

Complaint

Ms M has complained about the overdraft charges Clydesdale Bank Plc (trading as “Virgin Money”) applied to her current account.

Ms M is being represented, by the (“representative”), in her complaint.

The representative has said the charges applied to Ms M’s account were unfair as there was a failure to take account her patterns of reliance on debt and hardcore borrowing. In the representative’s view, there was no proper consideration of the longer-term impact of the borrowing on her.

Background

Ms M appears to have had an overdraft on her Virgin Money account from at least 2007. The limit was steadily increased until it reached £2,500.00 in December 2017. In October 2024, the limit on the overdraft was reduced to £100.

In July 2024, Ms M complained saying that she was allowed to continue using the overdraft in a way that was unsustainable and caused her continued financial difficulty.

Virgin Money did not uphold Ms M’s complaint. This was because it considered that it didn’t need to consider parts of Ms M’s complaint as it was made too late and for the parts that it did consider it didn’t think that it had done anything wrong or unfairly. Ms M was dissatisfied at Virgin Money’s response and referred her complaint to our service.

One of our investigators reviewed what Ms M and Virgin Money had told us. She reached the conclusion that she wasn’t persuaded that Virgin Money had acted unfairly by allowing Ms M to use her overdraft in a way that was unsustainable or otherwise harmful. So the investigator didn’t recommend that Ms M’s complaint be upheld.

The representative, on Ms M’s behalf, disagreed with the investigator and asked for an ombudsman’s 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.

Basis for my consideration of this complaint

There are time limits for referring a complaint to the Financial Ombudsman Service. Virgin Money has argued that Ms M’s complaint was made too late because she complained more than six years after some of the charges on the overdraft were applied, as well as more than three years after she ought reasonably to have been aware of her cause to make this complaint.

Our investigator explained why Ms M's complaint was one alleging that the lending relationship between Ms M and Virgin Money was unfair to Ms M 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 Ms M's complaint. Given the reasons for this, I'm satisfied that whether Ms M's complaint about some of the specific charges applied was made in time or not has no impact on that outcome.

I'm also in agreement with the investigator that Ms M's complaint should be considered more broadly than just the individual charges or lending decisions. I consider this to be the case as Ms M has not only complained about the circumstances behind the application of the individual charges, but also the fact Virgin Money's failure to act during the periods she alleges it ought to have seen she was experiencing difficulty caused ongoing hardship.

I'm therefore satisfied that Ms M's complaint is a complaint alleging that the lending relationship between herself and Virgin Money was unfair to her. I acknowledge the possibility that Virgin Money may still disagree that we are able to look at the whole of Ms M's complaint, but given the outcome I have reached, I do not consider it necessary to make any further comment or reach any findings on these matters.

In deciding what is fair and reasonable in all the circumstances of Ms M's case, I am required to take relevant law into account. As, for the reasons I've explained above, I'm satisfied that Ms M's complaint can be reasonably interpreted as being about that her lending relationship with Virgin Money was unfair to her, 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 (Virgin Money) and the debtor (Ms M), 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 Ms M's complaint, I therefore need to think about whether Virgin Money's allowing Ms M to use her overdraft in the way that it did, resulted in the lending relationship between Ms M and Virgin Money being unfair to Ms M, such that it ought to have acted to put right the unfairness – and if so whether it did enough to remove any such unfairness.

Ms M's relationship with Virgin Money is therefore likely to be unfair if it allowed Ms M to continue using her overdraft in circumstances where it ought reasonably to have realised that the facility had become unsustainable or otherwise harmful for her. And if this was the case, Virgin Money didn't then remove the unfairness this created somehow.

Did Virgin Money unfairly allow Ms M to continue using her overdraft in a way that was unsustainable or otherwise harmful for her?

Before I go any further, as this essentially boils down to a complaint that Ms M was unfairly charged as a result of being allowed to continue using her overdraft, I want to be clear in saying that I haven't considered whether the various amounts Virgin Money charged were fair and reasonable, or proportionate in comparison to the costs of the service provided. Ultimately, how much a bank charges for its services is a commercial decision. And it isn't something for me to get involved with.

