

Complaint

Mr A has complained that Moneybarn No. 1 Limited ("Moneybarn") unfairly entered into a conditional sale car finance agreement with him when it ought reasonably to have realised that the payments were unaffordable. He's said that he was very surprised to be accepted for the finance as he never expected to because of the state of his finances. He also said that the car wasn't of satisfactory quality and he tried to return it as a result.

Background

Moneybarn received an application for finance from Mr A through an intermediary in May 2018. It entered into a conditional sale agreement with Mr A providing him with the entire purchase amount of £7,695.00 over a term of 52 months. The loan had an annual percentage rate ("APR") of 37.4%, which was made up of interest of £6,513.09. This meant that the total amount repayable was £14,208.09 and it was due to be repaid in 51 instalments of £278.59.

Mr A phoned Moneybarn a few days after the sale, to say that he wished to return the vehicle. He said he wanted to reject the car as it wasn't suitable for purpose. This was followed by an email the following day where he confirmed that he'd contacted the dealer to explain these points and he now wanted to cancel the agreement and return the car. Moneybarn treated these concerns as a formal complaint and arranged for a company to inspect the vehicle. This third-party inspection company didn't agree that the vehicle wasn't of satisfactory quality. So Moneybarn didn't uphold Mr A's complaint.

Subsequent to this Mr A fell behind on the payments to his agreement. At this stage it's unclear whether this was because he chose not to pay as he wanted to return the car, or it was because he couldn't afford to make the payments. But this doesn't matter too much because Mr A, in any event, went on to make a complaint about the finance having been irresponsibly provided to him because he would never have been able to afford to make the payments. Moneybarn also rejected this complaint saying that it did enough to establish that Mr A could afford to make the payments and so it didn't lend irresponsibly.

Mr A disagreed with Moneybarn's findings both on the quality of the car and the affordability of the payments to the conditional sale agreement. Mr A's complaint was then reviewed by one of our investigators. Having considered everything, he didn't think that the car was of unsatisfactory quality when it was provided to Mr A. That said, he also didn't think that Moneybarn had completed proportionate checks to establish that Mr A could afford the monthly payments to the car. And if it had carried out such checks it would have seen that Mr A wasn't in a position to be able to afford to make the payments.

So overall, our investigator partially upheld Mr A's complaint and said that Moneybarn should take back the car from Mr A and terminate the conditional sale agreement. There was no refund to be made as Mr A hadn't paid a deposit or made any of payments due on the agreement.

Moneybarn disagreed with our investigator's view and asked for an ombudsman to review the complaint.

The regulatory and legal framework

Moneybarn lent to Mr A while it was authorised and regulated by the Financial Conduct Authority.

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

The Principles themselves are set out in PRIN 2.1.1R. And the most relevant principle here is 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 Moneybarn. 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 4 which set out a firm's obligations in relation to the pre-contractual information provided and adequate explanations; 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 Moneybarn lent to Mr A in May 2018.

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]

CONC also provides guidance to lenders about how to deal with consumers in arrears, this time making reference to the OFT’s Debt Collection Guidance (DCG).

CONC 7.3.2G says: *When dealing with customers in default or in arrears difficulties a firm should pay due regard to its obligations under Principle 6 (Customers’ interests) to treat its customers fairly.*

[Note: paragraphs 7.12 of ILG and 2.2 of DCG]

CONC 7.3.4R says that: *A firm must treat customers in default or in arrears difficulties with forbearance and due consideration.*

[Note: paragraphs 7.3 and 7.4 of ILG and 2.2 of DCG]

CONC 2.5 sets out rules and guidance for the conduct of business for credit broking. Again there is an alignment between the Office of Fair Trading’s Credit Brokers and Intermediaries Guidance (CBG), as well as the ILG and the rules set out in CONC 2.5, as again the Financial Conduct Authority rules refer back to sections of the OFT’s guidance.

CONC 2.5.3R says:

A firm must:

- (1) *where it has responsibility for doing so, explain the key features of a regulated credit agreement to enable the customer to make an informed choice as required by CONC 4.2.5 R;*

[Note: paragraphs 4.27 to 4.30 of CBG and 2.2 of ILG]

- (2) *take reasonable steps to satisfy itself that a product it wishes to recommend to a customer is not unsuitable for the customer's needs and circumstances;*

[Note: paragraph 4.22 of CBG]

- (3) *advise a customer to read, and allow the customer sufficient opportunity to consider, the terms and conditions of a credit agreement or consumer hire agreement before entering into it;*

[Note: paragraph 3.9I of CBG]

CONC 2.5.8R says:

A firm must not:

...

