Complaint

Mr F has complained about a hire-purchase agreement which BMW Financial Services (GB) Limited (trading as "Alphera" Financial Services) entered into him with. He's said the monthly payments for the agreement were unaffordable for him bearing in mind his financial circumstances.

Background and my provisional decision of 22 December 2020

In September 2017, Mr F entered into a hire purchase agreement for a brand-new car. The purchase price was £176,670.00. Mr F paid a deposit of £8,234.00. The remaining £168,436.00 was funded by a hire-purchase agreement with Alphera. The loan had an annual percentage rate ("APR") of 5.8% and was due to be repaid in 36 monthly instalments. This meant that the total charge for credit was £23,010.26. The monthly payments were around £2,745.46 and there was a final instalment of £92,609.70, which included a £1 option to purchase fee.

Mr F made the first few payments due under the agreement. But after failing to make the payments to the agreement from April 2018 onwards, in May 2018, Mr F approached Alphera about selling the vehicle back to the dealership that sold it to him and settle the outstanding balance on the agreement. As I understand it, Mr F was told he'd have to repay the total amount outstanding (once the sale proceeds were deducted) in one payment, or he would need to repay £72,387.91 to voluntarily terminate the agreement. Mr F opted to voluntarily terminate and subsequently complained to Alphera saying it acted irresponsibly when entering into this agreement with him.

Alphera didn't uphold Mr F's complaint. As far as it was concerned, all of its checks indicated Mr F would be able to afford the monthly payments and that was the reason for the agreement being approved. Mr F remained dissatisfied and referred his complaint to us. The complaint was then considered by one of our investigators. He didn't think Alphera's checks before providing the finance were reasonable and proportionate. He also thought such checks would more likely than not have shown Mr F couldn't afford the monthly payments. Alphera didn't agree, so the complaint was passed to an ombudsman for a final decision.

I attach my provisional decision of 22 December 2020, which forms part of this final decision and should be read in conjunction with it. In my provisional decision I explained why I intended to uphold Mr F's complaint. I invited both parties to provide any further comments they may have had, by 22 January 2021, before I reached a final decision.

Following this, both Alphera and Mr F responded to confirm receipt of my decision and say that they had nothing further to add.

My findings

I have reconsidered all the available evidence and arguments, including the responses to my provisional decision, to decide what is fair and reasonable in the circumstances of this complaint.

I set out in some detail why I intended to uphold Mr F's complaint in my provisional decision. In the absence of anything further to consider from either party, I see no reason to change my conclusions.

So having carefully considered everything, I'm upholding Mr F's complaint.

Fair compensation – what Alphera needs to do to put things right for Mr F

I've thought about what amounts to fair compensation in this case. Where I find that a business has done something wrong, I'd normally expect that business – in so far as is reasonably practicable – to put the consumer in the position they *would be in now* if that wrong hadn't taken place. In essence, in this case, this would mean Alphera putting Mr F in the position he'd now be in if she hadn't been sold the car in the first place.

But when it comes to complaints about irresponsible lending this isn't straightforward. Mr F *was* given the car in question and it has since been returned to Alphera. So, in these circumstances, I can't undo what's already been done. And it's simply not possible to put Mr F back in the position he would be in if he hadn't been sold the car in the first place. As this is the case, I have to think about some other way of putting things right in a fair and reasonable way bearing in mind all the circumstances. I'd like to explain the reasons why I think that it would be fair and reasonable for Alphera to put things right in the following way.

Our website sets out the main things we consider when looking at putting things right in cases where we conclude a lender did something wrong in irresponsible/unaffordable lending complaints. We usually say that the borrower needs pay back the credit amount provided and that the lender should refund any interest, fees and charges that the borrower paid. This is because the borrower will have had the benefit of the credit that they were provided with and it's usually the extra paid over and above this – any interest fees and charges – that will have caused the consumer to lose out.

So, in this case, this would mean Mr F paying back the £168,436.00 he was originally lent. But I don't think that a refund of the interest fees and charges is appropriate here. The car was taken back relatively soon after the agreement started and a settlement on this basis would mean Mr F paying for the full amount lent for a car he had for a few months, without owning the car at the end.

I've therefore given careful thought to how else it might be fair and reasonable to put things right for Mr F bearing in mind he was provided with a hire-purchase agreement here.