That said, while I'm not looking at Virgin Money's charging structure per se, it won't have acted fairly and reasonably towards Ms M if it applied this interest, fees and charges to Ms M's account in circumstances where it was aware, or it ought fairly and reasonably to have been aware Ms M was experiencing financial difficulty. So I've considered whether there was an instance, or there were instances, where Virgin Money didn't treat Ms M fairly and reasonably.

In other words, I've considered whether there were periods where Virgin Money continued charging Ms M even though it ought to have instead stepped in and taken corrective measures on the overdraft as it knew, or it ought to have realised, that she was in financial difficulty.

Having looked through Ms M's account statements throughout the period she was being charged, I can't see that Virgin Money ought reasonably to have unilaterally taken corrective measures in relation to Ms M's overdraft. I accept that Ms M used her overdraft and there is no dispute over that.

However, the representative's arguments appear to suggest that this in itself means that Ms M was experiencing financial difficulty and therefore the complaint should be upheld. But I think that it is far too simplistic to say that it automatically follows that a customer was in financial difficulty simply because they were using a financial product that they had an agreement to use and which they were entitled to use.

I accept that the rules, guidance and industry codes of practice all suggest that prolonged and repeated overdraft usage can sometimes be an indication of financial difficulty. However, this is not the same as saying that prolonged and repeated overdraft usage by a customer will always mean that they are, as a matter of fact, in financial difficulty. Indeed, if that were automatically the case, there would be an outright prohibition on revolving credit accounts being open ended, rather than there being a requirement for a lender to review how the facility is being used.

So I think it's important to look at overall circumstances of a customer's overdraft usage as part of considering their overall financial position. And, in this case, I've considered Ms M's incomings and outgoings as well as any overdrawn balances and thought about whether it was possible for her to have stopped using her overdraft, based on this.

I think that if Ms M was locked into paying charges in circumstances where there was no reasonable prospect of her exiting her overdraft then her facility would have been unsustainable for her. So I've carefully considered whether this was the case. The first thing for me to say is that Ms M was in receipt of credits that were sufficient to clear the overdraft within a reasonable period of time.

Furthermore, I'm satisfied that Ms M's case isn't one where the borrower was in their overdraft with no reasonable prospect of returning to a credit balance. Indeed, there are times where Ms M received influxes of funds and could have removed the overdraft.

Although I do accept that there were periods of times where Ms M would have met the criteria of someone who displayed a pattern of repeat use of their overdraft. For the avoidance of doubt, I accept that there is a section of CONC (CONC 5D) which came into force in December 2019 which specifically relates to this.

However, even if Virgin Money didn't meet all of the requirements set out in CONC 5D, I wish to make it clear that I don't think that simply sending letters will mean that a lender met all of its obligations, I'd still need to consider whether Ms M lost out as a result of any potential failing. I've also therefore considered whether Ms M's use of her overdraft (and Virgin Money continuing to allow her to use it) was causing her to incur high cumulative charges that were harmful to her. And having considered matters, I'm satisfied that this isn't the case.

To explain, while I'm not seeking to make retrospective value judgements over Ms M expenditure, there are significant amounts of non-committed, non-contractual and discretionary transactions going from Ms M's account.

Given the repeat usage letters Ms M is likely to have been sent by Virgin Money, I think that she ought to have realised that how much she was paying as a result of using her account in this way. So I don't agree that Ms M was using her overdraft purely for essential spending, or because she had a reliance on credit to get by, as the representative says.

Equally, while I've noted what the representative has said about Ms M borrowing elsewhere, I can't see anything in the account transactions which ought to have alerted Virgin Money to the possibility that Ms M was borrowing unsustainably, or that the charges she was incurring was causing her harm either.

