

Complaint

Mr J complains that BMW Financial Services (GB) Limited (trading as “Alphera” Financial Services) unfairly entered into a hire-purchase agreement with him.

He’s said that the finance was unaffordable and this resulted in him having to borrow elsewhere to make his repayments which eventually saw him defaulting on the agreement.

Background

In March 2012, Alphera provided Mr J with finance for a used car. The purchase price of the vehicle was £59,995.00. Mr J made an advance payment of £11,292.91¹ and entered into a 48-month hire-purchase agreement with Alphera for the remaining £48,702.09 he required.

The loan had interest, fees and total charges of £13,633.62 (made up of interest of £13,386.62, a credit arrangement fee part 1 of £148, a credit arrangement fee part 2 of £89 and a £10 option to purchase fee). The balance to be repaid of £62,336.61 was due to be repaid in a first monthly payment of £994.93, followed by 46 monthly repayments of £845.93 followed by an optional final payment of £22,428.00 which Mr J had to pay if he wished to keep the car.

The available information shows that while Alphera terminated Mr J’s agreement in 2014, Mr J continued making the payments to it up until May 2018.

In April 2024, Mr J complained to Alphera saying that it shouldn’t have entered into this hire-purchase agreement with him, as it ought to have realised that it was unaffordable for him and this resulted in him having to borrow elsewhere to make his repayments which saw him defaulting on the agreement. Alphera didn’t uphold Mr J’s complaint. As Mr J remained dissatisfied, he referred the matter to our service.

When it provided its file of papers on Mr J’s complaint, Alphera told us that it considered that the complaint was made too late. Mr J’s complaint was considered by one of our investigators. He reached the conclusion that proportionate checks would not have shown Alphera that it shouldn’t have entered into the hire-purchase agreement with Mr J. So he didn’t think that Mr J’s complaint should be upheld.

Mr J disagreed with our investigator and the complaint was passed to an ombudsman for a final decision.

My findings

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

¹ It’s unclear from the agreement whether the deposit was paid in cash, or whether this is the amount Mr J was left with once what was required to settle his previous Alphera agreement was deducted from the part exchange value of his existing vehicle.

Basis for my consideration of this complaint

There are time limits for referring a complaint to the Financial Ombudsman Service. Alphera has argued that Mr J's complaint was made too late because he complained more than six years after the decision to provide the finance 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 J's complaint as being one alleging that the relationship between him and Alphera was unfair to him as described in s140A of the Consumer Credit Act 1974 ("CCA"). He 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 J's complaint. Given the reasons for this, I'm satisfied that whether Mr J's complaint was made in time or not has no impact on that outcome.

I'm also in agreement with the investigator that Mr J's complaint should be considered more broadly than just the lending decision. I consider this to be the case as Mr J has not only complained not about Alphera's decision to lend to him, he has also alleged that this resulted in him having to borrow elsewhere to make his repayments and he, in any event, ended up defaulting on the agreement

I'm therefore satisfied that Mr J's complaint can therefore reasonably be interpreted as a complaint about the overall fairness of the lending relationship between him and Alphera. I acknowledge Alphera still may not agree we can look Mr J'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 J's case, I am required to take relevant law into account. As, for the reasons I've explained above, I'm satisfied that Mr J's complaint can be reasonably interpreted as being about the fairness of the lending relationship between him and Alphera, 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 (Alphera) and the debtor (Mr J), 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 J's complaint, I therefore need to think about whether Alphera's decision to lend to Mr J, or its later actions resulted in the lending relationship between Mr J and Alphera being unfair to Mr J, such that it ought to have acted to put right the unfairness – and if so whether it did enough to remove that unfairness.

Mr J's relationship with Alphera is therefore likely to be unfair if it didn't carry out reasonable and proportionate checks into Mr J's ability to repay in circumstances where doing so would have revealed the monthly payments to the agreement to have been unaffordable, or that it was irresponsible to lend. And if this was the case, Alphera didn't then somehow remove the unfairness this created.

I'll now turn to whether Alphera acted fairly and reasonably when entering into the hire-purchase agreement with Mr J.

What we consider when looking at complaints about irresponsible or unaffordable lending

We've explained how we handle complaints about irresponsible and unaffordable lending on our website. And I've used this approach to help me decide Mr J's complaint.

I think that it would be helpful for me to set out that we consider what a firm did to check whether repayments to credit were affordable (asking it to evidence what it did) and 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 regulator's rules and guidance did not and still do not mandate a list of checks to be used. It simply sets out the types of things that a lender could do.

It is for a lender to decide which checks it wishes to carry out, although we can form a view on whether what was done was proportionate to the extent it allowed the lender to reasonably understand whether the borrower could make their payments.

Bearing in mind Mr J's response to our investigator, I also think that it is important for me to explain that even if we don't think that the lender did enough to establish whether the repayments to an agreement were affordable, this on its own doesn't 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 and proportionate checks are likely to have shown – typically using information from the consumer – and this clearly shows that the repayments in question were unaffordable.

I've kept this in mind when deciding Mr J's complaint.