In circumstances where a borrower was provided with finance to purchase a car they were unable to afford to make the payments for, it's usually appropriate for the car to be returned and the agreement ended. Mr F's car was returned to Alphera some time ago and the agreement was ended at this point. So clearly there is no need for Mr F to now return the car. But Alphera does need to waive the final VT payment it says is outstanding. As I'm saying that this is what Alphera needs to do, I'm satisfied that I don't need to make an additional award for its lack of forbearance when Mr F sought to exit the agreement.

I've also thought about the deposit Mr F paid. It's clear that Mr F only made this payment because he was provided with an unaffordable hire purchase agreement. So I'm satisfied that Mr F's deposit of £8,234.00 should be returned to him, with interest of 8% simple a year added from the date this payment was made.

Mr F did have use of the car for a period of time. And I think that it's fair and reasonable for my award to reflect this. There isn't an exact formula for working out fair usage. But in deciding what's fair and reasonable I've thought about the amount of interest charged on the agreement, Mr F's usage of the car and what sort of costs he might have incurred to stay

mobile if he didn't have this car.

In doing so, I'm mindful that although Mr F didn't drive the car all that much in the period he had it – the email correspondence between Mr F, Alphera and the dealer suggests less than 500 miles – he was nonetheless provided with the use of a brand-new luxury vehicle. Bearing this in mind, I think that it's fair and reasonable for Alphera to keep all of the monthly payments it collected while Mr F had use of the car.

Mr F's credit file

Generally speaking, I'd expect a lender to remove any adverse information recorded on a consumer's credit file as a result of the interest and charges on any loans or credit they shouldn't have been given. I've not seen anything here which leads me to think such a direction would be unfair here. So having carefully thought about everything, Alphera should remove any negative information that it has recorded on Mr F's credit file about this agreement.

All of this means that I'm intending to say that it is fair and reasonable in all the circumstances of Mr F's complaint for Alphera to put things right in the following way:

- Refund Mr F's deposit with interest of 8% simple per year; AND
- Waive any amount outstanding after the termination of the agreement;
- Remove any adverse information it has recorded about this agreement on Mr F's credit file.

My final decision

For the reasons set out above and in my provisional decision of 20 December 2020, I'm upholding Mr F's complaint. BMW Financial Services (GB) Limited should put things right in the way I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to Mr F to accept or reject my decision before 13 February 2021.

Jeshen Narayanan
Ombudsman

COPY OF PROVISIONAL DECISION

Complaint

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Background

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Alphera didn't uphold Mr F's complaint. As far as it was concerned, all of its checks indicated Mr F would be able to afford the monthly payments and that was the reason for the agreement being approved. Mr F remained dissatisfied and referred his complaint to us. The complaint was then considered by one of our investigators. He didn't think Alphera's checks before providing the finance were reasonable and proportionate. He also thought such checks would more likely than not have shown Mr F couldn't afford the monthly payments. Alphera didn't agree, so the complaint was passed to an ombudsman for a final decision.

The regulatory and legal framework

Alphera lent to Mr F while it was authorised and regulated by the Financial Conduct Authority.

The FCA's Principles for Business set out the overarching requirements which all authorised firms are required to comply with.

PRIN 1.1.1G, says

The Principles apply in whole or in part to every firm.

The Principles themselves are set out in PRIN 2.1.1R. And the most relevant principles here are PRIN 2.1.1 R (2) which says:

A firm must conduct its business with due skill, care and diligence.

And PRIN 2.1.1 R (6) which says:

A firm must pay due regard to the interests of its customers and treat them fairly.

The Consumer Credit Sourcebook (CONC) sets out the rules which apply to providers of consumer credit like Alphera. Bearing in mind the complaint before me, I think the most relevant sections of CONC here are CONC 1 which sets out guidance in relation to financial difficulties; CONC 5 which sets out a firm's obligations in relation to responsible lending; and CONC 6 which sets out a firm's obligations after a consumer has entered into a regulated agreement.

