complaint

Mrs P complains about T.B.I. Financial Services Ltd ("TBI") adding interest to a judgment debt.

background

On 10 August 2007 TBI obtained a county court judgment ("CCJ") against Mrs P for an outstanding credit card debt. Mrs P didn't settle the judgment so later on that year TBI obtained a charging order for the debt.

In 2009 the order was varied allowing Mrs P to repay the debt at the rate of £10 per month ("variation order"). And Mrs P has kept up with those repayments since.

Sadly, last year Mrs P was diagnosed with a degenerative disease. Her husband, Mr P, notified TBI and asked about the balance of the debt. When he found out that it was substantially more than the CCJ – notwithstanding all of Mrs P's payments – he queried this. TBI explained that this was because of the interest that had been charged over the years at a rate of 12% per annum.

Mr P, on Mrs P's behalf, complained. He said that the court hadn't awarded post judgment interest. TBI disagreed and highlighted the relevant parts of the court orders that it says permit it to charge interest.

Mr P brought the complaint to our service. The investigator didn't think that it'd been fair and reasonable to charge this much interest because it was more than Mrs P's monthly repayments. So she wasn't ever going to be able to repay the debt. TBI considered this and offered to back date interest to the 2009 variation order at 4% per annum.

The investigator didn't think this offer went far enough. So he asked TBI to remove all interest from 2009. And to stop charging interest going forward. TBI refused and asked for an ombudsman to make a decision.

It also said that the investigator's findings retrospectively changed the court orders, which this service can't do. So we don't have jurisdiction to consider the complaint at all.

my provisional decision

In my provisional decision, I said:

> I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.
>
> *can I consider this complaint*
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> I'd like to first address TBI's point about jurisdiction. This complaint is firmly within the jurisdiction of this service as outlined in the relevant rules in the DISP section of the Financial Conduct Authority Handbook. Namely, it's a complaint about a regulated business, carrying out a regulated activity and it has been brought to us within the relevant timescales.

It appears that what TBI is in fact referring to is our discretion to dismiss complaints that fall within our jurisdiction, without considering the merits, if a court has considered the same issues before (DISP 3.3.4AR(3)).

It's abundantly clear to me that there's no need to dismiss this complaint. The court has only ever considered – and decided upon – the amount of Mrs P's debt. And the rate at which she needs to repay that debt. The issues that I'm considering are entirely different and are all matters that have arisen after the court orders. Namely, the way TBI has managed Mrs P's debt – including the ongoing charging of interest and failure to send regular statements – and how it has treated her since the court orders. Especially in light of her change of circumstances – something which didn't even exist at the time of the court orders.

So Mrs P is entitled to bring these new issues to this service and I'm able to consider them.

was TBI entitled to charge interest on the judgment debt?

My starting point has been to consider whether TBI was entitled to charge ongoing interest after the court orders. Looking at the orders, the CCJ stated "interest to date of judgment" in the body of the order – which implies that ongoing interest wasn't permitted. But then a final charging order a few months later referred to "any further interest". So the wording of the court orders is confusing.

In any event, TBI has drawn my attention to the notes at the bottom of the CCJ to say that it was entitled to charge ongoing interest. Those notes state that interest can only be charged if:

i) The judgment debt is for more than £5,000; or,
ii) The debt attracts contractual or statutory interest.

Clearly (i) can't apply as Mrs P's judgment debt was for less than £5,000. And I don't think that (ii) applies either for the following reasons.

The County Courts (Interest on Judgment Debts) Order 1991 ("the 1991 order") clearly states that interest can't be charged on a judgment debt in relation to an agreement regulated by the Consumer Credit Act 1974 ("CCA"). As Mrs P's judgment debt related to an outstanding credit card balance, it falls into this category.

But the House of Lords in Director General of Fair Trading v First National Bank Plc ([2001] UKHL 52) said that charging interest on a CCA judgment debt was nevertheless possible if there's a term in the credit agreement stating that interest can be charged post judgment. TBI has said that term 6(iv) of the agreement is the one that allows this. But that term is about charging interest on outstanding balances. And it doesn't expressly permit post judgment interest.

As an aside, TBI has also referred to the Court of Appeal judgment in Ezekiel v Orakpo (The Times 16 September 1996) in support of a general right to charge interest on judgment debts. I've read this judgment with interest and I thank TBI for highlighting it. But I don't think it applies for two reasons.

Firstly, a House of Lords judgment will always take precedence over a Court of Appeal one – so the authority on the issue of CCA judgment debts has to be the House of Lords judgment I've cited above.

