

complaint

Mr B has complained about a logbook loan Carcashpoint Limited ("Carcashpoint") provided to him. He says at the time of his application he was trapped in a debt spiral which meant that he couldn't afford any more borrowing. And if Carcashpoint had completed thorough checks it would have known that there was no way he'd be able to repay this loan.

background

Mr B was provided with a loan of £1,460.00 in August 2013. The loan had a 36 month (or 156 week) term and Mr B was required to make monthly repayments of £186.59. This meant that should the loan have run to term Mr B was required to repay a total of £6,717.36.

Our investigator looked at Mr B's complaint and concluded Mr B shouldn't have been provided with this loan. Carcashpoint disagreed and asked for an ombudsman's decision. As a result, the complaint has been passed to me for a final decision.

In reaching my decision, I have taken into account the relevant law and regulations; relevant regulators' rules, guidance and standards; relevant codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

the legal and regulatory framework

Carcashpoint gave Mr B his loan in the period up to the end of March 2014. During this time it needed a standard licence from the Office of Fair Trading ("OFT"), in order to carry out consumer credit activities.

Section 25(2) of the Consumer Credit Act 1974 set out the factors the OFT had to consider when deciding whether 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)** [my emphasis].

Section 25(2B) set out a direct 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** [my emphasis].*

In March 2010, the OFT sought to produce clear guidance on the test for irresponsible lending for the purposes of section 25(2B) of the Consumer Credit Act 1974. And so it issued its guidance on irresponsible lending (“ILG”).

So I consider the ILG to be of central importance in reaching a fair and reasonable outcome in Mr B’s case.

The foreword to the guidance set out its purpose and it said:

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 through a form or a meeting*

Sections 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.

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. The ILG was amended to reflect any changes required by the Consumer Credit Directive and an additional requirement on a lender to carry out an "Assessment of creditworthiness" was set out in section 55B of the Consumer Credit Act. It's important to note that both section 25 and section 55 remained in force until regulation of Consumer Credit providers passed to the FCA in April 2014.

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."

Section 140 of the Consumer Credit Act 1974

Mr B's loan was provided 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.*

my 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 the case.

Taking into account the relevant rules, guidance, good industry practice and law, I think there are two overarching questions I need to consider in order to decide what's fair and reasonable in the circumstances of this complaint. These questions are:

- Did Carcashpoint complete reasonable and proportionate checks to satisfy itself that Mr B would be able to repay his loan in a sustainable way?
 - If so, did it make a fair lending decision?
 - If not, would those checks have shown that Mr B would've been able to do so?
- Did Carcashpoint act unfairly or unreasonably in some other way?

If I determine that Carcashpoint didn't act fairly and reasonably in its dealings with Mr B and that he has lost out as a result, I will then go on to consider what is fair compensation.

Did Carcashpoint complete reasonable and proportionate checks to satisfy itself that Mr B would be able to repay his loan in a sustainable way?

Regulations in place when Carcashpoint lent to Mr B required it to carry out a reasonable assessment of whether Mr B could afford to repay his loans 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 Carcashpoint had to think about whether repaying the loan sustainably would cause difficulties or adverse consequences *for Mr B*. In other words, it wasn't enough for Carcashpoint to think only about the likelihood that it would get its money back without considering the impact of repayment on Mr B himself. The loans being secured on Mr B's car didn't alter, lessen or dilute this obligation.

Checks also had to be "proportionate" to the specific circumstances of the loan application. In general, what constitutes a proportionate affordability check will be dependent upon a number of factors including – but not limited to – the particular circumstances of the borrower

(e.g. their financial history, current situation and outlook, and any indications of vulnerability or financial difficulty) and the amount / type / cost of credit they are seeking. Even for the same customer, a proportionate check could look different for different loan applications.

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

- 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); and
- the *greater* the number and frequency of loans, and the longer the period of time during which a customer has been given loans (reflecting the risk that repeated refinancing may signal that the borrowing had become, or was becoming, unsustainable).

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 and any foreseeable changes in future circumstances. I've thought about all the relevant factors in this case.

Were Carcashpoint's checks reasonable and proportionate?

Carcashpoint appears to have gone through an income and expenditure questionnaire with Mr B. Carcashpoint says the income and expenditure information showed that Mr B had a monthly disposable income of £605 which meant that he could easily afford the monthly payment of £186.59.

