

complaint

Mr B has complained that TFS Loans Limited ("TFS") irresponsibly provided him with an unaffordable guarantor loan. He says that he shouldn't have been given the loan due to his situation and the risk that he posed bearing in mind his existing debt and gambling addiction.

background

TFS provided Mr B with a guarantor loan in December 2013. The loan was for £6,000.00. A broker fee of £600 and a lender fee of £295 appear to have been added to the loan, which was due to attract £10,024.28 in interest should it have run to term. So the total charge for the credit was £10,919.28 and the total amount to be repaid was £16,919.28. All of this meant that Mr B needed to make 72 monthly repayments of £234.99.

One of our investigators had an initial look at what TFS and Mr B told us. And she thought that TFS hadn't done anything wrong or treated Mr B unfairly when providing this loan. So she didn't uphold Mr B's complaint. Mr B disputed our investigator's assessment and asked for an ombudsman's decision.

Mr B's complaint was then reviewed by one of our adjudicators with a view to the case being passed to an ombudsman. And after her review she told TFS that the checks it carried out before providing Mr B with this loan weren't reasonable and proportionate and if such checks had been carried out it would have seen that it Mr B wasn't in a position to sustainably make the repayments.

So she thought that TFS shouldn't have provided Mr B with this loan and upheld the complaint. TFS disagreed with our adjudicator's assessment and asked for an ombudsman's decision. So the complaint has now been passed to me for a final decision.

the regulatory framework

TFS provided Mr B with this 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 140 of the Consumer Credit Act 1974

Mr B’s loan was provided 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 particular complaint.

These two overarching questions are:

- Did TFS 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 TFS act unfairly or unreasonably in some other way?

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

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

The rules and regulations at the time TFS lent to Mr B required it to carry out a reasonable and proportionate assessment of whether he could afford to repay his loan in a sustainable manner. TFS was required to carry out this borrower focused assessment in addition to a similar one on the guarantor. This assessment is sometimes referred to as an "affordability assessment" or "affordability check".

The checks had to be "borrower" focused – so TFS had to think about whether repaying the loan sustainably would cause difficulties or adverse consequences *for Mr B*. In practice this meant that TFS had to ensure that making the payments to the loan wouldn't cause Mr B undue difficulty or adverse consequences.

In other words, it wasn't enough for TFS to simply think about the likelihood of it getting its money back, it had to consider the impact of loan repayments on Mr B. The existence of a guarantee and the potential for TFS to pursue the guarantor instead of Mr B, for the loan payments doesn't alter, lessen, or somehow 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 consumer (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 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've been for a given loan application – including (but not limited to) any indications of borrower vulnerability and any foreseeable changes in future circumstances.

I've carefully thought about all of the relevant factors in this case.

Were TFS's checks reasonable and proportionate?

TFS has said that it completed an income and expenditure assessment with Mr B and produced a credit report. During this assessment Mr B confirmed that he a monthly income of £4,680.00 and existing monthly credit commitments of £2,922.84, which meant that he was left with £1,438.16 for his other living expenses once his TFS loan payments were also taken into account. Mr B also disclosed that he'd defaulted on a credit card around three years or so previously.

I've carefully thought about what TFS has said. But simply requesting information from a borrower doesn't, on its own, mean that a lender will have carried out a borrower focused assessment of the borrower's ability to sustainably repay a loan.

Mr B told TFS that he'd previously defaulted on a credit card and that's why he wasn't able to obtain mainstream finance. So while I accept that Mr B may have said that the default was historic, I still think that TFS ought to have taken steps to verify Mr B's monthly expenditure. In my view, this default coupled with the significant amount of other existing debt Mr B had was inconsistent with someone having the level of disposable income that Mr B declared.

I say this while especially mindful of the fact that the rules themselves provide guidance on the proportionality of affordability/creditworthiness assessments. The rules and guidance suggest that the risk of any 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. This was an expensive loan and TFS had been told that Mr B had previous problems repaying credit.

I accept that TFS might have been prepared to accept this credit risk because the existence of Mr B's guarantor might have given it more confidence that the payments would be made, But I don't think that the existence of the guarantor, on its own, meant that Mr B himself would be able to sustainably make the payments given what the credit file showed.

Indeed I also think that it might also be helpful for me to explain that a less detailed affordability assessment, without the need for verification, is only really likely to be fair, reasonable and proportionate in circumstances where the amount to be repaid is relatively small, the consumer's financial situation is stable and they will be indebted for a relatively short period.