Secondly, this judgment doesn't appear to be in relation to a CCA judgment debt. So it doesn't help with the specific exclusion relating to CCA judgment debts only as outlined in the 1991 order. And reiterated by the House of Lords.

For all of these reasons, I'm not convinced that TBI was actually ever legally entitled to charge interest post judgment debt. But even if I'm wrong on this, my decision would still be that it's only fair and reasonable that TBI now back dates all interest, and doesn't charge any interest going forward, for the following reasons.

failure to send statements

During my review of this complaint, it became apparent that TBI had never sent statements to Mrs P. TBI said that it didn't have an obligation to do that. But it accepted that it would've been good practice.

Section 78 of the Consumer Credit Act 1974 ("s.78") places a legal obligation on creditors to send – as a minimum – annual statements in relation to running-account credit. That includes credit card debts.

The Office of Fair Trading ("OFT") has issued guidance on whether s.78 continues to apply when post judgment debt interest is being charged by a creditor ("Guidance on sections 77, 78 and 79 of the Consumer Credit Act 1974 – the duty to give information to debtors and the consequences of non-compliance on the enforceability of the agreement" 2010).

Paragraph 4.1 of that guidance very clearly states that s.78 doesn't apply where a judgment has been obtained "unless there is an interest-after-judgment clause in the agreement".

So if I'm right and, for the reasons I've outlined above, no interest-after-judgment clause exists in Mrs P's credit card agreement then TBI would be right in saying that it had no legal obligation to send Mrs P statements. But it would then also have to accept that it has incorrectly charged interest.

But TBI clearly believes that an interest-after-judgment clause did exist. If that's correct, then it can't also say that it had no legal obligation to send Mrs P statements. And both s.78 and the OFT guidance clearly state that a failure in that obligation means the credit agreement in question is unenforceable.

TBI has also made the point that, regardless of statements not being sent, Mrs P was nevertheless aware that interest was being charged on an ongoing basis. That's because prior to the first court order Mr P refused to agree to a voluntary charging order. So TBI's solicitor had told Mr P, during a call, that TBI would take the matter to court and ask for interest at 12% per annum.

There's a letter from TBI's solicitor sent to Mrs P at that time confirming the telephone conversation. It only stated that interest would be requested – not the timescales involved. So on the basis that this was an accurate reflection of the telephone call, I don't think the fact that ongoing interest would be charged was made sufficiently clear. As an aside, the letter refers to 8% per annum and not the 12% that TBI has now referred to. So there's a discrepancy there too.

On the other hand, Mr P says that the first time they realised that interest had continued to be added to the debt was when he contacted TBI last year. His recollection is that the court didn't award ongoing interest. And given what I've already outlined above about the confusing court orders – and the unclear letter from TBI's solicitors – I accept that Mr P is genuine in what he says.

In any event, I don't think that knowledge of what the court did – or didn't – direct can discharge the obligation under s.78.

So I've gone onto consider the impact of failing to send statements to Mrs P. I think that if annual statements had been sent correctly then – based on how Mr P instantly complained when he found out what the balance of the debt was – it's likely that he would've challenged the interest charged by TBI much sooner.

Or he would've had a chance to decide whether to repay the debt or not – rather than allowing interest to accrue for ten years. Mrs P could've also returned to court to clarify the position or seek an amendment – an option that is no longer realistic given the passage of time and her deteriorating health.

For all of these reasons, if I'm right about TBI being unable to charge interest then it didn't need to send statements. But then that means the interest point needs to be put right. If TBI is right, and it was entitled to charge interest, then it has failed to send statements. And that has left Mr and Mrs P unaware of the interest that has been building up for ten years. Meaning they lost the chance to stop that from happening – which can't possibly be fair. So, again, the interest point needs to be put right.

TBI's treatment of Mrs P.

Mr P has kindly shared medical evidence confirming Mrs P's disease. There can be no dispute that she's a very vulnerable consumer and her future prognosis is extremely saddening. And I don't think TBI has done enough to help her since finding out about her disease. I'll explain why.

I shared the medical evidence with TBI. And explained that due to the nature of Mrs P's disease I think it's important to give her a realistic chance of settling her debt as soon as possible. The rate at which Mrs P is currently repaying her debt – which continues to increase because of interest – means that this is currently impossible. So I explained to TBI that this is another reason why back dating interest, and charging none going forward, is a fair solution.

