

complaint

The executor on behalf of the estate of Mr L complains that Volkswagen Financial Services (UK) Limited ("VWFS") irresponsibly approved a hire purchase agreement for Mr L.

background

In September 2016, Mr L acquired a used car from a dealership using a hire purchase agreement from VWFS. The cash price of the car was £169,950. Mr L part-exchanged his existing car for £94,950, he used £64,450 of that part-exchange value as a deposit for the car, the remaining £30,500 was transferred to his bank account by the dealership.

The remaining £105,500 was financed with the hire purchase agreement. The agreement was for 24 months with monthly repayments of around £1,250 and a final optional payment of around £92,700.

Sadly, Mr L passed away around two months later. The executor of his estate raised a complaint with both the dealership and VWFS regarding the sale of the hire purchase agreement. He didn't think adequate checks were carried out before the lending was granted. He said that Mr L was in his late eighties, retired, terminally ill and owed hundreds of thousands of pounds at the time the agreement was incepted.

The executor said that VWFS and the dealership had a duty of care to vulnerable consumers and should have conducted more in-depth checks into Mr L's health and whether he could afford the agreement. He said the dealership and VWFS should have insisted there was a third party present with Mr L during the application to assist him.

VWFS didn't uphold the complaint. It said it had carried out adequate affordability checks. It said Mr L had declared he was a retired director of a company and still drawing a regular salary. It said the company appeared to have a net worth in excess of one million pounds and Mr L had no adverse information recorded on his credit file. It said there was no indication that Mr L was in poor health and it couldn't have predicted he would die so soon. It said Mr L being in his late eighties wouldn't have prevented it from lending to him as it doesn't discriminate on age.

Our investigator didn't recommend the complaint be upheld. She didn't think VWFS had carried out adequate affordability checks, however, if they had asked for evidence of Mr L's income and expenditure it would have likely shown the agreement was affordable to him. She said on this basis she didn't think VWFS had acted unfairly in lending to him. Further, she wasn't persuaded VWFS knew about Mr L's poor health and didn't think they were required to insist someone else be present during the application process.

The executor on behalf of the estate didn't agree. In summary he said:

- Mr L wasn't a director of the company at the time. If VWFS had checked information about the company before lending as it claims, it ought to have seen this.
- Although Mr L's bank statements show he was getting regular credits of £2,500 from the company, this wasn't income. This was money he was borrowing from the company. In total he owed the company in excess of £200,000 and in excess of £140,000 to the executor. A simple request to see payslips would have revealed he wasn't drawing an income from the company.
- He was terminally ill and any request to his doctor about his health would have revealed he would be unlikely to make repayments for two years.

- Given his age and that he displayed signs of confusion or wishful thinking when taking out this agreement, VWFS ought to have had a third party present. The executor wants the ombudsman to address where in the rules it says this duty of care didn't apply in the circumstances of this case.
- Where in the rules does it say VWFS weren't required to carry out credible affordability and health checks.

As both parties didn't agree, the complaint has been passed to me 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. In doing so, I've considered – amongst other things – the rules and guidance for lenders set out in the Consumer Credit Sourcebook ("CONC") within the Financial Conduct Authority's handbook.

I think there are two overarching questions I need to consider in order to decide what's fair and reasonable in all of the circumstances of this complaint. These questions are:

1. Did VWFS complete reasonable and proportionate checks to satisfy itself that Mr L would be able to repay the borrowing in a sustainable way?
 - a. If so, did it make a fair lending decision?
 - b. If not, would reasonable and proportionate checks have shown that Mr L could sustainably repay the borrowing?
2. Did VWFS act unfairly or unreasonably in some other way?

If I think Mr L has been disadvantaged in any way by VWFS' actions, I'll go onto consider what I think is a fair way to put things right.

Did VWFS complete reasonable and proportionate checks to satisfy itself that Mr L would be able to repay the borrowing in a sustainable way?

Before granting credit, VWFS were required to carry out a reasonable and proportionate assessment of Mr L's ability to sustainably repay the debt. This is often referred to as an 'affordability check'. This check had to be borrower-focussed. This means it needed to be concerned with whether Mr L could sustainably afford the borrowing (considering his specific circumstances), rather than how statistically likely he was to repay. The latter, is the risk posed to VWFS as the lender, or its 'credit risk' but this is not necessarily the same as an assessment of affordability.