- (10) *effect an introduction to a lender or an owner or to another credit broker, where the firm has considered whether the customer might meet the relevant lending or hiring criteria and it is or should be apparent to the firm that the customer does not meet those criteria;*

[Note: paragraph 3.9aa and 4.41i of CBG]

...

- (17) *unfairly encourage a customer to increase, consolidate or refinance (which expression has the same meaning as in CONC 6.7.17 R) an existing debt to the extent that repayments under an agreement would be unsustainable for the customer;*

[Note: paragraph 4.26h of CBG]

- (18) *encourage a customer to take out additional credit or to extend the term of an existing credit agreement where to do so is, or is reasonably likely be, to the detriment of a customer;*

[Note: paragraph 4.41h of CBG]

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 provisional findings

I have read and considered all the evidence and arguments available to me from the outset, in order to decide what is, in my opinion, fair and reasonable in all the circumstances of Mr A's complaint.

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

- Did Moneybarn complete reasonable and proportionate checks to satisfy itself that Mr A would be able to make the payments to his conditional sale agreement in a sustainable way?
 - If so, was a fair lending decision made?
 - If not, would those checks have shown that Mr A would've been able to do so?
- Did Moneybarn act towards Mr A unfairly or unreasonably in some other way?

If I determine that Moneybarn did not act fairly and reasonably in its dealings with Mr A and that he has lost out as a result, I will go on to consider what is fair compensation.

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

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

The affordability checks should've been "borrower-focused" – so Moneybarn had to think about whether repaying the loan sustainably would cause difficulties or adverse consequences *for Mr A*. In other words, it wasn't enough for Moneybarn to think only about the likelihood that it would get its money back, or that the loan was secured on the vehicle sold, without considering the impact of repayment on Mr A himself.

Checks also had to be "proportionate" to the specific circumstances of the application in question. 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 the light of this, I think that a reasonable and proportionate check ought generally to have been *more* thorough:

- the *lower* a customer's income (reflecting that it could be more difficult to make repayments 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 loan (reflecting the fact that the total cost of the credit is likely to be greater and the customer is required to make payments for an extended 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.

Moneybarn's checks before entering into the conditional sale agreement with Mr A.

Moneybarn says that as it is a sub-prime lender the majority of its customers have lower than average credit ratings. Mr A's credit history was deemed acceptable and he met the criteria in which to proceed to the next stage of the application process. It says it requested proof of Mr A's income and asked him to either provide pay slips or bank statements.

Mr A sent over pay slips and they were satisfactory for its underwriting criteria. Mr A was also subject to its usual credit checks which included a check for indebtedness. Mr A also signed several documents including pre-contractual information. And in its view this highlighted that Mr A shouldn't enter into the agreement should he know of any reason why it might not have been affordable for him in the future.

When asked to provide the output of the credit checks carried out, Moneybarn couldn't do so. It said that it was only able to confirm that two searches were carried out in May 2018. It could provide the authorisation numbers that the agencies carrying out the checks provided. But it didn't have anything on the output of these checks. It's unclear whether Moneybarn ever received this information and simply relied on the results of the searches reaching a particular threshold, or whether this information was obtained at the time but wasn't retained.

In any event, as Moneybarn says it carried out credit checks regarding Mr A's indebtedness I consider it perfectly fair and reasonable to expect it to have had some knowledge of Mr A's recent credit history. Especially as it said that as a sub-prime lender the majority of its customers have lower than average credit ratings. Having reviewed Mr A's credit file, I can see that he'd defaulted on a number of his previous credit commitments and he was in arrears on a number of others too.

Bearing this in mind as well as the fact that Mr A either wasn't asked to, or wasn't able to provide a deposit when purchasing the car, the term of the agreement and the amount of the monthly payments, I think that it would have been reasonable and proportionate to find out

more about Mr A's monthly outgoings in order to assess whether he could take on this commitment.

For whatever reason, Mr A had proved unable to maintain his commitments to a number of other lenders. So I think it was reasonable and proportionate to apply further scrutiny to Mr A's expenditure (he was asked to evidence his income) in order to understand why things were going to be different this time and that Mr A would be able to make his payments in this instance.

While Moneybarn did apply reasonable scrutiny to Mr A's income by asking him to evidence this in the form of payslips, I don't think that it fairly and reasonably applied the same scrutiny to his expenditure. As far as I can see, Moneybarn didn't ask Mr A anything at all about his expenditure let alone verify it. Instead it proceeded with the application because the monthly payment required was less than 25% of Mr A's verified income. And Moneybarn's submissions to me appear to be saying that it would always proceed with an application where the proposed monthly payments are less than 25% of verified income.