TBI responded to say that Mrs P has always had sufficient equity in her home to settle the debt in full. Instead she has chosen to continue "living beyond her means". In any event, taking into consideration what I'd outlined, it revised its offer to back date interest at 3% per annum from the variation order in 2009 to when it found out about Mrs P's disease. And to also stop charging interest going forward. It also undertook to not take legal action if Mrs P chooses to stop making her monthly payments. Basically, it's happy to wait until the house is sold and the charging order crystalizes.

I've considered TBI's comments. The only way Mrs P could achieve what TBI is suggesting would be to re-mortgage her home and thereby take on more debt. Plus that would simply shift the debt to Mrs P's mortgage lender – so in reality the situation would remain unchanged. The other option would be to sell her home, which I think would be a disproportionate solution given the amount of her debt.

So the suggestion that Mrs P has somehow wilfully refused to settle her debt, through failing to release the equity in her home, is alarming. And to say that she is "living beyond her means" as a result of this is equally alarming.

TBI's undertaking not to enforce the charging order if Mrs P stops paying, although no doubt made with good intentions, misses the crux of this complaint entirely. Namely, it's clear from the medical evidence that Mrs P would benefit from some kind of finality and peace of mind at a time where her health is deteriorating at a fast rate. And Mr P is trying to settle as many of her debts as he can before her condition worsens. So TBI's suggestion is completely counter intuitive to this reasonable aim.

TBI has also said that back dating interest retrospectively changes the terms of the court orders. I completely disagree. Assuming the notes in the court orders permit ongoing interest to be charged, the wording of them clearly left the charging of that interest to TBI's discretion. So it wasn't something mandatory.

And in any event, TBI can choose to handle Mrs P's debt in a different way to that suggested by the court. Provided it's not more onerous than the court's directions or to Mrs P's detriment. Indeed, TBI has done just that by offering to backdate some of the interest and by undertaking not to take enforcement action if Mrs P stops making her monthly payments. So TBI could've gone one step further and decided to back date all interest.

So I still think that TBI should re-work Mrs P's debt as though no interest had ever been charged from the date of the CCJ. And stop charging interest going forward. When deciding this I've weighed up all of the above facts and kept in mind TBI's overarching duty to treat Mrs P fairly (PRIN 2.1.1(6) R and CONC 7.3 of the FCA Handbook).

And I've also considered TBI's interests. This resolution ensures that TBI is still able to recover the debt awarded by the CCJ. And I think it's equally in TBI's interests to collect the debt and draw a line under this matter as soon as possible. But for some reason TBI appears to be set on drawing this matter out until Mrs P's home is sold.

conclusion

For all of these reasons I think that the fairest solution would be for TBI to back date all interest to the CCJ in 2007 at 0% per annum. It then needs to let Mrs P know what her new balance is. And no interest should be charged going forward.

None of my findings change the repayment terms set by the court – so it's important that Mrs P continues to repay her debt at the current rate of £10 per month. But she could, if she wished to, repay the full balance sooner. That's entirely a matter for her. TBI has indicated that if Mrs P decides to settle the debt sooner then it'll have to check where the settlement funds have come from. Because it believes that if Mrs P raises the funds through releasing equity from her home then this whole complaint has been disingenuous – as she could've done this all along.

To be clear, throughout my numerous conversations with Mr P I have found him to be entirely credible. And this extends to Mrs P. The crux of this decision is to ensure fair treatment of a very vulnerable customer. And that will be achieved through giving Mrs P a realistic chance of settling her debt as soon as possible. So TBI preventing or delaying an early repayment, by exploring whether Mrs P is "disingenuous", would not only be completely inappropriate but would also undermine my findings.

Finally, Mr P has handled this complaint from start to finish. And given the nature of Mrs P's disease it's clear that she has been completely unaware of it. So I don't think there's any need to award her compensation for trouble and upset.

As an aside, when looking at the account statements I noticed that £470 of legal fees had been added to the debt at the time of the charging order. But the court only awarded £208 in costs – which was also added to the debt in addition to the £470. So I asked TBI to remove the additional £470, which it has kindly agreed to do.

the response to my provisional decision

Mr P, on behalf of Mrs P, has accepted my provisional findings.

TBI has also responded with its comments, for which I'm grateful for, as follows:

can I consider this complaint

TBI maintains that this complaint is outside the jurisdiction of this service because it has already been decided in court in 2009.

Was TBI entitled to charge interest on the judgment debt?

