DRN-5971116

The complaint

Mr J complains Creation Consumer Finance Ltd (Creation) unfairly charged him interest on his credit account after he bought an item on a Buy-Now-Pay-Later (BNPL) basis.

What happened

I issued my provisional decision on this complaint on 12 November 2024. An extract from that decision can be found below, which also forms part of this decision.

In March 2022, Mr J opened a running credit account with Creation with a £5,000 credit limit that allowed him to make purchases on a BNPL basis. Mr J used the account to agree to (and settle) two such purchases within the interest-free period with no issue.

On 25 November 2023, Mr J bought a third item from one of Creation's retail partners on a BNPL basis. Under this credit agreement, Mr J had to pay the amount he borrowed (£2,677.99) on or before 25 November 2024 to avoid being charged interest. Otherwise, interest was chargeable on the remaining balance from the date of purchase.

Mr J missed the 25 November 2024 deadline and hadn't made any repayments by then. So Creation charged him £934.65 of backdated interest, followed by a further £67.77 (in December 2024) and £25.32 (in January 2025) of interest charges. Mr J complained to Creation in early December 2024 about the lack of warnings around the deadline.

On 8 January 2025, Creation sent Mr J its final response rejecting his complaint. It said the 25 November 2024 deadline was mentioned in the two monthly statements leading up to it, available on its online portal. And explained it had sent Mr J email reminders on 2 May 2024, 3 September 2024 and 2 October 2024 and did enough to remind him of the deadline.

Our investigator agreed with Creation for broadly the same reasons.

Mr J disagreed, citing a lack of evidence for those reminders being sent. He also said the term allowing Creation to charge backdated interest was unfair, and the amount charged so high that it amounted to an unfair penalty. The complaint has now come to me for a decision.

What I've provisionally 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.

I've summarised the complaint in my own words, and I won't be responding to every argument. No discourtesy is intended by this. Our rules allow me to do this given the informal nature of our service. If I've not mentioned something, it isn't because I've ignored it. Rather, I'm satisfied I only need to focus on what I consider key to reach a fair outcome.

I say this while having Mr J's substantial submissions in particular in mind. He has cited multiple regulations, statute, and case law, to evidence Creation's obligations to him. He asserts, for example, that Creation has a duty to be transparent with him, ensure charges

are proportionate, disapply unfair contract terms, and to treat its consumers fairly. As I accept these obligations exist, I've focused on whether Creation has acted in line with them.

"Special Offer Date" reminders

Mr J said Creation didn't do enough to remind him about the "Special Offer Date". This is the term in the agreement that refers to the 25 November 2024 deadline by which Mr J had to repay what he borrowed to avoid being charged interest.

In principle, I agree Creation had to make it clear to him the 12-month BNPL period was coming to an end. Although there isn't any regulation that mandates a firm to specifically warn its consumers about such deadlines, I'd expect Creation to do so as part of its regulatory duty to communicate information clearly and fairly and pay due regard to its consumers' interests. Such warnings are common industry practice.

Mr J said he didn't receive the 2 May 2024, 3 September 2024, and 2 October 2024 email reminders warning him about the 25 November 2024 deadline, and doubts they were sent. While I accept that's possible, I need to decide if Creation had likely sent those reminders.

Ideally, there'd be copies of emails definitively showing Creation sent the reminders. However, simply because Creation cannot produce those emails now doesn't necessarily mean they were never sent. I say that because the BNPL reminder emails are system-generated template reminders that Creation, as a matter of policy, doesn't keep copies of. Instead, Creation logs an entry on its system every time such emails are sent.

Creation provided timestamped system records aligning with the May, September, and October 2024 dates above, indicating when the emails were sent. It also provided a copy of the template used, clearly outlining the Special Offer Date. I think it's unlikely these records would exist if those emails weren't sent. While I appreciate the amount of proof doesn't meet Mr J's expectations, I'm satisfied on balance Creation sent these emails.

Even if Creation hadn't sent these emails, Creation provided evidence showing Mr J registered for its online portal on 15 August 2023, providing him access to both the credit agreement and online statements, including statements for October and November 2024. On the front page of those statements is an "Important Information" box, prominently reminding Mr J he had to repay £2,677.99 by 25 November 2024 to avoid being charged interest from the date of purchase. I find these available statements, on their own, to constitute sufficient warning of the Special Offer Date.

