

complaint

Mr U has complained that 1st Stop Personal Loans Limited (“1st Stop” or “the lender”) should not have agreed a guarantor loan for him in September 2013.

Mr U says the loan was unaffordable for him and that 1st Stop would have understood this had it carried out sufficient checks before agreeing to lend to him. Mr U explained that he had a low income, that he had defaulted and missed payments on other loans and that this would have been apparent from his credit file record.

background

1st Stop agreed a loan of £3,500 for Mr U on the 17 September 2013. The monthly repayment was £172.55 over a term of three years and the total amount to be repaid was £6,296.80. It seems Mr U immediately had difficulty meeting his repayments via direct debit. The loan was eventually repaid in September 2017.

Our adjudicator assessed the complaint and found that 1st Stop should have gone further in its assessment of Mr U's ability to meet the loan repayments. And, had it done so, it would have found that he wasn't in a position to afford the repayments and so it should not have agreed to lend. Our adjudicator recommended that 1st Stop refund the interest and charges Mr U paid on his loan plus 8% simple interest per annum and remove any negative information about it from his credit file.

1st Stop disagreed with this recommendation and said that it had sufficient evidence to support its view that the required checks were carried out when Mr U applied for his loan. The complaint has now come to me, as an ombudsman, for review and final decision. 1st Stop hasn't provided any further comment or information in response to our adjudication so I will make my decision on the basis of the information available.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. I have also taken into account the law, any relevant regulatory rules and good industry practice at the time.

I have set out part of the relevant legal and regulatory framework that 1st Stop was subject to over the period it lent to Mr U in an [appendix](#) at the end of this decision. This includes some of the provisions of the Consumer Credit Act including later amendments, and guidance and rules provided by the Office of Fair Trading (the OFT) who was the regulator at the time.

Under this framework, in order to hold a consumer credit licence 1st Stop was obliged to lend responsibly. As clarified by the OFT, this meant that it needed to make a reasonable assessment as to whether or not a borrower could afford to meet its loan repayments in a sustainable manner over the lifetime of the agreement. Repaying debt in a sustainable manner meant being able to meet the repayments out of normal income while meeting normal outgoings and not having to borrow further to meet these repayments.

Neither the law nor the OFT specified what level of detail was needed or how the assessment was to be carried out in practice. The OFT said that the level of detail would depend on the type of product, the amount of credit being considered, the associated cost and risk to the borrower relative to the borrower's financial situation, amongst other factors.

It's important to note that this means the assessment needed to be consumer-focussed. It was not an assessment of the risk to the lender, but of the risk to the consumer. So even in this case where Mr U had a guarantor who had agreed to step in and meet repayments in the event that he couldn't, this doesn't absolve 1st Stop of its obligation to assess whether in the first instance Mr U could meet his repayments without undue difficulty.

Bearing all of this in mind, in coming to a decision on Mr U's case, I have considered the following questions:

- did 1st Stop complete reasonable and proportionate checks when assessing Mr U's loan application to satisfy itself that he would be able to repay the loan in a sustainable way?
- if not, what would reasonable and proportionate checks have shown?
- did 1st Stop act unfairly or unreasonably in some other way?

Having considered everything, I'm upholding Mr U's complaint about his loan. I appreciate this will be disappointing for 1st Stop and I hope my explanation below makes it clear why I have come to this conclusion.

did 1st Stop complete reasonable and proportionate checks when assessing Mr U's loan application to satisfy itself that he would be able to repay the loan in a sustainable way?

As the OFT set out in its guidance, assessing whether or not a borrower could meet their repayments sustainably required a check which was proportionate to the circumstances of the lending (loan size, term etc.) and to the financial circumstances of the consumer. Therefore, a lender's assessment would need to be flexible – what was reasonable for one consumer might not be so for another, or indeed what might be reasonable for a consumer for one loan application might not be so for the same consumer for a different loan.

In general, I'd expect a lender to require more assurance, the greater the potential risk to the consumer of not being able to repay the credit in a sustainable way. So, for example, I'd expect a lender to seek more assurance by carrying out more detailed checks

- the lower a customer's income (reflecting that it could be more difficult to make any loan repayments to 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 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).