CONC 1.3G provides guidance on financial difficulty. It says:

"In CONC (unless otherwise stated in or in relation to a rule), the following matters, among others, of which a firm is aware or ought reasonably to be aware, may indicate that a customer is in financial difficulties:

(1) consecutively failing to meet minimum repayments in relation to a credit card or store card;

(2) adverse accurate entries on a credit file, which are not in dispute;

(3) outstanding county court judgments for non-payment of debt;

(4) inability to meet repayments out of disposable income or at all, for example, where there is evidence of non-payment of essential bills (such as, utility bills), the customer having to borrow further to repay existing debts, or the customer only being able to meet repayments of debts by the disposal of assets or security;

(5) consecutively failing to meet repayments when due;

(6) agreement to a debt management plan or other debt solution;

(7) evidence of discussions with a firm (including a not-for-profit debt advice body) with a view to entering into a debt management plan or other debt solution or to seeking debt counselling"

It's clear there is a high degree of alignment between the previous regulator, the Office of Fair Trading's ("OFT") *Irresponsible Lending Guidance* (ILG) and the rules set out in CONC. As is evident from the following extracts, the FCA's CONC rules specifically note and refer back to sections of the OFT's ILG on many occasions.

CONC 4 sets out a firm's obligations around pre-contract disclosure and adequate explanations.

CONC 4.2.5R(1) says:

Before making a regulated credit agreement the firm must:

(a) provide the customer with an adequate explanation of the matters referred to in (2) in order to place the customer in a position to assess whether the agreement is adapted to the customer's needs and financial situation.

CONC 4.2.5R(2) includes:

(a) the features of the agreement which may make the credit to be provided under the agreement unsuitable for particular types of use;

(b) how much the customer will have to pay periodically and, where the amount can be determined, in total under the agreement;

(c) the features of the agreement which may operate in a manner which would have a significant adverse effect on the customer in a way which the customer is unlikely to foresee.

CONC 5 sets out a firm's obligations in relation to responsible lending. These rules were updated in November 2018, but I refer below to the rules as they were at the time Alphera lent to Mr F in September 2017.

CONC 5.2.1R(2) sets out what a lender needs to do before agreeing to provide a consumer with credit, including entering into an agreement of this type. It says a firm must consider:

(a) the potential for the commitments under the regulated credit agreement to adversely impact the customer's financial situation, taking into account the information of which the firm is aware at the time the regulated credit agreement is to be made; and

*[**Note**: paragraph 4.1 of ILG]*

(b) the ability of the customer to make repayments as they fall due over the life of the regulated credit agreement, or for such an agreement which is an open-end agreement, to make repayments within a reasonable period.

*[**Note**: paragraph 4.3 of ILG]*

CONC also includes guidance about 'proportionality of assessments'.

CONC 5.2.3G says:

The extent and scope of the creditworthiness assessment or the assessment required by CONC 5.2.2R (1), in a given case, should be dependent upon and proportionate to factors which may include one or more of the following:

(1) the type of credit;

(2) the amount of the credit;

(3) the cost of the credit;

(4) the financial position of the customer at the time of seeking the credit;

(5) the customer's credit history, including any indications that the customer is experiencing or has experienced financial difficulties;

(6) the customer's existing financial commitments including any repayments due in respect of other credit agreements, consumer hire agreements, regulated mortgage contracts, payments for rent, council tax, electricity, gas, telecommunications, water and other major outgoings known to the firm;

(7) any future financial commitments of the customer;

(8) any future changes in circumstances which could be reasonably expected to have a significant financial adverse impact on the customer;

(9) the vulnerability of the customer, in particular where the firm understands the customer has some form of mental capacity limitation or reasonably suspects this to be so because the customer displays indications of some form of mental capacity limitation (see CONC 2.10).

*[**Note**: paragraph 4.10 of ILG]*

CONC 5.2.4G(2) says: *A firm should consider what is appropriate in any particular circumstances dependent on, for example, the type and amount of credit being sought and the potential risks to the customer. The risk of credit not being sustainable directly relates to the amount of credit granted and the total charge for credit relative to the customer's financial situation.*

*[**Note**: paragraph 4.11 and part of 4.16 of ILG]*

CONC 5.3 contains further guidance on what a lender should bear in mind when thinking about affordability. CONC 5.3.1G(1) says: *In making the creditworthiness assessment or the assessment required by CONC 5.2.2R (1), a firm should take into account more than assessing the customer's ability to repay the credit.*

*[**Note**: paragraph 4.2 of ILG]*

CONC 5.3.1G(2) then says: *The creditworthiness assessment and the assessment required by CONC 5.2.2R (1) should include the firm taking reasonable steps to assess the customer's ability to meet repayments under a regulated credit agreement in a sustainable manner without the customer incurring financial difficulties or experiencing significant adverse consequences.*