I have significant concerns about the proportionality (as well as the lack of borrower focused nature) of any approach that heavily relies on it being fair and reasonable for a lender to lend simply because the monthly payments are below a certain percentage of a prospective borrower's income. Especially where that lender says the majority of its customers have had previous problems repaying credit. But I'm not required to consider Moneybarn's lending process as a whole here.

What I'm required to do, in this case, is decide whether Moneybarn's checks were reasonable and proportionate to understand if Mr A would more likely than not have been able to make the payments to this agreement bearing in mind what it knew about Mr A. And given what I've said about Mr A's previous difficulties repaying credit and his existing commitments, both of which I think are more likely than not to have shown up in the credit checks carried out, I think Moneybarn's failure to take any steps to ascertain Mr A's actual monthly expenditure, let alone verify it leads me to conclude that its checks before entering into this conditional sale agreement with Mr A were neither reasonable nor proportionate.

I've seen Moneybarn's submissions regarding Mr A's most recent default not being counted because it was for a small amount. But in my view a prospective borrower defaulting on a small amount remains a significant concern that merits further investigation. I think a borrower not being able to, or perhaps choosing, not to pay a small amount and instead accepting the significant implications of default is indicative of that consumer possibly having wider financial difficulty. And where a lender is aware of any such defaults I think it's fair and reasonable for that lender to enquire into the circumstances behind it and also take additional steps to ensure that any further lending is affordable.

So Moneybarn's submissions in relation to Mr A's most recent default haven't persuaded me to alter my conclusion that its failure to verify Mr A's expenditure meant that it didn't complete reasonable or proportionate checks before entering into this conditional sale agreement with Mr A.

Would reasonable and proportionate checks on Mr A's conditional sale agreement have indicated to Moneybarn that he would more likely than not have been unable to make the payments in a sustainable manner?

I've already explained that I think reasonable and proportionate checks would've involved verifying Mr A's normal monthly outgoings and any regular financial commitments. But as Moneybarn didn't carry out such checks before entering into this agreement, I can't say for sure what any such verification of Mr A's normal monthly outgoings and regular financial commitments would more likely than not have shown.

So I need to decide whether it is more likely than not that fair, reasonable and proportionate affordability checks would've told Moneybarn that it was unfair to offer these funds to Mr A. To help us understand for ourselves what Moneybarn would more likely than not have discovered if it had completed reasonable and proportionate checks on Mr A's agreement, we asked Mr A to provide us with information on his financial circumstances.

Of course, I accept different checks might show different things. And just because something shows up in the information Mr A has provided, it doesn't mean it would've shown up in any checks Moneybarn might've carried out. But in the absence of anything else from Moneybarn showing what Mr A's monthly expenditure is more likely than not to have consisted of, I think it's fair and reasonable to place considerable weight on it as an indication of what Mr A's financial circumstances were likely to have been at the time.

I've carefully looked through everything Mr A's provided and I've also thought about everything both parties have said. Having done so, I don't think Mr A was in a position to sustainably make the payments to this agreement. I say this because I think that any reasonable review of Mr A's outgoings, would have shown that he was already in a difficult financial position.

He already owed significant amounts of money to various credit providers on credit cards, personal loans and a logbook loan. He wasn't making any significant inroads into what he owed on these debts, only making minimum payments where he made any payment at all, and instead was engaged in a cycle of borrowing from multiple short-term providers in an attempt to make these payments and to repay previous loans. And this doesn't even take into account any costs for his and his dependants' normal living expenses either.

In these circumstances, I think there was little reasonable prospect of Mr A being able to make his payments without undue difficulty or borrowing further. And as I think that reasonable and proportionate checks would more likely than not have shown Moneybarn all of this, it follows that I think reasonable and proportionate checks would more likely than not have alerted it to the fact that Mr A wouldn't have been able to sustainably make the repayments due under this agreement.

Bearing in mind all of this, I find that Moneybarn didn't act fairly and reasonably towards Mr A when it entered into this conditional sale agreement with him.

Did Moneybarn act unfairly or unreasonably in some other way?

Even though I've already set out why I find that Moneybarn shouldn't have entered into this conditional sale agreement with Mr A. There are a couple of other matters which could mean that Moneybarn acted unfairly or unreasonably towards Mr A in some other way.

Firstly, there is the matter of Mr A's concerns about the quality of the vehicle. I've thought about this matter carefully. But as I've already found that Moneybarn shouldn't have entered into this conditional sale agreement with Mr A in the first place, I don't think that any finding that I may make in relation to the car Mr A was sold not being of satisfactory quality, will materially affect Mr A's position. So, in these circumstances, as it's not necessary for me to do so, I make no finding on whether or not the car Mr A was sold was of satisfactory quality.