Considering all the above, I find Creation gave enough warning to Mr J to ensure he was made aware of the 25 November 2024 deadline.

Unfair contract terms

Even if Creation had reminded Mr J of the Special Offer Date, he argues the term allowing Creation to charge interest on the full balance from the date of purchase is an unfair contract term according to the Consumer Rights Act 2015 (CRA), section 62.

Under section 62 of the CRA, a contract term might be unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.

However, some contract terms are exempt from fairness considerations under section 64 of the CRA. The relevant part states:

"64 Exclusion from assessment of fairness

(1) A term of a consumer contract may not be assessed for fairness under section 62 to the extent that—
   a. It specifies the main subject matter of the contract, or
   b. The assessment is of the appropriateness of the price payable under the contract by comparison with the goods, digital content or services supplied under it.

(2) Subsection (1) excludes a term from an assessment under section 62 only if it is transparent and prominent.

(3) A term is transparent for the purposes of this Part if it is expressed in plain and intelligible language and (in the case of a written term) is legible.

(4) A term is prominent for the purposes of this section if it is brought to the consumer's attention in such a way that an average consumer would be aware of the term…"

The upshot of the above section as it relates to Mr J's circumstances is that any terms that are (a) transparent and prominent, and (b) about either the price or main subject matter of a loan, aren't assessable for "fairness".

The explanatory notes to section 64 of the CRA explain that a term is not transparent and prominent if it's "in the small print" of the contract. That's clearly not the case here.

I say that because when Mr J signed up for Creation's credit facility allowing him to make BNPL purchases in March 2022, he was sent an acceptance letter stating, on the first page, that "any balance left to pay after this date will incur interest from the date of your purchase at the rate specified in your credit agreement". The term was also placed in a box to give it further prominence. The second page lists important information and also cites the relevant term under the heading "interest" – which states:

"If you repay in full the sum detailed in the [BNPL] transaction as being payable before the end of the [BNPL] period no interest will be payable. If you do not repay in full before the end of the [BNPL] period, interest at the rate shown above will be payable from the date that transaction was made on any amount not paid off by you."

I think the wording is plain, intelligible, and understandable to the average consumer. And overall, I find Creation made the term both transparent and prominent. That means I need to consider whether the term relates to the price or main subject matter of the loan, as set out in section 64(1) of the CRA, to see if it's assessable for fairness.

In Office of Fair Trading v Abbey National plc and others [2009] UKSC 6, [2010] 1 AC 696, the Supreme Court considered whether unauthorised overdraft charges could be assessed for fairness in relation to regulation 6(2) of The Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR). Regulation 6(2) provides:

"In so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate to – (a) to the definition of the main subject matter of the contract, or (b) to the adequacy of the price or remuneration, as against the goods or services supplied in exchange."

While I appreciate the relevant regulation at the time of the court's decision was different, the CRA makes clear that regulation 6(2) of the UTCCR was replaced by section 64 of the CRA, and the case above is still the leading authority on the interpretation of the CRA section.

The key issue for the court concerned regulation 6(2)(b) of the UTCCR, and the types of terms relating to the "price or remuneration" of a bank's services which are therefore exempt from fairness considerations. And in particular, the charges for an unauthorised overdraft.

Contrary to the more restrictive approach taken by the Court of Appeal, the Supreme Court unanimously held the terms setting out the charge for using an unauthorised overdraft fell within regulation 6(2)(b) and cannot be assessed for fairness. Such charges, despite their contingent nature, are considered the "price and remuneration" for the provision of an unauthorised overdraft service, notwithstanding the service was one of many a bank provides. At paragraph 47, Lord Walker stated:

"Charges for unauthorised overdrafts are monetary consideration for the package of banking services supplied to personal current account customers. They are an important part of the banks' charging structure…The facts that the charges are contingent, and that the majority of customers do not incur them, are irrelevant. On the view that I take of the construction of regulation 6(2), the fairness of the charges would be exempt from review in point of appropriateness under regulation 6(2)(b) even if fewer customers paid them and they formed a smaller part of the banks' revenue stream."