*[**Note**: paragraph 4.1 (box) and 4.2 of ILG]*

CONC 5.3.1G(6) goes on to say:

For the purposes of CONC "sustainable" means the repayments under the regulated credit agreement can be made by the customer:

(a) without undue difficulties, in particular:

(i) the customer should be able to make repayments on time, while meeting other reasonable commitments; and

(ii) without having to borrow to meet the repayments;

(b) over the life of the agreement, or for such an agreement which is an open-end agreement, within a reasonable period; and

(c) out of income and savings without having to realise security or assets; and "unsustainable" has the opposite meaning.

*[**Note**: paragraph 4.3 and 4.4 of ILG]*

In respect of the need to double-check information disclosed by applicants, CONC 5.3.1G(4) states: *(a) it is not generally sufficient for a firm to rely solely for its assessment of the customer's income and expenditure on a statement of those matters made by the customer.*

And CONC 5.3.7R says that: *A firm must not accept an application for credit under a regulated credit agreement where the firm knows or ought reasonably to suspect that the customer has not been truthful in completing the application in relation to information supplied by the customer relevant to the creditworthiness assessment or the assessment required by CONC 5.2.2R (1).*

*[**Note**: paragraph 4.31 of ILG]*

The Consumer Credit Act 1974

The Consumer Credit Act 1974 (CCA) is an act established for the protection of consumers and the control of traders of the provision of credit. S56 of the Act provides as follows:

56 Antecedent negotiations

(*1) In this Act "antecedent negotiations" means any negotiations with the debtor or hirer—*

(a) conducted by the creditor or owner in relation to the making of any regulated agreement, or

(b) conducted by a credit-broker in relation to goods sold or proposed to be sold by the credit-broker to the creditor before forming the subject-matter of a debtor-creditor-supplier agreement within section 12(a), or

(c) conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement within section 12(b) or (c),and "negotiator" means the person by whom negotiations are so conducted with the debtor or hirer.

(2) Negotiations with the debtor in a case falling within subsection (1)(b) or (c) shall be deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity.

(3) An agreement is void if, and to the extent that, it purports in relation to an actual or prospective regulated agreement—

(a) to provide that a person acting as, or on behalf of, a negotiator is to be treated as the agent of the debtor or hirer, or

(b) to relieve a person from liability for acts or omissions of any person acting as, or on behalf of, a negotiator.

(4) For the purposes of this Act, antecedent negotiations shall be taken to begin when the negotiator and the debtor or hirer first enter into communication (including communication by advertisement), and to include any representations made by the negotiator to the debtor or hirer and any other dealings between them.

So one of the purposes of Section 56 CCA is to deem credit-brokers and suppliers to be the agent of the creditor when conducting antecedent negotiations with a debtor in relation to goods and services purchased with finance under debtor-creditor-supplier agreements.

Section 99 CCA sets out a consumer's right to terminate a hire purchase or conditional sale agreement by giving notice. It states:

99 Right to terminate hire-purchase etc. agreements.

(1) At any time before the final payment by the debtor under a regulated hire-purchase or regulated conditional sale agreement falls due, the debtor shall be entitled to terminate the agreement by giving notice to any person entitled or authorised to receive the sums payable under the agreement.

(2) Termination of an agreement under subsection (1) does not affect any liability under the agreement which has accrued before the termination…"

Section 100 of the CCA sets out the consumer's liability on termination:

100 Liability of debtor on termination of hire-purchase etc. agreement.

(1) Where a regulated hire-purchase or regulated conditional sale agreement is terminated under section 99 the debtor shall be liable, unless the agreement provides for a smaller payment, or does not provide for any payment, to pay to the creditor the amount (if any) by which one-half of the total price exceeds the aggregate of the sums paid and the sums due in respect of the total price immediately before the termination…

My findings

I've considered all the available evidence and arguments provided from the outset in order to decide what's fair and reasonable in the circumstances of this complaint.

Taking into account the relevant rules, guidance and law, and considering the main reason for Mr F's complaint, I think there are two overarching questions that I needed to consider in order to provisionally decide what is fair and reasonable in the circumstances of this complaint.