What's considered reasonable and proportionate will vary depending on a number of factors such as, but not limited to:

- The amount of credit;
- The total repayable and the size of the regular repayments;
- The duration of the agreement;
- The cost of the credit; and
- The consumer's individual circumstances.

What this means is that there isn't a one-size-fits-all approach to what is considered proportionate as any of these factors (or others) might influence what a reasonable and proportionate check ought to be.

The total amount repayable under the agreement (including the deposit) was around £187,000. The monthly repayments were around £1,250 over a 24 month term. Given this was a significant amount to repay, my starting point is that any reasonable assessment of affordability ought to have been thorough.

However, I'm mindful that Mr L put down a large deposit of nearly £65,000 and that the dealership paid him a further £30,500 into his bank account as the excess from his part-exchange. This payment alone would have been enough to cover the 24 monthly repayments of around £1,250. And as the final repayment of £92,700 was an optional one, it might appear on the face of it to have been an affordable arrangement.

Having said this, VWFS couldn't have known what Mr L was intending to use that money for without asking further questions of him, which it doesn't appear to have done. So, I don't think it would have been reasonable for it to have concluded the agreement was affordable on that basis alone (for clarity, it hasn't suggested it did this). However, I think these wider circumstances are relevant when considering what a reasonable and proportionate check ought to have looked like.

VWFS says it carried out a credit check. This showed that Mr L only had two existing credit commitments. One was a credit card with a limit of £1,500 and the other a mail order account with a limit of £900. Both had relatively low balances and had been managed well. I don't therefore think there was anything contained within the credit check that ought to have alerted VWFS to any potential affordability issues for Mr L.

VWFS says it also 'modelled' Mr L's income based on information it had gathered about him during the application, such as information about the company he said he was a director of. VWFS hasn't given us any information about what income it estimated Mr L had nor how it arrived at whatever figure of income it eventually settled on. This is despite numerous requests from our service to provide some further information. VWFS' lack of response is disappointing and in the absence of this information, I've concluded that VWFS didn't have any reasonable understanding of what Mr L's income was.

In any event, given the large amount of credit it was advancing to Mr L over a relatively short period of time, and notwithstanding the £30,500 payment he received, I think it would have been reasonable and proportionate for VWFS to have tried to verify Mr L's income in some way.

I don't think making a 'best guess' was reasonable given the size of the commitment and particularly because it was aware that Mr L had declared he was retired. I think this would have made it harder to predict what his salary might have continued to be from the company he said still continued to pay him. Further, VWFS appears to have estimated income based on the net worth of the company, but I don't think this would give a reasonable estimate of what any one employee might earn.

Further, I note that VWFS didn't look to find out anything about what committed expenditure Mr L had other than his existing credit commitments. Without verifying his income or asking about his other commitments, VWFS couldn't have possibly made a reasonable conclusion that Mr L could afford such a large financial commitment. This is because, as I've said above, the payment the dealership made to him could have been earmarked for something other than the VWFS agreement.

Overall, I don't think VWFS carried out reasonable and proportionate affordability checks before it lent to Mr L.

Would reasonable and proportionate checks have shown that Mr L could sustainably repay the borrowing?

It's not clear what information or evidence VWFS would have asked for to verify Mr L's income or what Mr L would have told it about his other committed expenditure had VWFS asked. I've reviewed copies of Mr L's bank statements for the months leading up to the sale of the finance. I'm not suggesting VWFS were required to review Mr L's bank statements, but in the absence of anything else, I think this gives a good indication of what information VWFS would likely have discovered had it looked to verify his income and asked about his expenditure in some way.

Mr L's bank statements appear to show he was receiving around £6,500 per month in income. The executor has said the £2,500 monthly payment from the company Mr L was previously a director of wasn't income and was actually money he was borrowing. However, I don't think this is something VWFS would have reasonably discovered even if it had carried out adequate affordability checks.

