, were introduced.

Furthermore and, in any event, bearing in mind Mr S' response to our investigator, I think that it would be helpful for me to set out that we consider what a firm did to check whether any repayments to credit were affordable (asking it to evidence what it did) and then determine whether this was enough for the lender to have made a reasonable decision on whether to lend.

Generally, we think it's reasonable for a lender's checks to be less thorough – in terms of how much information it gathers and what it does to verify that information – in the early stages of a lending relationship.

But we might think it needed to do more if, for example, a borrower's income was low, the amount lent was high, or the information the lender had – such as a significantly impaired

credit history – suggested the lender needed to know more about a prospective borrower's ability to repay.

That said, I think that it is important for me to explain that our website does not provide a set list of mandated checks that a lender is expected to carry out on every occasion. Indeed, the requirements have not and still do not mandate a list of checks that a lender should use. Any rules, guidance and good industry practice in place over the years has simply set out the types of things that a lender could do when considering whether to lend to a prospective borrower.

It is for a lender to decide which checks it wishes to carry out, although we can form a view on whether we think what was done was fair to the extent it allowed the lender to reasonably understand whether the borrower could make their payments. Furthermore, if we don't think that the lender did enough to establish whether the repayments that a prospective borrower might have to make were affordable, this doesn't on its own mean that a complaint should be upheld.

We would usually only go on to uphold a complaint in circumstances where we were able to recreate what reasonable checks are likely to have shown – typically using information from the consumer – and this clearly shows that the repayments in question were unaffordable.

Application to Mr S' complaint - Did M&S Bank act fairly and reasonably when providing Mr S with his credit card and the limit increases on it?

M&S Bank hasn't been able to say much about the checks that it carried out at the time it accepted Mr S' application for a credit card, or agreed to increase his credit limit on the occasions that it did. It has simply been able to say that Mr S used his account in line with the terms and conditions and there were long periods of inactivity on the account.

On the other hand, Mr S says that credit card and limit increases were unaffordable for him and left him severely in debt which he has struggled to pay off ever since.

When Mr S applied for a credit card in February 2006, this not only predated the current regulator's (the Financial Conduct Authority ("FCA")) rules and guidance which came in, in April 2014, it also predated the regulation of consumer credit. Prior to April 2007, while a number of lenders signed up to various voluntary codes, a lender wasn't required to be regulated in order to provide credit.

Furthermore, while a lender was required to be regulated by the Office of Fair Trading ("OFT") from April 2007 onwards, the OFT didn't introduce its main guidance on irresponsible and unaffordable lending until March 2010. Therefore, the decisions M&S Bank made to offer Mr S credit - the decision to provide the card itself and the limit increases - took place prior to the introduction of the main regulations and standards in relation to irresponsible and unaffordable lending.

That's not to say that there weren't any expectations or standards in relation to lending at the time Mr S applied for a credit card and the limit increases were offered. The then British Bankers' Association ("BBA") had a Banking Code, which was in place at the time and represented good industry practice even if M&S Bank wasn't a member of the BBA.

However, it would be fair to say that its obligations and responsibilities were not the same as they are now. For example, the concepts of borrower focused assessments and proportionate checks were not part of the expectations or requirements at the time. And neither were concepts such as monitoring accounts and offering assistance where there were signs that the borrower may have been experiencing financial difficulty.

What subscribers to the banking code agreed to do at the time of Mr S' application for a credit card and its decision to offer limit increases, was assess whether it felt that he would be able to repay any credit provided. I therefore need to consider this part of Mr S' complaint in relation to these expectations that were in place on a lender at this time.

What's important to note is that Mr S was provided with a revolving credit facility rather than a loan. And this means that M&S Bank was required to understand whether credit limits of £6,000.00, £8,000.00, £10,000.00 and £12,150.00 could be repaid within a reasonable period of time, rather than in one go.

It's fair to say that a credit limit of £6,000.00, £8,000.00, £10,000.00 and £12,150.00 will have required relatively chunky monthly payments in order to clear the full amount that could be owed within a reasonable period of time. Although the size of the limits would suggest any assumptions regarding a reasonable period of time would probably be based on a standard term had an equivalent amount been borrowed on an unsecured personal loan. So perhaps around five to seven years.

M&S Bank hasn't been able to provide any details on what it found out about Mr S as a result of the credit checks that it carried out prior providing the card or increasing his credit limit on the occasions that it did. Given the initial card application took place almost twenty years ago and the last increase is more likely than not to have taken place more than fifteen years ago, I don't think that this lack of information is unreasonable. Therefore, I've not drawn any adverse conclusions as a result of M&S Bank not being able to provide this.