Secondly I've also considered Moneybarn's failure to repossess the vehicle from Mr A – especially in light of the fact that no payments at all – whether as a deposit or in the form of monthly payments – have ever been made. Moneybarn has said that it didn't take any steps to take possession of the vehicle because the agreement was in dispute and that it wished to avoid causing further distress to Mr A.

I've given thought to what Moneybarn has said and I would agree that exercising forbearance where a consumer may be experiencing financial difficulty in the usual course of a dispute with our service wouldn't usually be an unreasonable course of action. This would especially be the case where the consumer was reliant on a vehicle for work, health reasons, or any other good reason.

That said, I'm mindful of the particular circumstances of this case. And in particular the fact that Mr A attempted to return the vehicle – albeit for different reasons – within a week of purchasing it. As I understand it, Mr A also made numerous other attempts to get Moneybarn to collect the vehicle saying that he wasn't using it because he wasn't able to and that he was incurring storage costs because Moneybarn was unfairly refusing to take it back.

So, bearing in mind these particular circumstances, I think that Moneybarn taking possession of the vehicle was the fair and reasonable thing to do. And I'm concerned that Moneybarn's failure to do so is likely to have led to a significant diminution in the value of the vehicle and possibly led to Mr A incurring additional costs.

Given all of this, I find that Moneybarn's failure to collect the vehicle from Mr A meant that it acted unfairly and unreasonably towards him in some other way.

Conclusions

Overall and having thought about the two overarching questions, set out on page 8 of this decision, I find that:

- Moneybarn *failed* to carry out reasonable and proportionate checks to establish whether Mr A would be able to sustainably make his repayments before entering into this conditional sale agreement with him;
- Reasonable and proportionate checks *would* more likely than not have showed Moneybarn that Mr A would not have been able to sustainably make the repayments to this agreement as and when they fell due;
- Moneybarn acted unfairly or unreasonably towards Mr A in some other way by refusing to take possession of the car when Mr A asked it to and in circumstances where it was aware that Mr A said he couldn't afford the payments.

The above findings leave me minded to reach the overall conclusion that Moneybarn didn't act fairly and reasonably in its dealings with Mr A.

Did Mr A lose out as a result of Moneybarn's shortcomings?

I think that Mr A did suffer adverse consequences as a result of Moneybarn unfairly entering into this conditional sale agreement with him. I think this is the case because he's being expected to pay interest and other charges on an agreement that never should have been entered into.

So overall and having carefully thought about everything provided and what's fair and reasonable in all the circumstances of this case, I find that Mr A lost out because Moneybarn unfairly entered into a conditional sale agreement with him, which it ought to have realised was unaffordable for him. And this means I think that Moneybarn needs to put things right.

Fair compensation – what Moneybarn needs to do to put things right for Mr A

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 Moneybarn putting Mr A in the position he'd now be in if he hadn't been sold the car in the first place.

But when it comes to complaints about irresponsible lending this isn't straightforward. Mr A was given the car in question and it has been in his possession for almost two years. So, in these circumstances, it's difficult to easily place Mr A 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 of the case. And I'd like to explain the reasons why I think that it would be fair and reasonable for Moneybarn 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 that 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.

But in this case there are no interest and charges to be refunded because no payments at all were made to the agreement. Equally I've already found that Moneybarn should have taken possession of the car sometime ago and my direction needs to reflect this. So, given Moneybarn now needs to take back the car, it wouldn't be fair to expect Mr A to pay back the amount he was lent as he won't have the vehicle. In these circumstances, I'm satisfied that the fair and reasonable thing to do in this case would be for Moneybarn to recover the vehicle from Mr A and to terminate the agreement. As Mr A didn't pay a deposit and didn't make any payments to the agreement there is no refund for Moneybarn to make to him.

I have already said that I acknowledge Mr A has been in possession of the car for almost two years. And ordinarily I'd usually say that a customer should have to pay for having had use of the vehicle for the period of time that they did. But I've also found that Moneybarn

didn't act fairly and reasonably by not collecting the car and the information I've been provided with (the current mileage of the car) indicates that it's more likely than not that Mr A hasn't used the vehicle in the period since.

So, given the particular circumstances of this case, I don't think it would be fair and reasonable for Moneybarn to charge Mr A anything for usage.

Mr A'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 the finance they shouldn't have been given. After all it's the interest and charges that the consumer is typically refunded and the expectation is they will have repaid, or they should repay what they owe.

But I don't think that doing this would be the fair and reasonable thing to do given the particular circumstances.