These questions are:

- Did Alphera complete reasonable and proportionate checks to satisfy itself that Mr F would be able to repay the credit in a sustainable way?
    - If so, was a fair lending decision made?
    - If not, would those checks have shown that Mr F would've been able to do so?
- Did Alphera act unfairly or unreasonably towards Mr F in some other way?

If I determine that Alphera did not act fairly and reasonably in its dealings with Mr F and that he has lost out as a result, I'll go on to consider what's fair compensation.

I'll proceed to consider the first of the overarching questions.

Did Alphera complete reasonable and proportionate checks to satisfy itself that Mr F would be able to repay in a sustainable way?

The regulations in place when Alphera lent to Mr F required it to carry out a reasonable assessment of whether Mr F could afford to make his repayments in a sustainable manner. This is sometimes referred to as an "affordability assessment" or "affordability check".

Any affordability checks should have been "borrower-focused" – so Alphera had to think about whether making the payments sustainably would cause difficulties or adverse consequences *for Mr F*. In other words, it wasn't enough for Alphera's lending decision to only consider the likelihood that it would get its money back, or that it had the ability to repossess the vehicle, without considering the impact making these payments would have on Mr F.

Checks also had to be "proportionate" to the specific circumstances of the loan application. In general, what constitutes a proportionate affordability check will be dependent upon a number of factors including – but not limited to – the particular circumstances of the borrower (e.g. their financial history, current situation and outlook, and any indications of vulnerability or financial difficulty) and the amount / type / cost of credit they are seeking. Even for the same customer, a proportionate check could look different for different loan applications.

In light of this, I think that a reasonable and proportionate check generally ought to have been *more* thorough:

- the *lower* a customer's income (reflecting that it could be more difficult to repay a given loan amount from a lower level of income);
- the *higher* the amount due to be repaid (reflecting that it could be more difficult to meet a higher repayment from a particular level of income);
- the *longer* the term of the agreement (reflecting the fact that the total cost of the credit is likely to be greater and the customer is required to make payments for a longer period).

There may also be other factors which could influence how detailed a proportionate check should be for a given loan application – including (but not limited to) any indications of borrower vulnerability, any foreseeable changes in future circumstances, or any substantial time gaps between loans. I've thought about all the relevant factors in this case.

Alphera's checks

I've considered the checks Alphera says it carried out in this particular case. It seems to me Alphera is relying on its background checks and the declaration Mr F signed as having been sufficient to determine that the monthly payments were affordable. But as far as I can see, all Alphera has provided is a Consumer Credit Finance Factsheet which Mr F signed to confirm he had approximately monthly budget of over £2,000 in order to make his payments. Even if this is the case, I don't see how this in itself translates into Mr F being able to afford as much as £2,750 a month

And while Alphera has provided the output of the credit checks, there's nothing at all on the output of its background checks, what it was in them that led it to conclude Mr F could afford to make the monthly payments of approaching £2,750 a month, or anything else about Mr F's monthly expenditure. Indeed, it seems to me that Alphera simply expects us to accept Mr F's payments were affordable because its systems approved it.

Considering the amount advanced, the monthly payment and the fact the loan was provided relatively recently, I find the paucity of detailed documentation provided to be astonishing. For example, Alphera cannot or will not even tell us the monthly income it had recorded for Mr F even though the credit check showed a substantial amount of existing debt and at least one of his accounts had defaulted. And as Alphera says it gathered sufficient information, in line with its regulatory obligations, to inform its lending decisions, it's extremely disappointing that Alphera hasn't provided it to me.

This service cannot and will not look for evidence and construct an argument to support Alphera's defence of Mr F's complaint. If Alphera can't, or won't, provide the information relied on and describe why it showed it was fair and reasonable to lend to Mr F then I can't and won't reach the conclusion that its checks before entering into this agreement were proportionate. Without any explanation from Alphera on this matter, I can't take it as read that its lending decision was fair.

For the sake of completeness, I'd also add that I don't consider the fact Mr F made the first few payments on the agreement on time in itself demonstrates the monthly payments were affordable. I say this while mindful of the fact Mr F didn't, and perhaps wasn't able to, make any subsequent payments. Equally the amount of existing credit commitments showing on Mr F's credit check persuade me that it wasn't reasonable to proceed without obtaining further income and expenditure information notwithstanding the £8,234.00 deposit he paid.

In these circumstances, and in the absence of anything else to indicate that Alphera took any further steps to ascertain Mr F's monthly income or regular expenditure, I'm not currently satisfied that the checks Alphera carried out before reaching the conclusion the agreement was affordable for Mr F were reasonable and proportionate.