In any event, I'm also mindful that I've not been provided with any information and neither has it even been argued, that Mr S had any significant adverse information – such as defaulted accounts or county court judgments ("CCJ") recorded against him at the time of these lending decisions.

I note that Mr S has said his annual salary during the period concerned ranged between £38,000.00 and £44,000.00. So I don't think that Mr S' salary itself would have precluded M&S Bank from providing this credit card or increasing the credit limit at the respective times. Furthermore, while I've seen what Mr S has said about accumulating a debt of £58,000.00 by the time he entered into his debt management plan, this was in June 2012.

So this was Mr S' debt three years after the last of the lending decisions were made, rather than the amount Mr S owed his existing creditors at either of the respective times that M&S Bank decided to lend. In these circumstances, I can't reasonably say that M&S Bank ought to have taken this into account when it lent, or that this debt meant that Mr S shouldn't have been lent to. This is particularly as not all lenders reported on all account balances to all credit reference agencies in the period between 2006 to 2009.

M&S Bank clearly felt that Mr S could repay £6,000.00, £8,000.00, £10,000.00 and £12,150.00 within a reasonable period of time. Given, as I've explained, it's fair to say that the standards expected of lenders at this time was far more light touch than it is today, I'm not persuaded that it was unreasonable for M&S Bank to conclude that Mr S could repay £6,000.00 or £8,000.00 within a reasonable period of time.

Nonetheless, while I accept that it was the OFT's Irresponsible Lending Guidance which set out that a lender was required to carry out proportionate checks into a customer's circumstances in order to reach a reasonable determination on whether they could repay any credit provided, I'm mindful that in April 2007 and most likely July 2009, Mr S' credit limit was being increased to £10,000.00 and then £12,150.00.

I can't see how M&S Bank could reasonably have felt that Mr S would be able to repay such increased amounts without having some kind of idea about his income and expenditure. I wish to make it absolutely clear that I'm not saying that M&S Bank needed to carry out reasonable and proportionate checks, or request bank statements from Mr S, at these respective times.

What I'm saying is that given the amount M&S Bank was lending, I think that it had to have a reasonable idea of Mr S' circumstances before it could fairly and reasonably say that it felt Mr S could repay the amounts in question. As M&S Bank hasn't provided me with any indication that it did do this, I can't agree that it knew enough such that it could reasonably feel that Mr S could make the repayments to credit limits of £10,000.00 and £12,150.00 within a reasonable period of time.

Ordinarily, where a firm didn't do enough to establish that a customer could repay before providing credit or increasing the amount available to a customer, I'd usually go on to recreate reasonable and proportionate checks in order to get an indication of what such checks would more likely than not have shown.

However, Mr S says he is unable to provide us with the information we've asked him for in order to be able to assess what M&S Bank finding out more about his regular monthly living costs is likely to have shown. So I've not been provided with sufficient evidence to reasonably conclude that the limit increases were as a matter of fact unaffordable for Mr S.

I appreciate that Mr S may feel that it is unreasonable and unfair to expect him to provide information which he doesn't have and cannot reasonably be expected to have. But I also have to take into account that M&S Bank isn't required to have retained all of this information either and it was Mr S that chose to make his complaint in October 2023. As this is the case, I have to decide the complaint on what I have before me.

It is only fair and reasonable for me to uphold a complaint in circumstances where I can clearly see that a lender provided credit when it is clear that it ought to have known that it was unaffordable. For reasons I will explain in the next section of this final decision, I don't think that the fact that Mr S may have been using his card to gamble in itself means that the credit limit increases shouldn't have been provided to him either.

Equally, bearing in mind M&S' obligations at the respective times, I don't think that Mr S taking out a consolidation loan – potentially between the final two limit increases – in itself demonstrates these credit limit increases shouldn't have been provided. I think it's important to remember that the requirements on a lender to monitor how a customer used a revolving credit account and consider the individual transactions didn't yet exist.

Furthermore, it's worth noting that Mr S' credit limit was actually decreased in October 2007. I don't know why Mr S' limit was decreased in October 2007. However, I suspect that the increase that took place between then and July 2009 may well have been because Mr S used some of the proceeds from the consolidation loan to reduce his M&S Bank card balance. M&S Bank is likely to have viewed this payment positively and concluded that Mr S was maintaining his account well.