To explain, I'm telling Moneybarn to collect the car from Mr A and terminate the agreement. I've also said that it isn't fair and reasonable for Moneybarn to charge anything for usage for the period where Mr A had the car because it more likely than not wasn't used. So while I started out by saying that it's difficult to place Mr A in the position he would have been had he not been provided with the funds to buy this car in the first place, it seems to me that this is one of those unique circumstances where I have been able to unwind what went wrong. Moneybarn doesn't have to refund any payments, it simply has to take the car back from Mr A and although it's now a couple of years older it more likely than not hasn't been used.

Given I have, to all intent and purpose, been able to put Mr A in the position he would be in had he not entered into this agreement I think it would be unreasonable for me to depart from this conclusion in terms of Mr A's affairs going forward – especially where I'm issuing a decision in circumstances where Mr A has said his financial position hasn't improved.

In these circumstances, it seems to me that amending Mr A's credit file to remove adverse information (and in effect record that this loan was settled early) thus potentially increasing the chances of him being able to access further funds would be counterproductive and arguably not in his best interests, or those of any potential lender.

So having carefully thought about everything, rather than asking it to remove any adverse information from Mr A's credit file, I think that Moneybarn should remove the agreement in its entirety from Mr A's credit file. This means that Moneybarn should remove all reference to this conditional sale agreement from Mr A's credit file.

Compensation for additional losses and any distress and inconvenience caused

Mr A has told us that he's had to pay fees to store the vehicle as a result of Moneybarn's refusal to take it back. He's told us that he reached an agreement where he'd pay £120 a month, that he's already paid £500 in fees; and that he's liable for a further £1,780. He says that Moneybarn should reimburse him these costs. I've given a lot of thought to what he's said.

I want to start by saying that I can make an award to cover any additional – or consequential – losses suffered by a consumer where those losses were directly caused by a firm acting unfairly or unreasonably towards them. So as I've found that Moneybarn acted unfairly or

unreasonably towards Mr A in some other way by failing to collect the car from him, I can and should make an award for any costs Mr A incurred in order to store the car. But I'd need to be satisfied that it was more likely than not that any fees have already been paid or that they are due to be paid. As this is the case, I've considered whether Mr A has suffered or is due to suffer a loss as a result of having to pay storage fees.

I accept that it's perfectly possible for a consumer to have to pay fees to store a vehicle that they aren't using where they don't have the space to store this themselves. Equally the figure of £120 a week that Mr A says he paid, while a little on the high side, doesn't appear to be wholly unreasonable. That said, I asked Mr A to provide me with evidence of the existence of his agreement as well as evidence of proof of payment – such as receipts, invoices, or some other evidence of payment having been made.

Mr A has provided me with some emails and screenshots of some bank transfers. I've given a lot of thought to what Mr A has provided. But I'm afraid that the screenshots provided don't show me who the payments are going to or that they are going to cover parking payments. Indeed they are far too sporadic for me to draw a causal link between what's been paid and the figures quoted in the email. For example, I can only see sporadic payments here and there and nothing to suggest that Mr A was paying £120 a week.

As this is the case, I simply haven't been provided with enough to reasonably conclude that it's more likely than not Mr A has already paid £500 in storage fees and that he's liable for a further £1,780. And as I'm not making a finding that it's more likely than not that these fees have been paid and that the remaining amount is due, it follows that I'm not making any award for storage costs.

That said, I do think that Moneybarn's acting unfairly or unreasonably towards Mr A by not collecting the car from him did cause him a degree of distress and inconvenience. Our investigator recommended that Moneybarn should pay Mr A £250 for the distress and inconvenience caused by its actions.

Having considered matters, I don't think that this is unreasonable. And in the absence of any further arguments from either side as to why I should award a different amount, I'm satisfied that an award of £250 for the distress and inconvenience caused by Moneybarn acting unfairly or unreasonably in some other way towards Mr A represents a fair and reasonable settlement in respect of this part of the case.

Overall, all of this means that I find that it would be fair and reasonable in all the circumstances of Mr A's complaint for Moneybarn to put things right in the following way:

- arrange to collect the car from Mr A at no cost to him;
- terminate the conditional sale agreement and write off any outstanding balance remaining;
- remove all reference to this conditional sale agreement from Mr A's credit file;
- pay Mr A £250 for the distress and inconvenience its actions in acting unfairly or unreasonably in some other way – by failing to collect the car – caused.

My final decision

For the reasons I've explained, I'm upholding Mr A's complaint. Moneybarn No. 1 Limited should put things right for Mr A in the way I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 27 April 2020.

Jeshen Narayanan
ombudsman