Let me start by explaining that I have limited information about the loan or the agreement process. 1st Stop said in response to this Service's request for information about the complaint that *"due to the almost 6 years gap it would not be reasonable to still hold the calls as this is outside of our retention requirements. In addition we have to request the file from a secure off site holdings and to date have received no hard file"*. I appreciate that Mr U's loan was agreed some years ago but 1st Stop have been unable to provide Mr U's credit agreement or any information about the guarantor arrangements.

1st Stop says that it would have completed a full income and expenditure checks with both the applicant and the guarantor to ensure affordability. The lender said that Mr U's mother was the guarantor for the loan and it provided payslips dated August 2013 for both her and

Mr U. It also provided what it said was the guarantor's income and expenditure figures. But the monthly income figure given is about three times the amount shown on the payslip.

1st Stop also provided customer contact notes from early November 2013 to January 2018. These suggest that, while Mr U's mother may have made some payments for the loan, it was actually his father who was guarantor.

I appreciate that offering Mr U a guarantor loan could reduce the risk to 1st Stop of not getting its money back as his guarantor might be required to step in and meet the repayments if Mr U could not. But this doesn't reduce or remove the risk to Mr U of experiencing undue difficulty in meeting his repayments. And, as I've explained above, it is the risk to Mr U which 1st Stop was required to assess. I plan to say nothing further about the affordability checks the lender carried out on the guarantor's financial situation. Not only do I have conflicting and limited information on this point, but in this case I don't need to make a finding on the matter because I am upholding Mr U's complaint for other reasons.

1st Stop said that it would have carried out a basic credit check with a credit reference agency to confirm that Mr U had no county court judgements against him and wasn't bankrupt. This would also check his application for potential fraud. However, 1st Stop hasn't provided the results of this check or any evidence that it took place.

1st Stop didn't provide any record of Mr U's income or expenditure. As mentioned, it has provided his payslip which shows Mr U's basic monthly pay as £873. Mr U had some overtime pay that month which brought his net pay to £950, but I don't think it's reasonable to consider his overtime payments as fixed given his average monthly net pay for that year to date was less than £840.

I don't know what Mr U told it about his outgoings, assuming it asked about those. But given that the loan repayments would take up about 20% of Mr U's monthly income and that he needed to be able to meet this level of repayment for three years, I don't think it was fair of 1st Stop to rely on expenditure information from Mr U without verifying it. 1st Stop hasn't said that it took steps to do this and, altogether, I can't say it carried out a proportionate check here.

what would reasonable and proportionate checks have shown?

Mr U has provided his bank statements from around that time. To be clear, I'm not suggesting 1st Stop should have necessarily asked Mr U for these as part of its assessment but it is one way of verifying what he might have said about his expenditure.

I can see from these that Mr U had some outstanding debt – namely a long term loan with repayments of £268 taken out a few months prior to this one. He also had credit cards and an outstanding home credit loan. These combined with his new 1st Stop loan payment meant that Mr U was committing to spending more than half his monthly income on repaying debt, leaving about £400 to cover his normal living costs. Some of these are identifiable on his bank statements, for example mobile phone charges, water rates, car tax, petrol and food costs. Other identifiable spend includes payments to betting websites and betting shop cashpoint withdrawals, which in August 2013 alone amounted to more than his monthly salary. There are other cash withdrawals and many large transactions which seem to be payments to and from individuals and to and from other accounts. I think it's fair to say that Mr U's finances were volatile.

I don't know enough about Mr U's circumstances to say that this loan was unaffordable on a strict pounds and pence basis. However, given what I can identify of his spend on household bills and on a car, and on basics such as food and clothing, I think it's unlikely that he would have been able to afford his repayments in a sustainable manner. This is evidenced in the customer contact notes which show that from the very beginning Mr U's direct debit for his loan payment was returned or was cancelled. 1st Stop's call notes from early 2014 say that there was clearly a problem with the direct debit date or account as it has failed numerous times. And I can see that his mother made some payments around this time. As mentioned, Mr U finally repaid his loan almost a year later than originally agreed.