So overall and having carefully considered everything and while I appreciate that this will disappoint Mr S, I've not been persuaded that M&S finding out more about his regular living costs, is more likely than not to have shown it that it shouldn't have provided the final two credit limit increases either.

Other matters

Mr S has referred to a number of different regulations in support of his argument that M&S Bank failed to treat him fairly and reasonably by taking account of his gambling. Amongst other things, Mr S has referred to the FCA's Consumer Duty and its Consumer Credit Sourcebook ("CONC"). Mr S has also referred to guidance published on our website.

I've thought about what Mr S has said and it is clear that he has carried out a significant amount of research. However, CONC didn't come into force until the FCA became the regulator of consumer credit on 1 April 2014. Furthermore, the Consumer Duty didn't come into force until much later than this - the end of July 2023. As Mr S' account defaulted in January 2013, the provisions Mr S has referred to weren't in force during the time his account was live and I cannot apply them retrospectively.

As I've explained, earlier on in this decision, the guidance on our website - including that referring to gambling related harm - is based on the obligations lenders have had since regulation came into force. So bearing in mind the period of time that M&S Bank was lending to Mr S this guidance also has limited application to his complaint.

In reaching my conclusions, I've noted that since 2020, the Gambling Commission has banned gambling companies, from within the United Kingdom ("UK"), accepting payments made by credit card. It's important to note that this is a restriction the gambling regulator has made on how gambling companies accept bets or payments.

This isn't quite the same as a lender being prohibited from allowing gambling transactions on a credit card. Although in practice most, if not all, lenders have since taken steps to stop funds lent on a credit card being used to gamble. For example, the terms and conditions of a card may prevent a credit card being used for gambling transactions and many lenders also refuse to process transactions using certain merchant codes.

I therefore accept that the rules, obligations and voluntary measures now in place mean it is unlikely that a borrower taking out a credit card now would be able to run their account in the way that Mr S ran his M&S Bank card (i.e. using it to make significant gambling transactions and accrue the debt that he did). In these circumstances and looking at today's standards, I can understand why Mr S may feel that M&S Bank has treated him unfairly during the period he had his account.

However, I can't view whether M&S Bank treated Mr S fairly and reasonably through the prism of today's standards. All I can do is consider its actions against the rules, obligations and expectations that were in place at the time and make a call whether it acted fairly and reasonably at that stage. Having done so, I've not seen anything to indicate that M&S Bank failed to act in accordance with what was expected of it at the time.

I've also noted that Mr S is unhappy that M&S Bank hasn't retained information on his account as long as some other financial institutions have done so. I can understand why Mr S may feel that the lack of records held by M&S Bank has hampered his complaint. However, I do nonetheless need to consider that not only is M&S Bank not required to retain information indefinitely, it is also only permitted to hold information on a customer for as long as it is necessary to do so.

It is fair to say that some institutions keep information for longer than others. There are no hard and fast rules. But an institution will consider things such as when an account was being provided and whether it is still being actively used.

In this case, I need to keep in mind and consider that Mr S applied for his credit card approaching twenty years ago. His account was also defaulted more than twelve years ago.

In these circumstances, it's difficult to see what legitimate reason M&S Bank would have to retain information regarding its decisions to lend, or about Mr S' individual transactions this long after the account stopped being actively used. There is an outstanding balance which Mr S has been making payments to. But this doesn't require the granularity of the individual transactions on the account, prior to it defaulting.

As this is the case and I've, in any event, been able to reach a conclusion on whether M&S Bank met its obligations to Mr S during the period I've considered, I'm not persuaded that he has lost out as a result of M&S Bank's decision not to retain this information. Therefore, I don't think that M&S Bank being unable to provide this information means that it failed to treat Mr S fairly and reasonably either.

Overall, and based on the available evidence I don't find that Mr S' relationship with M&S Bank was unfair. I've not been persuaded that M&S Bank created unfairness in its relationship with Mr S by irresponsibly lending to him, whether when initially agreeing to provide him with a credit card, or in respect of the credit limit increases. I don't find M&S Bank treated Mr S unfairly in any other way either based on what I've seen.

So overall and having considered everything, while I can understand Mr S' sentiments and appreciate why he is unhappy, I'm nonetheless not upholding this complaint. I appreciate this will be very disappointing for Mr S. This is particularly as he has carried out a significant amount of research and clearly feels strongly about this matter. However, I hope he'll understand the reasons for my decision and that he'll at least feel his concerns have been listened to.

My final decision

For the reasons I've explained, I'm not upholding Mr S' complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 16 April 2025.

Jeshen Narayanan
Ombudsman