Would reasonable and proportionate checks more likely than not have shown that Mr F was able to sustainably make the repayments to this agreement?

As proportionate checks weren't carried out before this agreement was provided, I can't say for sure what they would've shown. So I need to decide whether it is more likely than not that a proportionate check would have told Alphera that it was unfair to enter into this agreement with Mr F.

Mr F has provided us with evidence of his financial circumstances at the time he applied for the finance. Of course, I accept different checks might show different things. And just because something shows up in the information Mr F has provided, it doesn't mean it would've shown up in any checks Alphera might've carried out.

But in the absence of anything else from Alphera showing what this information would have shown, I think it's perfectly fair and reasonable to place considerable weight on it as an indication of what Mr F's financial circumstances were more likely than not to have been at the time. To be clear, I've not looked at Mr F's bank statements because I think that Alphera ought to have obtained them before lending to him. I've consulted Mr F's bank statements because they were readily available at this stage and they contain the information I now need to reconstruct the proportionate check Alphera should have but failed to carry out.

Mr F's bank statements show that he was in receipt of an average of around £1,000.00 or so a month. As I understand it, Mr F was in the process of leaving the company where he'd been director and the company he was leaving was going to make the payments to the agreement as part of the terms and conditions of his leaving.

But even though there may have been expectation the payments to the agreement itself would be met by the company Mr F was leaving, at least at the time of agreement, Alphera would have been aware that Mr F would have significant running costs for this vehicle. For example, although Alphera wouldn't have known exactly how much Mr F's insurance premium would be, it would have known the insurance group of the vehicle being financed and that it was a condition of the finance agreement as well as a legal requirement for Mr F to ensure the vehicle was insured. So I think it's fair and reasonable to expect Alphera to have factored these reasonably foreseeable costs in its assessment of whether Mr F could afford the vehicle.

I'm also mindful that there was a £92,609.70 final payment for the vehicle. I accept Mr F was able to hand the vehicle back after 36 months. And so I wouldn't necessarily have expected Alphera to have carried out an in depth assessment of his ability to be able to make this payment. But the deposit Mr F paid and the amount of the monthly payments (as well as the source of funds), lead me to think that Alphera ought fairly and reasonably to have explained that Mr F would end up paying a significant sum for what was in effect a long-term rental in the event he wasn't able to make the £92,609.70 payment. I've not seen anything to demonstrate that Alphera did this here.

In any event, Mr F's existing commitments to credit, bills and normal monthly living costs pretty much took up all of his monthly income. So it's clear that he didn't have the disposable income to sustainably make the repayments for the vehicle he was sold.

Overall and having carefully considered everything, I think that reasonable and proportionate checks would have alerted Alphera to the fact that Mr F wasn't able to make the payments to this agreement without experiencing financial difficulty and/or borrowing further. And so it follows that he wasn't in a financial position to meet his obligations as a result of this agreement.

Did Alphera act unfairly or unreasonably towards Mr F in some other way?

I've also thought about Alphera's actions once Mr F fell into arrears. From what I can see, Mr F's payments were made in full and on time up until February 2018. Mr F missed the payment due in March 2018. He also let Alphera know that he wasn't going to make his April

2018 payment as he didn't have the funds to and he was also unlikely to be able to make payments going forward.

In April 2018, Mr F contacted both Alphera and the dealer who sold the car to him about the possibility of exiting the contract bearing in mind he wasn't in a position to make the payments and, in his view, had never been able to make them in the first place.

There are various ways in which a consumer can end or exit a car finance agreement. Voluntary Termination ("VT") is a statutory right set out in Section 99 of the Consumer Credit Act 1974 ("the Act") and is often additionally a contractual term in a hire purchase agreement. In summary, VT allows a consumer to give the car back at *any* point and have their liability capped at one half of the total price of the agreement. The consumer will then arrange the return of the car with the car finance house. Alphera provided Mr F with a quote on 2 May 2018, which informed him that he could hand the car back voluntarily but he would have to make a termination payment of £72,387.91.