Taking all of this into account I think that, on balance, had 1st Stop carried out a proportionate check for this loan, it would have learnt enough to decline to lend to Mr U because it would have seen that he wasn't likely to be able to meet his repayments in a sustainable manner. And so I find it was irresponsible to have agreed to lend to him in this instance and it needs to put this right.

what 1st Stop needs to do to put things right

In order to put Mr U back in the position he would have been in, had it not agreed to lend to him, 1st Stop should:

- refund all interest and charges Mr U paid for his loan;
- pay interest on these refunds at 8% simple* per year from the dates of payment to the dates of settlement;
- remove any adverse information about this loan from Mr U's credit file;

*HM Revenue & Customs requires 1st Stop to take off tax from this interest. 1st Stop must give Mr U a certificate showing how much tax it's taken off if he asks for one.

my final decision

I am upholding Mr U's complaint for the reasons set out above and require 1st Stop Personal Loans Limited to put things right as I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr U to accept or reject my decision before 22 November 2019.

Michelle Boundy
Ombudsman

Appendix The legal and regulatory background to the lending

This appendix contains some of the laws and regulatory rules and guidance that I have borne in mind when making my decision.

the Consumer Credit Act 1974

Section 25(2) of the Consumer Credit Act 1974 set out the factors the Office of Fair Trading (OFT) had to have regard to when deciding whether or not to grant a consumer credit licence to a lender. It said:

- (1) In determining whether an applicant for a licence is a fit person for the purposes of this section the OFT shall have regard to any matters appearing to it to be relevant including (amongst other things)—*
- (a) the applicant's skills, knowledge and experience in relation to consumer credit businesses, consumer hire businesses or ancillary credit businesses;*
 - (b) such skills, knowledge and experience of other persons who the applicant proposes will participate in any business that would be carried on by him under the licence;*
 - (c) practices and procedures that the applicant proposes to implement in connection with any such business;*
 - (d) evidence of the kind mentioned in subsection (2A)*
- (2A) That evidence is evidence tending to show that the applicant, or any of the applicant's employees, agents or associates (whether past or present) or, where the applicant is a body corporate, any person appearing to the OFT to be a controller of the body corporate or an associate of any such person, has—*
- (a) committed any offence involving fraud or other dishonesty or violence;*
 - (b) contravened any provision made by or under—*
 - (i) this Act;*
 - (ii) Part 16 of the Financial Services and Markets Act 2000 so far as it relates to the consumer credit jurisdiction under that Part;*
 - (iii) any other enactment regulating the provision of credit to individuals or other transactions with individuals;*
 - (c) contravened any provision in force in an EEA State which corresponds to a provision of the kind mentioned in paragraph (b);*
 - (d) practised discrimination on grounds of sex, colour, race or ethnic or national origins in, or in connection with, the carrying on of any business;*
or

- (e) engaged in business practices appearing to the OFT to be deceitful or oppressive or otherwise unfair or improper (whether unlawful or not)*

Section 25(2B) set out an example of the type of practice referred to in Section 25(2A(e)) and said:

For the purposes of subsection (2A)(e), the business practices which the OFT may consider to be deceitful or oppressive or otherwise unfair or improper include practices in the carrying on of a consumer credit business that appear to the OFT to involve irresponsible lending.

section 140 of the Consumer Credit Act 1974

Mr U's loan was given to him after Section 140 of the Consumer Credit Act came into force on 6 April 2007. Section 140A sets out circumstances where the court may determine that the relationship between a creditor and a debtor is unfair to the debtor. Section 140A says:

140A Unfair relationships between creditors and debtors

- (1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following-*
 - (a) any of the terms of the agreement or of any related agreement;*
 - (b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;*
 - (c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).*
- (2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor).*
- (3) For the purposes of this section the court shall (except to the extent that it is not appropriate to do so) treat anything done (or not done) by, or on behalf of, or in relation to, an associate or a former associate of the creditor as if done (or not done) by, or on behalf of, or in relation to, the creditor.*
- (4) A determination may be made under this section in relation to a relationship notwithstanding that the relationship may have ended.*
- (5) An order under section 140B shall not be made in connection with a credit agreement which is an exempt agreement [for the purposes of Chapter 14A of Part 2 of the Regulated Activities Order by virtue of article 60C(2) of that Order (regulated mortgage contracts and regulated home purchase plans)]*

Section 140B sets out the types of order the court could make should it determine that the relationship between the creditor and debtor is unfair to the debtor. Section 140B says:

140B Powers of court in relation to unfair relationships

(2) An order under this section in connection with a credit agreement may do one or more of the following—

