

Complaint

Miss L has complained about the overdraft charges Lloyds Bank PLC (“Lloyds”) applied to her current account.

Miss L is being represented, by the (“representative”), in her complaint.

The representative has said the charges applied to Miss L’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

Lloyds has said that its earliest records show that Miss L had an overdraft of £100 in August 2001. The limit on was steadily increased on it until it reached £800 in May 2009. The limit has remained at this amount since then. In March 2024, Miss L complained saying that she was allowed to continue using the overdraft in a way that was unsustainable and caused her continued financial difficulty.

Lloyds did not uphold Miss L’s complaint. This was because it considered that it didn’t need to consider parts of Miss L’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. Miss L was dissatisfied at Lloyds’ response and referred her complaint to our service.

One of our investigators reviewed what Miss L and Lloyds had told us. He reached the conclusion that he wasn’t persuaded that Lloyds had acted unfairly by allowing Miss L to use her overdraft in a way that was unsustainable or otherwise harmful. So the investigator didn’t recommend that Miss L’s complaint be upheld.

The representative, on Miss L’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. Lloyds has argued that Miss L’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 Miss L’s complaint was one alleging that the lending relationship between Miss L and Lloyds was unfair to Miss L 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 Miss L’s complaint. Given the reasons for this, I’m satisfied that whether Miss L’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 Miss L’s complaint should be considered more broadly than just the individual charges or lending decisions. I consider this to be the case as Miss L has not only complained about the circumstances behind the application of the individual charges, but also the fact Lloyds’ 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 Miss L’s complaint is a complaint alleging that the lending relationship between herself and Lloyds was unfair to her. I acknowledge the possibility that Lloyds may still disagree that we are able to look at the whole of Miss L’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 Miss L’s case, I am required to take relevant law into account. As, for the reasons I’ve explained above, I’m satisfied that Miss L’s complaint can be reasonably interpreted as being about that her lending relationship with Lloyds 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 (Lloyds) and the debtor (Miss L), 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 Miss L’s complaint, I therefore need to think about whether Lloyds’ allowing Miss L to use her overdraft in the way that it did, resulted in the lending relationship between Miss L and Lloyds being unfair to Miss L, such that it ought to have acted to put right the unfairness – and if so whether it did enough to remove any such unfairness.

Miss L’s relationship with Lloyds is therefore likely to be unfair if it allowed Miss L 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, Lloyds didn’t then remove the unfairness this created somehow.

Did Lloyds unfairly allow Miss L to continue using her overdraft in circumstances where it ought to have removed the facility from her?

Before I go any further, as this essentially boils down to a complaint that Miss L 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 Lloyds 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 Lloyds' charging structure per se, it won't have acted fairly and reasonably towards Miss L if it applied this interest, fees and charges to Miss L's account in circumstances where it was aware, or it ought fairly and reasonably to have been aware Miss L was experiencing financial difficulty. So I've considered whether there was an instance, or there were instances, where Lloyds didn't treat Miss L fairly and reasonably.

In other words, I've considered whether there were periods where Lloyds continued charging Miss L 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 Miss L's account statements through the vast majority of the period concerned, I can't see that Lloyds ought reasonably to have unilaterally taken corrective measures in relation to Miss L's overdraft. I accept that Miss L used her overdraft and there is no dispute over that.

However, the representative's arguments appear to suggest that this in itself means that Miss L 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 Miss L'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 Miss L 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 Miss L was in receipt of credits that were sufficient to clear the overdraft within a reasonable period of time.

I'm therefore satisfied that Miss L's case isn't one where the borrower was marooned in their overdraft with no prospect of exiting it. It's also fair to say that Miss L would have credit balances for longer but for her non-essential spending. That said, I've noted that the representative's complaint has focused on CONC ("CONC 5D") and I accept that there were periods of times where Miss L would have met the criteria of someone who displayed a pattern of repeat use of their overdraft after CONC 5D came into force in December 2019.

However, even if Lloyds 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 Miss L lost out as a result of any potential failing. I've also therefore considered whether Miss L's use of her overdraft (and Lloyds 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 Miss L expenditure, there are significant amounts of non-committed, non-contractual and discretionary transactions going from Miss L's account. Indeed, there was significant discretionary spend and as I've explained if this was reduced the facility would have been cleared.

Given the repeat usage letters Miss L is likely to have been sent by Lloyds, 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 simply don't agree that Miss L was using her overdraft purely for essential spending, or because she had a reliance on credit to get by, as the representative says.