Application to Mr J's complaint - Was Alphera's decision to enter into a hire-purchase agreement with Mr J, in March 2012, fair and reasonable?

Alphera suggests that various factors - such as Mr J's credit score, what he owed to other lenders, his existing indebtedness; whether he had any credit cards and/or payday loans; his

employment status and the amount of the monthly payment to this agreement – were all considered before Mr J's application was accepted.

This may well have been the case. However, while I accept that there may be valid reasons for this, nonetheless Alphera hasn't provided us with the specifics of what it learned about Mr J particular circumstances as result of enquiring into the various factors that it says it did.

On the other hand, Mr J has said that the finance was unaffordable and this resulted in him having to borrow elsewhere to make his repayments which saw him defaulting on the agreement.

I've thought about what Mr J and Alphera have said.

The first thing for me to say is that while I'm sympathetic to the fact that Alphera is no longer required to have this information, nonetheless I'm not in a position to agree that Alphera did take reasonable steps to understand whether Mr J could afford the monthly payments. And in these circumstances, I'm not in a position where I can reasonably say that it did complete fair, reasonable and proportionate affordability checks before entering into this hire-purchase agreement with Mr J.

As this is the case, I find that there is insufficient evidence for me to reasonably conclude that Alphera carried out proportionate checks before agreeing to lend to Mr J.

However, as I explained earlier, even though I don't think that Alphera did enough to establish whether the repayments to this agreement were affordable, this doesn't on its own mean that Mr J's complaint should be upheld. This is because where a firm failed to carry out reasonable and proportionate checks 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 J is unable to provide us with the information we require in order to be able to assess what Alphera finding out more about his circumstances is likely to have shown. So I've not been provided with sufficient evidence to reasonably conclude that the monthly payments to this agreement were as a matter of fact unaffordable for Mr J.

I appreciate that Mr J has said it is unreasonable and unfair to expect him to provide information which he doesn't have and cannot reasonably be expected to have. This is particularly as he has provided a letter from his bank confirming that it is no longer holds his bank statements from the time on its systems.

However, I also have to take into account that Alphera isn't required to have retained information on its checks either. This is particularly as the agreement was fully settled in 2018 and it was Mr J that chose to make his complaint a number of years after this in April 2024. As this is the case, I have to decide the complaint on what I have before me.

Equally, it is only fair and reasonable for me to uphold a complaint in circumstances where I can see that any credit provided was unaffordable. And I'm afraid that I've not been provided with sufficient evidence which corroborates what Mr J has said about not being able to make the monthly payments. Indeed, while I've noted what Mr J has said about having to borrow elsewhere in order to do so, I've noted that he did make his payments for more than a year after the start of the agreement.

For the sake of completeness, I would also add that while this isn't in itself determinative, it's worth noting that Mr J had made all the repayments as they fell due on his previous Alphera

agreement. The monthly payments on that agreement (at just under £1,600.00) were significantly higher than the monthly payments on this agreement.

Furthermore, Alphera was entitled to consider its previous dealings with Mr J as part of its checks. And Mr J's record of making payments (that were almost double the amount required on this one) on his previous agreement will have added some support to the fact that the monthly payments on this agreement were affordable for him.

In reaching my conclusions on this matter, I do accept that Mr J has said that his circumstances changed drastically in the period between the agreements being taken. I've also seen what Mr J has said about going through a difficult time when he applied for this finance and so he wasn't thinking straight about how he could afford the payments. In the first instance, I want to say that I'm sorry to hear about Mr J's situation and fully appreciate that he must have been going through a difficult time.

However, I also have to consider Mr J's submissions about the change in his financial circumstances in the context that they are now being made in support of a claim for compensation. Whereas at the time of sale, at least, Mr J clearly wanted the car he had chosen and it's fair to say that any explanations he would have provided would have been with a view to persuading Alphera to lend rather than highlighting the agreement was unaffordable.

In these circumstances, I think that it is unlikely – and certainly less likely than not – that Mr J would have dissuaded Alphera from relying on his payment record on his more expensive agreement, when deciding to enter into this hire-purchase agreement with him.

Overall and having carefully considered everything, I've not been provided with sufficient evidence to be persuaded that Alphera's checks before entering into this hire-purchase agreement with Mr J went far enough. Nonetheless I've also not been provided with sufficient evidence to be reasonably persuaded that Alphera carrying out such checks would have prevented it from providing these funds, or entering into this agreement with Mr J.

As this is the case, I don't find that the lending relationship between Mr J and Alphera was unfair to Mr J. I've not been persuaded that Alphera created unfairness in its relationship with Mr J by irresponsibly lending to him when it entered into this hire-purchase agreement with him. And I don't find Alphera treated Mr J unfairly in any other way either based on what I've seen.

So overall and having considered everything, while I can understand Mr J's sentiments and appreciate why he is unhappy, I'm nonetheless not upholding this complaint. I appreciate that this will be very disappointing for Mr J – particularly as it is clear that he feels strongly about this matter. But 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

My final decision is that I'm not upholding Mr J's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J to accept or reject my decision before 6 May 2025.

Jeshen Narayanan

Ombudsman