- (a) require the creditor, or any associate or former associate of his, to repay (in whole or in part) any sum paid by the debtor or by a surety by virtue of the agreement or any related agreement (whether paid to the creditor, the associate or the former associate or to any other person);]*
- (b) require the creditor, or any associate or former associate of his, to do or not to do (or to cease doing) anything specified in the order in connection with the agreement or any related agreement;*
- (c) reduce or discharge any sum payable by the debtor or by a surety by virtue of the agreement or any related agreement;*
- (d) direct the return to a surety of any property provided by him for the purposes of a security;*
- (e) otherwise set aside (in whole or in part) any duty imposed on the debtor or on a surety by virtue of the agreement or any related agreement;*
- (f) alter the terms of the agreement or of any related agreement;*
- (g) direct accounts to be taken, or (in Scotland) an accounting to be made, between any persons.*

section 55B of the Consumer Credit Act 1974

On 1 February 2011 the majority of the legislation implementing the provisions of the Consumer Credit Directive 2008 came into force. This included an additional requirement on a lender to carry out an “Assessment of creditworthiness” which was set out in section 55B of the Consumer Credit Act. Section 55B said:

Assessment of creditworthiness

55B *(1) Before making a regulated consumer credit agreement, other than an excluded agreement, the creditor must undertake an assessment of the creditworthiness of the debtor.*

(2) Before significantly increasing—

- (a) the amount of credit to be provided under a regulated consumer credit agreement, other than an excluded agreement, or*
- (b) a credit limit for running-account credit under a regulated consumer credit agreement, other than an excluded agreement, the creditor must undertake an assessment of the debtor's creditworthiness.*

(3) A creditworthiness assessment must be based on sufficient information obtained from—

(a) the debtor, where appropriate, and

(b) a credit reference agency, where necessary.

(4) For the purposes of this section an agreement is an excluded agreement if it is—

(a) an agreement secured on land, or

(b) an agreement under which a person takes an article in pawn.”.

regulation by the Office of Fair Trading

In March 2010, the OFT issued its guidance on the test for irresponsible lending for the purposes of the aforementioned section 25(2B) of the Consumer Credit Act 1974. The foreword to its ‘Irresponsible Lending Guidance’ (ILG) set out its purpose saying:

The primary purpose in producing this guidance is to provide greater clarity for businesses and consumer representatives as to the business practices that the Office of Fair Trading (OFT) considers may constitute irresponsible lending practices for the purposes of section 25(2B) of the Consumer Credit Act 1974. It indicates types of deceitful or oppressive or otherwise unfair or improper business practices which, if engaged in by a consumer credit business, could call into consideration its fitness to hold a consumer credit licence.

Whilst this guidance represents the OFT’s view on irresponsible lending, it is not meant to represent an exhaustive list of behaviours and practices which might constitute irresponsible lending.

Section two of the guidance sets out the general principles of fair business practice. Section 2.1 says:

In the OFT’s view there are a number of overarching principles of consumer protection and fair business practice which apply to all consumer credit lending.

Section 2.2 of the guidance says:

In general terms, creditors should:

- not use misleading or oppressive behaviour when advertising, selling, or seeking to enforce a credit agreement*
- make a reasonable assessment of whether a borrower can afford to meet repayments in a sustainable manner*
- explain the key features of the credit agreement to enable the borrower to make an informed choice*
- monitor the borrower’s repayment record during the course of the agreement, offering assistance where borrowers appear to be experiencing difficulty and*

- *treat borrowers fairly and with forbearance if they experience difficulties*

Section 2.3 lists other expectations of lenders. Amongst other things, it says:

In addition to the above there should be:

- *fair treatment of borrowers. Borrowers should not be targeted with credit products that are clearly unsuitable for them, subjected to high pressure selling, aggressive or oppressive behaviour or inappropriate coercion, or conduct which is deceitful, oppressive, unfair or improper, whether unlawful or not*

Borrowers who may be particularly vulnerable by virtue of their current indebtedness, poor credit history, or by reason of age or health, or disability, or for any other reason, should, in particular, not be targeted or exploited.