As well as VT it is sometimes possible for a consumer to exit a finance agreement by voluntarily surrendering the car. Voluntary Surrender ("VS") is a far more informal arrangement, which isn't set out in the Act or any other legislation. Put simply, it is handing back the car which results in the borrower being liable to pay the full amount outstanding under the loan agreement, less any early settlement interest rebate and the net proceeds of the subsequent sale of the car. The benefit to a borrower is that they usually won't be liable for any enforced repossession/legal recovery costs.

It may also be more beneficial for a consumer to choose to voluntarily surrender a car if they are nearer to the beginning of the agreement, when the car hasn't depreciated significantly, and they have made only a small number of payments towards the agreement. Mr F had had the car for just over 6 months when he approached Alphera and the dealer and was provided with an early settlement figure of £161,259.95 on 19 April 2018. And at this stage he also had an offer to purchase the vehicle for £125,000.00. This would have left him with an outstanding liability of £36,259.95, which is around half of what he had to pay if he'd taken the VT option.

Notwithstanding the significant additional liability for doing so, Mr F chose to take the VT option despite telling Alphera he didn't have the funds to make any payments. I have attempted to ascertain why Mr F chose an option which left him with a considerable amount more to pay, in circumstances where he says he didn't have the funds to pay anything at all.

Having carefully considered everything, it looks to me that Mr F was told, or at the very least given the impression, that taking the VS option would result in him having to settle the outstanding balance in one lump sum payment, whereas any VT payment might be repayable over some kind of repayment plan. In other words, I think Mr F was told if he chose the VS settlement option he had to pay £36,259.95 in one go, and if he went for the VT option the £72,387.91 owing could be repaid using a repayment plan.

Mr F had already missed two consecutive payments. I set out in the relevant rules section of this provisional decision the regulator (in CONC 1.3G) sets out this could be an indication a consumer may be experiencing financial difficulty and by this stage Mr F had also told Alphera that he didn't have the means to make payments because he hadn't been paid. I can't see how or why Alphera couldn't have engaged in discussion about an arrangement to pay any outstanding amount, irrespective of the mechanism Mr F eventually used to exit the agreement. Indeed, given the obligations set out in CONC for lenders to treat consumers in

arrears fairly, with due consideration and forbearance – I would have expected Alphera to have engaged positively with Mr F about any outstanding amount he needed to pay to meet any remaining obligations as a result of this agreement.

Even if I am wrong on this, I still have concerns over the fact that Mr F elected for the option that was considerably more expensive here – almost double – at a time where he'd already said that he was owed wages and it would be sometime before these would be paid to him if at all. As I've said above, Mr F would have owed only half of what he ended up owing Alphera if he'd chosen to VS the car. This makes a huge difference bearing in mind the sums of money involved here.

I think Alphera needed to explain to Mr F – in a clear and unambiguous manner – that given his financial circumstances, it would exercise forbearance and due consideration irrespective of which option he took to exit the agreement. This is in line with the FCA's guidance an expectations regarding Arrears, default and recovery (including repossessions) set out in CONC 7 and the overarching principle for firms to "*pay due regard to the interests of its customers and treat them fairly" as set out in* PRIN 2.1.1 R (6).

I'm currently minded to conclude that Alphera didn't do this. And so I'm minded to find that Alphera did act unfairly or unreasonably towards Mr F in some other way.

Conclusions

Overall and having thought about the two overarching questions, set out on page 7 of this provisional decision, I'm intending to issue a final decision which finds that:

- Alphera *didn't* complete reasonable and proportionate checks on Mr F to satisfy itself that he was able to make the payments to this agreement;

- reasonable and proportionate checks *would* more likely than not have shown Mr F was not in a financial position to sustainably make the repayments to this hire purchase agreement;

- Alphera *did* act unfairly or unreasonably in some other way towards Mr F;

The above findings leave me intending to reach the overall conclusion that Alphera didn't treat Mr F fairly and reasonably when entering into and during the course of this hire-purchase agreement.

Did Mr F lose out as a result of Alphera's shortcomings?

I've considered whether Mr F suffered adverse consequences as a result of Alphera unfairly entering into this hire purchase agreement with him. Alphera took the car back within a few months of the agreement starting. Given Mr F paid an £8,234.00 deposit as well as some monthly payments and is now left with Alphera expecting him to pay a further approaching £73,000.00 for a vehicle that was taken back so quickly, I find that did Mr F lose out because of what Alphera did wrong.