He goes on to conclude:

"I would declare that the bank charges levied on personal current account customers in respect of unauthorised overdrafts (including unpaid item charges and other related charges) constitute part of the price or remuneration for the banking services provided and, in so far as the terms giving rise to the charges are in plain and intelligible language, no assessment under the [UTCCR] of the fairness of those terms may relate to their adequacy as against the services supplied."

I appreciate that case was about bank charges, while Mr J's objection relates to the terms justifying £934.65 of interest charged on a loan. However, the principles discussed in the above case are helpful in deciding if section 64(1)(b) of the CRA applies here.

Mr J's circumstances are less complex than those the Supreme Court dealt with. Creation provides a variety of lending services. Mr J used those services to borrow £2,677.99 from Creation on a BNPL basis, as set out in the credit agreement.

The service provided is a more complex credit package than a simple loan. Like a regular loan, interest is charged at an agreed interest rate (34.82% APR) on the amount borrowed (£2,677.99) from the date of the borrowing (or date of purchase here). But with this BNPL agreement, Mr J is afforded further flexibility.

He can either (a) repay what he borrowed in 12 months, and incur no interest, (b) repay some of it back within that period and incur interest on the remaining balance, or (c) not repay anything in that period — with the effect the loan becomes similar to a standard loan, with interest chargeable on the original amount borrowed from the outset.

The terms that describe these core features, including that interest is chargeable from the date of purchase, are part and parcel of how the loan is fundamentally priced. And the interest charged according to those terms is the "price and remuneration" or "price payable" for this particular financial service. As those terms are transparent and prominent, I think it's unlikely a court would find them assessable for "fairness" under section 64(1)(b) of the CRA.

Even if I thought the term wasn't exempt under section 64(1)(b) of the CRA, I wouldn't consider the term unfair. I say that while paying careful consideration to Mr J's assertion that

the £934.65 interest charge, resulting from "retroactive" interest, is an unfair penalty charge, especially given the lack of a grace period to repay the balance after the 12-month deadline.

He also argues the £934.65 charge is disproportionate, as the amount charged isn't reflective of either the cost to Creation's business or of his culpability following his offer to repay the full balance immediately after the deadline. He concludes the relevant term creates a significant imbalance in the parties' rights and obligations in the contract to his own detriment and should be disapplied.

I accept there is some support at common law and in the CRA that a disproportionately high penalty charge might amount to an unfair contract term. Part 1 of Schedule 2 of the CRA gives a grey list of terms that are potentially unfair. The only one that has any sort of relevance to Mr J's argument is sixth on the list. It states:

"A term which has the object or effect of requiring a consumer who fails to fulfil his obligations under the contract to pay a disproportionately high sum in compensation" might be unfair.

While I appreciate the £934.65 interest charge was applied as a lump sum, I don't think it can fairly be construed as a penalty charge. It's not, for example, a charge levied on Mr J due to his failure "to fulfil his obligations" under the contract. I say that because under the agreement, Mr J is entitled to not repay any amount during the 12-month BNPL period without breaching the contract and incurring a penalty charge. And so I don't think his situation fits the example of a potentially unfair term as set out in the CRA.

I note the CRA's grey list is non-exhaustive. But in the circumstances, I'm not persuaded the terms relating to the price of the loan, including those setting out the interest rate or the date interest is charged from, are unfair. The £934.65 charge is simply reflective (and directly proportionate) to Mr J borrowing £2,677.99 for 12 months at the agreed interest rate.

The fact the interest was backdated is a necessary consequence of how flexibility operates within the charging structure. It cannot be known what interest is chargeable until the 12 months is up. Like our investigator said, this is similar to how other BNPL products operate in the industry. It's also similar to how other 0% interest-free loan products in the wider market operate. The deferred interest model is not unusual, and the interest was ultimately avoidable should Mr J have repaid what he borrowed within the 12 months.

In summary, I don't think the relevant term Mr J is contesting is assessable for fairness under the CRA. But even if it were, I'm not persuaded the terms relating to the price of the loan, including the term outlining how interest is deferred, creates a "significant imbalance" between the parties.

I don't think the term stating interest is chargeable from the date of purchase is likely to be deemed unfair by a court. It follows that I don't think Creation unfairly relied on the term when determining the interest Mr J owed under the agreement.