Section four of the guidance is concerned with the assessment of affordability that lenders were required to carry out before granting credit. Section 4.1 says:

In the OFT's view, all assessments of affordability should involve a consideration of the potential for the credit commitment to adversely impact on the borrower's financial situation, taking account of information that the creditor is aware of at the time the credit is granted. The extent and scope of any assessment of affordability, in any particular circumstance, should be dependent upon – and proportionate to – a number of factors (see paragraph 4.10 of this guidance document).

'Assessing affordability', in the context of this guidance, is a 'borrower-focussed test' which involves a creditor assessing a borrower's ability to undertake a specific credit commitment, or specific additional credit commitment, in a sustainable manner, without the borrower incurring (further) financial difficulties and/or experiencing adverse consequences.

Section 4.2 of the OFT guidance says:

Whatever means and sources of information creditors employ as part of an assessment of affordability should be sufficient to make an assessment of the risk of the credit sought being unsustainable for the borrower in question. In our view this is likely to involve more than solely assessing the likelihood of the borrower being able to repay the credit in question.

We consider that before granting credit, significantly increasing the amount of credit, or significantly increasing the credit limit under an agreement for running account credit, creditors should take reasonable steps to assess a borrower's likely ability to be able to meet repayments under the credit agreement in a sustainable manner.

“In a sustainable manner” is defined in Section 4.3 of the OFT guidance. And Section 4.3 says:

The OFT regards ‘in a sustainable manner’ in this context as meaning credit that can be repaid by the borrower:

- *without undue difficulty – in particular without incurring or increasing problem indebtedness*
- *over the life of the credit agreement or, in the case of open-end agreements, within a reasonable period of time*
- *out of income and/or available savings, without having to realise security or assets.*

Section 4.4 goes on to describe “undue difficulty” and says:

The OFT would regard ‘without undue difficulty’ in this context as meaning the borrower being able to make repayments (in the absence of changes in personal circumstances that were not reasonably foreseeable at the time the credit was granted):

- *while also meeting other debt repayments and other normal/reasonable outgoings and*
- *without having to borrow further to meet these repayments.*

Building on the proportionality principle set out in section 4.1, section 4.10 deals with the issues that might influence how detailed the affordability assessment should be. It includes factors such as:

- *the type of credit product;*
- *the amount of credit to be provided and the associated cost and risk to the borrower;*
- *the borrower’s financial situation at the time the credit is sought;*
- *the borrower’s credit history, including any indications of the borrower experiencing (or having experienced) financial difficulty*
- *the vulnerability of the borrower*

Section 4.12 is a non-exhaustive list of the types and sources of information that a lender might use to assess affordability, including:

- *evidence of income*
- *evidence of expenditure*
- *records of previous dealings with the borrower*
- *a credit score*

- *a credit report from a credit reference agency*
- *information obtained from the borrower, whether or an application form or separately*

Section 4.18 to 4.33 of the ILG set out some examples of “specific irresponsible lending practices” relating to how businesses assess affordability. Section 4.20 says this would include where a lender is:

Failing to undertake a reasonable assessment of affordability in an individual case or cases

Section 4.21 gives another example:

Failing to consider sufficient information to be able to reasonably assess affordability, prior to granting credit, significantly increasing the total amount of credit provided, or significantly increasing the credit limit (in the case of a running account credit agreement)

And Section 4.26 says a business would be acting irresponsibly if:

Granting an application for credit when, on the basis of an affordability assessment, it is known, or reasonably ought to be suspected, that the credit is likely to be unsustainable.

Sections 4.29 and 4.31 deal with a lender’s treatment of information disclosed by the customer. 4.29 says it would be an unsatisfactory business practice where a lender:

fail[s] to take adequate steps, so far as is reasonable and practicable, to ensure that information on a credit application relevant to an assessment of affordability is complete and correct.

And section 4.31 says it would be unsatisfactory for a lender to:

[Accept] an application for credit under circumstances in which it is known, or reasonably ought to be suspected, that the borrower has not been truthful in completing the application for credit with regards to the information supplied relevant to inform an assessment of affordability

Section 6 of the ILG sets out other “specific irresponsible lending practices” relating to lender behaviour once loan(s) have been agreed. Section 6.2 says it would be an unsatisfactory practice where a business is:

Failing to monitor a borrower’s repayment record

Section 6.2 goes on to say:

The OFT considers that creditors should take appropriate action...when/if there are signs of apparent / possible repayment difficulties.

-END-