TBI acknowledges that the House of Lords in Director General v First National Bank Plc was concerned with a contractual term that expressly permitted post judgment interest. But it says that the court didn't say that any such term had to refer to post judgment interest. So post judgment interest is also permitted by a term like the one TBI is relying upon – namely, a general term about interest accruing upon an outstanding balance. That's because Mrs P still has an outstanding balance.

failure to send statements

TBI says that my understanding of section 78 of the Consumer Credit Act 1974 is incorrect. That section only applies where a customer has made a request for a copy of the credit agreement and a statement. TBI didn't receive any such request from Mrs P. If it had then it would've complied with this.

And despite the discrepancy in the interest rate referred to in the solicitor's letter, it was clear that TBI's intention was to claim interest in the court action.

TBI's treatment of Mrs P

TBI has explained that between 2007 and 2010 two other creditors also had charging orders on Mr and Mrs P's property. So it's reasonable to assume that they were living beyond their means. Taking this into account, selling the house during that period wouldn't have been a disproportionate solution.

TBI would never suggest to a customer that they use the equity in their property to settle a debt. And it's alarmed that this service would fail to recognise equity in a home when assessing affordability, which is a key indicator in a lending proposition. So it's also relevant to Mr and Mrs P's situation.

Finally, TBI doesn't wish to delay any settlement until the property is sold. There are two reasons why it's questioning how Mr P plans to settle the account:

i) for money laundering purposes; and
ii) if it involves releasing equity from their property, then TBI wonders why it has taken this long for them to do that. TBI also says that the immediate settlement of the debt after the conclusion of this complaint would more likely undermine my findings.

my findings

I've re-considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint, including TBI's response to my provisional findings.

can I consider this complaint

It's unclear why TBI continues to refer to jurisdiction. There are no jurisdictional issues in this case. For the reasons I've previously outlined, if anything, it seems that TBI is trying to argue that this complaint should potentially be dismissed without considering its merits (DISP 3.3.4AR(3)). So I've reconsidered this point in light of TBI's further comments.

I'm only looking at events that have arisen after the court orders. So TBI's response is a little confusing given that post judgment events can't possibly have been decided by the court.

I think that what TBI is actually referring to is – what it perceives to be – a direction by the court that it could charge post judgment interest. I think it's important to point out that there's no evidence of an express direction by the court about post judgment interest. And as I outlined in my provisional findings, the body of the court orders are silent on this point – or, at best, confusing. Indeed, the CCJ expressly limited interest up until the date of the judgment.

In addition, I note that in Director General of Fair Trading v First National Bank Plc the House of Lords stated that "the practice in England and Wales is for the court to give judgment for the amount of principal and interest outstanding at the date of judgment, without reference to the borrower's continuing liability to pay interest on the outstanding balance of the principal sum after judgment" (paragraph 59).

TBI has instead sought to rely upon the notes at the bottom of the court orders to evidence its right to charge post judgment interest. But those notes are generic and don't form part of an express direction by the court. And they also only apply in certain circumstances. So this service is entitled to consider whether TBI's post judgment management of Mrs P's debt was in line with any entitlement arising from those notes, if one arises at all. This is something that the court hasn't considered.

For all of these reasons, I still see no reason why this service can't consider the issues that Mr and Mrs P have brought to this service.

But even if the court did expressly direct that TBI was entitled to charge post judgment interest, and I was therefore persuaded to dismiss this point, there is indisputably a part of Mrs P's complaint – the failure to send statements and the treatment of Mrs P post judgment – that I can look at and which I've addressed below. And in respect of those matters, I think TBI has acted unreasonably to the extent that I would still uphold the complaint in the same terms based on those failings alone.

was TBI entitled to charge interest on the judgment debt

The House of Lords in Director General of Fair Trading v First Bank Plc stated that if interest is due under a loan agreement then, "absent special provisions", the contract is considered ancillary to the covenant to pay the principal debt. The result of this is that if judgment is obtained for that principal debt then the covenant to pay interest merges into the judgment. So it became practice to include a term in credit agreements to the effect of the one the House of Lords was considering – namely, a term allowing post judgment interest. (See paragraphs 3 and 4 of the judgment).

So it seems clear to me from this that special provision had to be made in Mrs P's agreement for post judgment interest. As none exist then the contractual term that TBI now seeks to rely upon merged with the court's various judgments in relation to Mrs P's debt. This means that the court's orders and directions supersede the terms of the original agreement. And as I've outlined, the court doesn't appear to have expressly directed that TBI could charge post judgment interest.