<u>Obligation to suspend interest and charges</u>

Mr J said Creation should have suspended interest and charges on his account following his complaint.

In support, Mr J said DISP rule 1.3.1 states firms should avoid further detriment to their customers during the complaints process. However, I've looked at this rule and it appears to instead say firms should handle complaints reasonably and promptly. The rule does not oblige a firm to suspend contractual interest while a complaint is being investigated.

There is a separate provision (CONC 7.3.5G) that requires firms to consider suspending interest and charges for consumers in financial difficulty. But as Mr J was prepared to repay the full balance, it doesn't appear Mr J was in financial difficulty, so this rule isn't relevant.

Overall, I'm not persuaded Creation acted unfairly by continuing to apply interest and charges to Mr J's credit account in line with the contract terms.

Customer service

Following Mr J's complaint emails dated 4 December and 12 December 2024, where Mr J provided substantial detail outlining why he was unhappy with Creation adding almost £1,000 of interest to his account, Creation sent him its final response on 8 January 2025.

In an email dated 15 January 2025, Mr J wrote to Creation to express his concerns about the handling of his complaint. He noted he had arranged to discuss his complaint on a couple recent occasions, but due to schedule conflicts those calls didn't happen. Instead of a call-back, Creation proceeded to reject his complaint without having a substantive conversation with him, which he says may have prejudiced the complaint outcome. Despite his concerns, Creation called him back, reconsidered his complaint, and offered to reduce the interest charged by £100 as a gesture of goodwill in early February 2025, which Mr J rejected.

While I appreciate why Mr J requested compensation for the trouble and upset caused, our investigator wasn't wrong to say this is a complaint about "complaint handling", and therefore one our service cannot consider. This complaint point is clearly about complaint handling, and not the underlying financial service being provided — which he had already raised a complaint about. I say that while being mindful of the obligations on how firms should handle complaints under the Financial Conduct Authority's DISP rules.

As Creation is part of the Financial Ombudsman Service's Compulsory Jurisdiction, the relevant regulated and other activities I can consider come under DISP 2.3.1. The list of activities in that rule doesn't cover complaint handling. While I appreciate there's a gap in cover for regulations concerning a firm's complaint handling actions, I note firms have eight weeks from the date a complaint is raised to issue a response to their customers' satisfaction. Failing that, their customer can refer the complaint to the Financial Ombudsman Service. So whatever frustration a customer has about complaint handling effectively has an eight-week backstop.

In short, I don't think the particular service issue Mr J raised about Creation's complaint handling is one I can consider. Nor have I seen any other evidence of poor service warranting compensation from the way Creation administered the credit account.

Other considerations

Mr J referred to section 140 of the Consumer Credit Act 1974 (CCA), and supporting case law, to illustrate that a court might make a finding that the relationship between him and Creation was unfair. A court might do so for a multitude of reasons, including a failure to disclose important information about a prospective credit agreement, or acting unfairly while enforcing agreed-upon terms. The circumstances for which a court might find there to be an unfair relationship is wide-ranging.

As I've not found any factual basis within the scope of this complaint to evidence any unfairness in the relationship between Mr J and Creation, I don't feel any need to expand further. I acknowledge Mr J has requested that I make such a finding in relation to "excessive penalties" and "poor communication" – but I've already expansively dealt with

these issues above and, in short, I'm satisfied Creation, on the whole, acted fairly in its dealings with Mr J throughout the duration of the agreement.

I'm also aware Mr J raised other complaint points that he hadn't raised initially when he first complained in early December 2024. That includes, for example, Creation's alleged failure to properly deal with his request for personal information in line with his data protection rights.

Mr J does not appear to have raised this in his initial 4 December 2024 complaint email, nor his 12 December 2024 email reinforcing those complaints. Neither Creation's final response, dated 8 January 2025, or our service's complaint form that he filled in, addresses a data protection issue. So I consider this issue outside the scope of this complaint.

If Mr J wants to complain about Creation's lack of GDPR compliance, he may wish to raise that as a separate complaint and, if appropriate, ask the Information Commissioner's Office to first make a finding on whether there has been a breach of the GDPR.