It's fair to say that Miss L's account credits were sufficient to have cleared the overdraft within a reasonable period of time had she wished to do so. Equally, while I've noted what the representative has said about Miss L borrowing elsewhere, I can't see anything in the account transactions which ought to have alerted Lloyds to the possibility that Miss L was borrowing unsustainably, or that the charges she was incurring for using her overdraft were causing her harm either.

Miss L did have other credit commitments, but this in itself does not mean that she was reliant on credit to meet her essential expenditure. Indeed, if I were to take the representative's argument to its logical conclusion that some using credit was reliant on it, this would mean that a consumer would never be allowed to have more than one credit facility. And no such prohibition exists in the rules and regulations.

I accept neither of these things in themselves (or when taken together) mean that Miss L wasn't experiencing difficulty. But I don't agree that Miss L was reliant on credit. She was quite comfortably able to make any essential commitments without using her overdraft. However, Lloyds 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.

Given the representative's reference 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 Miss L's account was in receipt of, I'm not persuaded that Lloyds ought reasonably to have realised that Miss L'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 Miss L contacted Lloyds to explain that she was experiencing difficulty, or that she needed help in repaying her overdraft, prior to her complaint. Furthermore, given I've not seen anything in Miss L's statements, indicating that there were any of the signs highlighted in CONC 1.3 (when it was introduced), I'm satisfied that this isn't a case where there were signs of Miss L potentially, or actually being in financial difficulty.

As this is the case, I'm satisfied that the applicable section of CONC 5D, to Miss L'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 Lloyds was under an obligation to call Miss L in the way that the representative has suggested.

Finally, and for the sake of completeness, I would add that the earliest statements I've seen, which are from well over a decade ago, do suggest that Miss L circumstances might have been significantly worse than what they were in more recent times and certainly since the rules that the representative has referred to came into force. So it is possible that unfairness may have existed well over a decade ago - although the regulatory regime in place at these times was substantially different (for example, it predated the existence of CONC) - and Lloyds could possibly have applied charges in circumstances where it shouldn't have.

However, just because there may have been unfairness in a debtor's relationship with a creditor doesn't automatically mean it would be fair to refund any and all of the interest and charges on an account. And in giving careful thought to whether I should direct a refund in this case, I'm mindful that in *Smith v Royal Bank of Scotland Plc*¹, the Supreme Court pointed out that remedies for unfair relationships are at the court's discretion and the court may deny a remedy where the claimant had knowledge of the facts relevant to their claim, but substantially delayed making that claim.

There is no fixed period of delay that brings this principle into play, but the Supreme Court approved the District Judge's comment in the case that a court would be slow to remedy unfairness in a situation where the claimant delayed more than six years after knowing the facts.

Therefore, in determining a fair and reasonable outcome to Miss L's complaint it's important for me to take this into account as relevant law. Indeed, it is this relevant law that has resulted in me being able to look at Miss L's complaint in the first place. I consider that a complainant would have knowledge of the facts that caused any unfairness when they became aware of a problem and that they were suffering a loss.

I think that Miss L had enough to know whether she considered the overdraft charges excessive and unfair when she had to pay them. She would also have known whether these charges were keeping her in her overdraft too. I'm therefore satisfied that this is sufficient for her to have had knowledge of the relevant facts from at least September 2001 and certainly by the time Lloyds began declining her applications for additional credit from 2014 at the latest.

¹ *Smith and another v Royal Bank of Scotland plc* [2023] UKSC 34.

Miss L didn't do anything about this complaint until she complained in March 2024. So I don't think that it would be right for me to direct a refund of interest and charges in circumstances where, for the reasons I've explained above, the lending relationship between Miss L and Lloyds has not been unfair to Miss L, for at least well over a decade. As this is the case, the fact that Miss L looks to have been experiencing difficulty well in excess of a decade before she complained, hasn't persuaded me that it would be fair and reasonable for me to now uphold the complaint where that difficulty no longer exists and hasn't been present for a number of years.

Overall and having considered everything, I don't think that it would be fair and reasonable to require Lloyds to do anything in this instance. So while I can understand Miss L's sentiments and appreciate why she is unhappy, I'm nonetheless not upholding this complaint. I appreciate this will be very disappointing for Miss L. 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 Miss L's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss L to accept or reject my decision before 9 February 2026.

Jeshen Narayanan
Ombudsman