I've thought about what Carcashpoint has said. But it isn't enough to simply request information from a consumer. A lender is also required to scrutinise what it is provided with. And I don't think that Carcashpoint did that here. I

I say this because Mr B was asked to provide three months' worth of bank statements in order to verify his income. And while the income and expenditure declaration suggested that Mr B's wife paid all of the household bills. But the statements Mr B provided suggested that this was unlikely to be the case as bill payments were going out of his account. I'm also mindful that the statements provided indicated that Mr B had no money left in his account at the end of the month. And, in my view, this called into question Mr B's declaration that he had in excess of £600 in monthly disposable income.

So given the circumstances in this case, where Mr B was being provided with expensive high-interest loans and there was the possibility of him losing his car, I would've expected Carcashpoint to have asked further questions in order to clarify the inconsistencies between the declaration and what the bank statements showed.

As Carcashpoint failed to take steps to clarify the inaccuracies and inconsistencies, I don't think the checks it carried out before providing this loan was fair, reasonable or proportionate.

Would proportionate checks on Mr B's loan have indicated to Carcashpoint that he would have been unable to repay it in a sustainable manner?

I've already explained that I think a proportionate check for Mr B's loan would've involved properly scrutinising Mr B's normal monthly outgoings and regular financial commitments.

As Carcashpoint didn't carry out a proportionate check for this loan, I can't say for sure what proportionate checks would most likely have shown. So I need to decide whether it is more likely than not that fair, reasonable and proportionate affordability checks would've told Carcashpoint that it was unfair to offer this loan to Mr B. To help us understand for ourselves what Carcashpoint would more likely than not have discovered if it had completed reasonable and proportionate checks on Mr B's loans, we asked Mr B to provide us with information on his financial circumstances.

Having carefully considered the information, I think that a detailed review of Mr B's financial circumstances before this loan application would have shown that he'd previously had significant problems maintaining payments to credit. Mr B had defaulted on two accounts in the lead up to this application and his statements also show that he was borrowing from a number of different short-term lenders in an attempt to try and repay what he owed.

So it follows that I think a fair, reasonable and proportionate check would more likely than not have indicated that Mr M was struggling to make payments to his existing credit. And as Mr M couldn't repay what he already owed and his position was worsening, I think that he simply wasn't in a financial position to sustainably repay any further borrowing.

Consequently I'm satisfied that reasonable and proportionate checks would have alerted Carcashpoint to the fact that Mr B was more likely than not unable to repay this loan without undue difficulty and/or borrowing further. And it therefore follows that I think that it was unfair for Carcashpoint to have provided this logbook loan to Mr B.

Did Carcashpoint act unfairly or unreasonably towards Mr B in some other way?

I've carefully thought about everything provided. Having done so, I've not seen anything here that leads me to conclude Carcashpoint acted unfairly or unreasonably towards Mr B in some other way.

Did Mr B lose out as a result of Carcashpoint's shortcomings in relation to this loan?

As Mr B ended up paying interest and charges on a loan that he shouldn't have been given, I'm satisfied that he lost out as a result of having been unfairly provided with this loan.

conclusions

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

- Carcashpoint *didn't* complete reasonable and proportionate checks on Mr B to satisfy itself that he was able to repay his logbook loans in a sustainable way;

- reasonable and proportionate checks would more likely than not have shown Carcashpoint that Mr B would not have been able to repay this loan in sustainable way;
- Carcashpoint didn't act unfairly or unreasonably towards Mr B in some other way;
- Mr B lost out as a result of having been provided with this loan.

These findings lead me to conclude that Carcashpoint unfairly and unreasonably provided Mr B with his loan and he lost out as a result. So Carcashpoint needs to put things right for Mr B.

fair compensation – what Carcashpoint needs to do to put things right for Mr B.

Having carefully thought about everything provided, I think it would be fair and reasonable in all the circumstances of Mr B's complaint for Carcashpoint to put things right in the following way:

- refund all interest, fees and charges (including administration and late payment fees) Mr B paid on his loan.
- add interest at 8% per year simple on the above interest, fees, charges and overpayments from the date they were paid by Mr B to the date of settlement†;
- remove any adverse information recorded on Mr B's credit file as a result of this loan.

† HM Revenue & Customs requires Carcashpoint to take off tax from this interest. Carcashpoint must give Mr B a certificate showing how much tax it's taken off if he asks for one.

my final decision

For the reasons given above, I'm upholding Mr B's complaint about Carcashpoint Limited and telling it to pay Mr B compensation as I've set out above.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr B to accept or reject my decision before 9 November 2019.

Jeshen Narayanan
ombudsman