In summary, the evidence shows Creation did enough to make Mr J aware of the need to repay the full £2,677.99 back by 25 November 2024 to avoid interest being charged on this amount from the date of purchase. As Mr J hadn't repaid by the deadline, Creation was entitled to charge him interest. After taking into account what's fair and reasonable in all the circumstances, I don't find that Creation needs to take any further action.

I leave it to Mr J to decide whether to take up Creation's offer to reduce the interest by £100.

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.

Creation said it accepted my provisional decision but wanted to provide further information in support. In particular, it highlighted screenshots from its systems showing the date and time it received confirmation that certain emails were read.

As an example, it said an internal report shows Mr J opened the 2 October 2024 BNPL reminder email twice — on 2 October 2024 at 16:30 and then later at 18:18.

The timestamps Creation highlighted correlate with the report it referred to. I have a copy of the report, and I can see it shows:

- the 2 May 2024 BNPL reminder email was read the same day at 20:17 and 21:03.
- the 3 September 2024 BNPL reminder email was read on 3 September 2024 at 16:28, on 15 September 2024 at 20:56, and on 19 September 2024 at 17:09.

Creation's systems also show the email address these were sent to is the same email address our service has been using to successfully communicate with Mr J.

I appreciate Mr J still doesn't feel there's enough evidence to show the BNPL reminder emails had been sent. In his recent submissions, he said Creation hasn't provided copies of the original emails and other supporting evidence such as transmission metadata, or evidence that it was he who "read" the emails.

I accept it's possible to have stronger evidence that the BNPL reminder emails were sent. However, taking all the evidence together — and for reasons I set out in my provisional decision — I remain satisfied, on balance of probabilities, that the BNPL reminder emails

were sent and received by Mr J. I'm also satisfied Creation gave him sufficient warning about the 25 November 2024 deadline to repay what he borrowed to avoid interest being charged.

Mr J also raised other objections in response to my provisional decision spanning six pages.

I've carefully considered everything he said. In large part, his further submissions repeat or develop points he had already raised, for which I've addressed in my provisional decision.

Given the informal nature of our service, I'm not required to respond to every point Mr J has made. No discourtesy is intended by this. My focus is on the issues I consider central to reaching what I think is a fair outcome. So if I haven't mentioned a particular argument, it isn't because I've ignored it — I'm satisfied I've taken all of Mr J's submissions into account before reaching my decision.

My J says I've misapplied the relevant law and regulation, including the FCA's Principles for Businesses and the Consumer Duty, as well as statute and case law. I understand he feels strongly about this. But having considered his further submissions, I'm not persuaded I've applied the relevant law or regulatory framework incorrectly or unfairly.

With that in mind, I don't consider it necessary to revisit topics I addressed in detail in my provisional decision — such as unfair contract terms, unfair relationships, charging interest following a complaint, whether the interest charged was proportionate, and issues relating to data protection. I've considered Mr J's latest comments on those matters, but they don't change my reasoning or the conclusions I reached in my provisional decision.

The new point Mr J raised concerns his £435 offer to settle the debt, which he says was reasonable. In his view, Creation acted unfairly by not negotiating with him after his offer.

I recognise it was positive that Mr J sought to reach an agreement with Creation. However, his offer was significantly below the almost £1,000 in interest he was contractually obligated to pay. Creation wasn't required to accept a reduced settlement. Instead of accepting the offer, it maintained it would reduce the interest by £100, despite being under no obligation to do so. In the circumstances, I don't think Creation acted unfairly here.

Overall, I'm satisfied Creation made Mr J sufficiently aware that he had to repay the full £2,677.99 balance by 25 November 2024 to avoid interest being charged on that amount from the date of purchase. As he hadn't repaid anything by that deadline, I find that Creation was entitled, under the agreement's terms, to charge (and continue to charge) interest. I also find that it choosing to do so does not amount to a breach of any statutory or regulatory duty, including those coming under the FCA's Principles for Businesses or Consumer Duty.

Considering what's fair and reasonable in all the circumstances, I'm not recommending that Creation take further action.

For these reasons, as well the reasons set out in my provisional decision which forms part of this decision, I do not uphold this complaint. I leave it to Mr J to decide whether to take up Creation's offer to reduce the interest by £100.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J to accept or reject my decision before 6 January 2026.

Alex Watts
Ombudsman