I think it's unlikely Mr L would have disclosed that the £2,500 was money he was borrowing. It seems clear he likely told the dealership the company was paying him a salary, and this is what it looked like on his bank statements. The executor has said that had VWFS asked for payslips it would have been clear he wasn't earning a salary. While this might have been the case, there wasn't a requirement on VWFS to check a payslip within the CONC rules. However, I do think in the circumstances of this case, and taking into account what the rules say, I think it ought to have tried to verify Mr L's income. This could have been achieved in a number of ways, not just a payslip.

Mr L's bank statements also show his account was substantially in credit, on average at around £140,000. Further, the executor has told us that Mr L's estate was able to repay the over £200,000 of debt it says he owed to the company. Given all of this, it seems to me that had VWFS asked Mr L for proof of his income or ability to repay the agreement, he would have likely been able to provide them with sufficient evidence to show he was earning an income or had available funds which could comfortably support the repayments of the agreement.

Further, from reviewing the bank statements it doesn't appear that Mr L's existing monthly commitments exceeded the income he appeared to be receiving, or that he couldn't afford to sustain those commitments and the hire purchase repayments over the two year term. For these reasons, I don't think VWFS would have likely come to a different lending decision had it carried out adequate checks on Mr L's ability to repay the borrowing.

While I don't think VWFS carried out adequate affordability checks, I don't think its failure to do so caused Mr L or his estate a loss. This is because had appropriate checks been completed, as required by the rules, it's more likely than not VWFS would have still concluded the agreement was affordable and the estate would be in no different position now.

Did VWFS act unfairly or unreasonably in some other way?

The executor says that Mr L was vulnerable and in ill health and VWFS had a duty of care to ensure a third party was present with him when completing the application form. However, there was no requirement on VWFS to ensure someone else was with him during the application. Mr L has asked me to highlight where in the rules it says they weren't required to do this and weren't required to carry out an assessment on Mr L's health. But I can't do that because the rules don't provide an exhaustive list of what lenders aren't required to do. Instead, it sets out what they *are* required to do.

There is no rule that requires lenders to carry out an assessment of someone's health before entering into a regulated credit agreement. In summary, the rules set out that if the lender knows or suspects a consumer might be vulnerable or lacks the mental capacity to enter into a contract, it is required to put steps in place to help the consumer understand what it is they're entering into. This doesn't necessarily mean insisting on a third party being present during the application process, although in some specific circumstances that might be appropriate.

Further, the rules say that where the lender knows or reasonably suspects the consumer's circumstances are likely to change during the course of the agreement, it needs to take into account the impact of that change.

From everything I've seen here, I'm not persuaded VWFS or the dealership (acting as VWFS' agent for the purposes of brokering the finance agreement) were aware or ought to have been aware that Mr L was either vulnerable in some way, was terminally ill, or lacked the mental capacity to enter into a regulated credit agreement. The executor has told us Mr L was unlikely to have disclosed his illness to the dealership, so I don't think it's reasonable to say they should have known. And just because Mr L was in his late eighties it doesn't mean the dealership or VWFS ought to have automatically assumed he was vulnerable or lacked the capacity to contract.

While the executor has pointed to a spelling mistake in Mr L's name on the application form, the dealership has said this was because of a typing error by them, not Mr L. The executor says Mr L was very particular about the spelling of his name and the fact he didn't ask for this to be corrected shows something wasn't right. But I don't think it's reasonable for me to say VWFS or the dealership ought to have known what was or wasn't typical behaviour for Mr L, or that Mr L overlooking this error meant he was vulnerable or lacking in capacity to contract.

I've also noted the executor's concerns around Mr L declaring he was still earning a salary from the company he had retired from. But, as I've set out above, I don't think any reasonable line of questioning would have revealed otherwise. I don't doubt Mr L wouldn't have been able to produce a payslip, but he could have provided a bank statement showing a regular credit from the company which would have looked like a salary.

While I don't dispute Mr L was very unwell, I can't reasonably say VWFS ought to have been aware of this at the time of granting the credit or that there was any other reason why it would have been inappropriate to approve the finance. For these reasons, I don't think VWFS has acted unfairly or unreasonably in any other way.

my final decision

For the reasons given above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask the estate of Mr L to accept or reject my decision before 19 March 2021.

Tero Hiltunen
ombudsman