Ms M did have other credit commitments but this in itself does not mean that she was reliant on credit to meet her essential expenditure. Finally, I can't see that this was a case where Ms M was always towards the top end of her limit and maxing out the funds available to her either.

I accept neither of these things in themselves (or when taken together) mean that Ms M wasn't experiencing difficulty. But I don't agree that Ms M was reliant on credit. She was able to make any essential commitments without using her overdraft. However, Virgin Money was reasonably entitled to conclude that she was choosing to use her overdraft to make discretionary transactions and in periods where she had increased funds her discretionary expenditure increased.

As the representative has made repeated references to CONC 5D, I also wish to make it clear that it isn't simply the case that a customer should never be allowed to make discretionary payments from an overdraft. Indeed, its argument appears to be suggesting that a corrective action should be taken against a customer every time they meet the criteria for being sent a letter, irrespective of the circumstances. However, the rules and guidance aren't as blunt a tool as this. The position is far more nuanced.

The representative's interpretation runs contrary to the purpose of the rules and guidance which is to ensure that customers are protected from high cumulative charges where they are likely to cause harm. The rules and guidance aren't to prevent the use of overdraft in all circumstances where a repeat use letter has been sent in the way that the representative's argument suggests.

Even more importantly the representative's argument is at odds with the concept of proportionality – a firm should take action proportionate to the circumstances. This concept of proportionality runs right through CONC 5 as a whole. Given the amount of funds Ms M's

account was in receipt of, I'm not persuaded that Virgin Money ought reasonably to have realised that Ms M's overdraft usage was causing her harm.

I've also seen what the representative has said regarding CONC 5D.3.2R (3). However, CONC 5D.3.2 R (1) makes it clear that CONC 5D.3.2R only applies to customers who have a pattern of repeat use *AND* there are signs of the customer being in actual or potential difficulty.

In the first instance, it's worth noting that there isn't any suggestion that Ms M contacted Virgin Money to explain that she was experiencing difficulty, or that she needed help in repaying her overdraft, prior to her complaint. It looks like there was contact about potentially reducing the overdraft but Ms M wanted to discuss matters with her partner before doing this. Furthermore, given I've not seen anything in Ms M's statements, indicating that there were any of the signs highlighted in CONC 1.3, I'm satisfied that this isn't a case where there were signs of Ms M potentially, or actually being in financial difficulty.

As this is the case, I'm satisfied that the applicable section of CONC 5D, to Ms M's circumstances, is CONC 5D.3.1, rather than CONC 5D.3.2. CONC 5D.3.1 permits a firm to employ more subtle techniques such as sending a customer a further letter. As this is the case, I don't think that Virgin Money was under an obligation to call Ms M in the way that the representative has suggested.

Overall and having considered everything, I don't think that it was unreasonable for Virgin Money to have proceeded adding the charges that it did. This is particularly bearing in mind the consequences of Virgin Money taking corrective action, in the way that it would have done had it acted in way that the representative is suggesting it should have, would have been disproportionate.

I say this because I don't think that it would have been proportionate for Virgin Money to demand that Ms M immediately repay her overdraft and if not defaulting her account, in circumstances where there was a realistic prospect of Ms M clearing what she owed in a reasonable period of time.

Therefore, I don't find that the relationship between Ms M and Virgin Money was unfair to Ms M. I've not been persuaded that Virgin Money created unfairness in its relationship with Ms M by allowing her to use her overdraft in the way that she did. Based on what I've seen, I don't find Virgin Money treated Ms M unfairly in any other way either.

So overall and having considered everything, while I can understand Ms M's sentiments and appreciate why she is unhappy, I'm nonetheless not upholding this complaint. I appreciate this will be very disappointing for Ms M. But I hope she'll understand the reasons for my decision and that she'll at least feel her concerns have been listened to.

My final decision

For the reasons I've explained, I'm not upholding Ms M's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms M to accept or reject my decision before 18 August 2025.

Jeshen Narayanan
Ombudsman