But, in circumstances – such as here - where a customer's finances are showing signs of possible strain and distress, they are expected to maintain payments for a longer period of time and there is the potential that a guarantor will be required to step in and make payments, I think it's far more likely that any affordability assessment would need to be more detailed and contain a greater degree of verification, in order for it to be fair, reasonable and proportionate.

In my view, bearing in mind the term of the loan, the cost of the credit, what TFS had seen or ought to have seen in the information gathered and the potential implications for the guarantor, TFS needed to get a thorough understanding of Mr B's financial position in order to properly assess whether he'd be able to sustainably make the loan payments he was being asked to commit to.

So as well as asking Mr B about the details of his income and expenditure, I think that TFS needed to verify what it was being told by Mr B, rather than relying on what Mr B declared for his monthly expenditure. It could have done this by asking for information such as bank statements or copies of bills. And when it obtained this information it needed to properly scrutinise it and ensure that Mr B did have enough funds to be able to make the payments.

As there's no evidence that TFS did properly scrutinise the information provided, or that it asked Mr B to provide documentary evidence to support the expenditure declarations made, I find that it didn't complete fair, reasonable and proportionate affordability checks before providing Mr B with this loan.

Would reasonable and proportionate checks have indicated to TFS that Mr B would have been unable to sustainably repay this loan?

As reasonable and proportionate checks weren't carried out before this loan was provided, I can't say for sure what they would've shown. So I need to decide whether it is more likely than not that a proportionate check would have told TFS that Mr B would've been unable to sustainably repay this loan.

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

But in the absence of anything else from TFS showing what this information would have shown, I think it's perfectly fair, reasonable and proportionate to place considerable weight on it as an indication of what Mr B's financial circumstances were more likely than not to have been at the time.

As I've already explained, TFS was required to establish whether Mr B could sustainably make his loan repayments – not just whether the loan payments were technically affordable on a strict pounds and pence calculation.

Of course the loan payments being affordable on this basis might be an indication that a consumer could sustainably make the repayments. But it doesn't automatically follow that this is the case. And as a borrower shouldn't have to borrow further in order to make their payments, it follows that a lender should realise, or it ought fairly and reasonably to realise, that a borrower won't be able to sustainably make their repayments if it is on notice that they are unlikely to be able to make their repayments without borrowing further.

I've carefully considered the information Mr B has provided in light of all of this.

The information I've been provided with shows that that Mr B was gambling unsustainable amounts of money. In these circumstances, I don't think that TFS would have lent if it knew, as I think it ought to have, that Mr B owed so much on payday loans because of his

gambling. And that his ability to repay this loan would, to in all intent and purpose, be based on his success as a gambler.

Bearing all of this in mind, I'm satisfied that reasonable and proportionate checks would more likely than not have demonstrated that Mr B would not have been able to make the repayments to this loan without borrowing further and/or suffering undue difficulty. And, in these circumstances, I find that reasonable and proportionate checks would more likely than not have alerted TFS to the fact that Mr B would not be able to sustainably make the repayments to this loan.

Did TFS 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 TFS acted unfairly or unreasonably towards Mr B in some other way.

So I find that TFS didn't act unfairly or unreasonably towards Mr B in some other way.

conclusions

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

- TFS *didn't* complete reasonable and proportionate checks on Mr B to satisfy itself that he was able to repay his loan;
- reasonable and proportionate checks *would* more likely than not have shown Mr B was unable to sustainably make the repayments to this loan;
- TFS *didn't* also act unfairly or unreasonably towards Mr B in some other way.

The above findings leave me concluding that TFS unfairly and unreasonably provided Mr B with a guarantor loan in December 2013.

Did Mr B lose out as a result of TFS unfairly and unreasonably providing him with his guarantor loan?

I think that this loan had the effect of unfairly increasing Mr B's indebtedness as it led to him to being provided with expensive credit for a significant sum. This loan was expensive and he ended up paying interest and charges on a loan that he shouldn't have been given in the first place.

So I find that Mr B did suffer adverse consequences and as a result lost out because TFS unfairly provided him with this loan.

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

I've carefully thought about what TFS should do to put things right in this case. Having done so, I think that it would be fair and reasonable in all the circumstances of Mr B's complaint for TFS to put things right by:

- refunding the interest and charges (including all broker and document fees) Mr B paid on his guarantor loan;
- add interest at 8% per year simple on any interest and charges from the date they were paid by Mr B to the date of settlement†;
- removing any adverse information recorded on Mr B's credit file as a result of this loan.

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

my final decision

For the reasons I've explained, I'm upholding Mr B's complaint. TFS Loans Limited should put things right for Mr B in the way I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 3 November 2019.

Jeshen Narayanan
ombudsman