So overall and having thought about everything provided and what's fair and reasonable in all the circumstances of this case, I'm intending to find that Mr F lost out because of Alphera's actions. And this means I'm currently minded to conclude that Alphera needs to put things right.

Fair compensation – what Alphera needs to do to put things right for Mr F

I've thought about what amounts to fair compensation in this case. Where I find that a business has done something wrong, I'd normally expect that business – in so far as is reasonably practicable – to put the consumer in the position they *would be in now* if that wrong hadn't taken place. In essence, in this case, this would mean Alphera putting Mr F in the position he'd now be in if she hadn't been sold the car in the first place.

But when it comes to complaints about irresponsible lending this isn't straightforward. Mr F *was* given the car in question and it has since been returned to Alphera. So, in these circumstances, I can't undo what's already been done. And it's simply not possible to put Mr F back in the position he would be in if he hadn't been sold the car in the first place. As this is the case, I have to think about some other way of putting things right in a fair and reasonable way bearing in mind all the circumstances. I'd like to explain the reasons why I think that it would be fair and reasonable for Alphera to put things right in the following way.

Our website sets out the main things we consider when looking at putting things right in cases where we conclude a lender did something wrong in irresponsible/unaffordable lending complaints. We usually say that the borrower needs pay back the credit amount provided and that the lender should refund any interest, fees and charges that the borrower paid. This is because the borrower will have had the benefit of the credit that they were provided with and it's usually the extra paid over and above this – any interest fees and charges – that will have caused the consumer to lose out.

So, in this case, this would mean Mr F paying back the £168,436.00 he was originally lent. But I don't think that a refund of the interest fees and charges is appropriate here. The car was taken back relatively soon after the agreement started and a settlement on this basis would mean Mr F paying for the full amount lent for a car he had for a few months, without owning the car at the end.

I've therefore given careful thought to how else it might be fair and reasonable to put things right for Mr F bearing in mind he was provided with a hire-purchase agreement here.

In circumstances where a borrower was provided with finance to purchase a car they were unable to afford to make the payments for, it's usually appropriate for the car to be returned and the agreement ended. I've already explained that Mr F's car was returned to Alphera and the agreement was ended at this point. So clearly there is no need for Mr F to now return the car. But Alphera does need to waive the final VT payment it says is outstanding. As I'm saying that this is what Alphera needs to do, I'm satisfied that I don't need to make an additional award for its lack of forbearance when Mr F sought to exit the agreement.

I've also thought about the deposit Mr F paid. It's clear that Mr F only made this payment because he was provided with an unaffordable hire purchase agreement. So I'm satisfied that Mr F's deposit of £8,234.00 should be returned to him, with interest of 8% simple a year added from the date this payment was made.

Mr F did have use of the car for a period of time. And I think that it's fair and reasonable for my award to reflect this. There isn't an exact formula for working out fair usage. But in deciding what's fair and reasonable I've thought about the amount of interest charged on the agreement, Mr F's usage of the car and what sort of costs he might have incurred to stay

mobile if he didn't have this car. In doing so, I'm mindful that although Mr F didn't drive the car all that much in the period he had it – the email correspondence between Mr F, Alphera and the dealer suggests less than 500 miles – he was nonetheless provided with the use of a brand-new luxury vehicle. Bearing this in mind, I think that it's fair and reasonable for Alphera to keep all of the monthly payments it collected while Mr F had use of the car.

Mr F's credit file

Generally speaking, I'd expect a lender to remove any adverse information recorded on a consumer's credit file as a result of the interest and charges on any loans or credit they shouldn't have been given. I've not seen anything here which leads me to think such a direction would be unfair here. So having carefully thought about everything, I'm intending to direct Alphera to remove any negative information that it has recorded on Mr F's credit file about this agreement.

All of this means that I'm intending to say that it is fair and reasonable in all the circumstances of Mr F's complaint for Alphera to put things right in the following way:

- Refund Mr F's deposit with interest of 8% simple per year; AND
- Waive any amount outstanding after the termination of the agreement;
- Remove any adverse information it has recorded about this agreement on Mr F's credit file.

My provisional decision

I'm currently minded to uphold Mr F's complaint and direct BMW Financial Services (GB) Limited (trading as Alphera Financial Services) to pay compensation as set out above.

So unless the comments and evidence I get by 22 January 2021 change my mind, that's what I'll tell Alphera to do in my final decision.

Jeshen Narayanan
Ombudsman