In any event, even if I'm wrong about the legal position, I only have to take into account the relevant law when deciding whether TBI has acted fairly and reasonably in the circumstances of this complaint. And, as I've said above, I'd still be minded to uphold this complaint for the following reasons.

failure to send statements

I accept what TBI says about Mr and Mrs P never requesting copies of statements or the credit agreement under s.78(1). And the OFT guidance I've referred to only assists in relation to this subsection.

But s.78(4), which is a separate provision, would still apply. It's this subsection that creates the duty to send annual statements – as a minimum. I've communicated this to TBI and it has accepted that statements should've been sent.

I've considered TBI's comments on why it says Mr and Mrs P were nevertheless aware of TBI's intention to apply for post judgment interest. But an intention to apply – as indicated in the solicitor's letter – wouldn't have necessarily meant that TBI was subsequently successful in that application at court. The fact that the court orders appear to be silent on this corroborates Mr P's recollection that no interest was expressly awarded. So I accept that Mr and Mrs P didn't know that post judgment interest was being applied, especially as they didn't receive any post judgment statements.

The relevance of this is that, for the reasons I've previously outlined, I'm satisfied that Mr and Mrs P would've either challenged the interest or perhaps found a way to settle the debt. Rather than allowing it to continue building up for ten years. Of course it's now impossible for me to know whether they would've succeeded in either of these options. But as they've lost the chance to even try I think that the fairest solution is to give them the benefit of the doubt.

So regardless of whatever happened in the run up to the court proceedings, and in the months thereafter, it can't be overlooked that TBI neglected to keep Mrs P informed of the ever increasing debt over a ten year period. This in and of itself, even if I were persuaded interest could've been applied, is a significant failing. And for the reasons I've outlined above places Mrs P in an unfair position.

TBI's treatment of Mrs P.

My provisional findings outlined TBI's comments in relation to the equity in Mr and Mrs P's. Namely, they've had sufficient equity since 2007 to repay their debt. I didn't say that TBI had ever suggested this as a repayment method to Mr and Mrs P.

I've noted what TBI has said about the other charging orders. And I accept that this indicates that Mrs P was struggling financially at the time of the orders. But that doesn't necessarily mean a wilful or deliberate intention to live beyond her means or to evade paying her debts.

Turning to TBI's comments about why I haven't taken the equity in Mr and Mrs P's home into account, presumably the court would've considered Mrs P's ability to repay the debt when it made the charging order. And when it set up the arrangement to pay.

In any event, my findings don't relate to the principal debt or whether Mrs P can afford to repay that. I'm considering whether it was fair for TBI to charge post judgment interest without alerting Mrs P, at reasonable intervals, to the fact that it was doing so. And its failure to provide her with regular statements of the account so that she could manage the debt accordingly.

As I've said above, I don't think it was fair of TBI to charge interest without keeping Mrs P appraised of the fact that the principal debt wasn't diminishing. And the fact that the overall debt was increasing.

Finally, if Mr and Mrs P choose to repay their debt in full then of course TBI is entitled to carry out the necessary checks under money laundering regulations. As I've outlined, what wouldn't be appropriate is TBI questioning whether Mr and Mrs P have been "disingenuous" by not repaying their debt sooner. That is a point that has no bearing on money laundering checks, which is about confirming that any repayment funds have come from a legal source.

It's also important to remember that Mr and Mrs P believed that their repayments over the years have been reducing the principal debt. So they wouldn't have known that there was a need to try and repay it sooner than the repayment schedule set by the court. It follows that they couldn't have been disingenuous about something that they had no knowledge of.

conclusion

I'm not persuaded to change my provisional findings. It seems clear to me that either TBI wasn't entitled to charge post judgment interest or it was but failed to send statements in line with s.78(4). Either way the fairest solution is to back date the interest for all of the reasons I've given in both my provisional and final findings.

And of course there's the additional point about the fair treatment of a very vulnerable consumer. Namely giving Mrs P a realistic chance to settle her debt before her health deteriorates even further. Again, my provisional and final findings apply.

my final decision

For the reasons I've given, my final decision is that I uphold this complaint.
T.B.I. Financial Services Ltd must now:

- Back date all interest to the first court dated 10 August 2007 and re-work Mrs P's account accordingly;
- Remove the £470 of legal fees added to the account in December 2007 and, again, re-work the account accordingly – including any interest that was added to that amount;
- Ensure no interest is charged going forward;
- Notify Mrs P of the new balance of her debt and continue to notify her of her account activity and outstanding balance, as a minimum, annually;
- Allow Mrs P to repay the debt sooner than the current repayment schedule should she wish to do so.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs P to accept or reject my decision before 18 October 2018.

Sim Ozen
ombudsman