

The complaint

Mr D has complained that Clydesdale Financial Services Limited, trading as Barclays Partner Finance (“BPF”), didn’t properly assess his ability to repay a loan before lending to him.

What happened

In August 2016, Mr D borrowed £29,421 from BPF to pay for a timeshare membership sold to him by a timeshare provider (“the Supplier”). The membership cost £25,544, but Mr D borrowed more to refinance an existing loan he held with BPF. At the same time that the timeshare was sold, the Supplier – acting as a broker for BPF – arranged the loan for Mr D. The loan was to run for fifteen years with a monthly payment of £339.81, meaning the total amount repayable was £61,165.80.

Mr D complained that BPF had lent to him without properly checking he was able to repay the loan, for example, by asking for details about his income or outgoings. Mr D thought that, had it done so, it would have realised he was not in a position to repay the loan.

BPF responded to say the loan agreement was clear on the amount borrowed, the term and the amount of the monthly repayments. It pointed out that Mr D had a fourteen-day withdrawal period to exit the timeshare agreement and loan and also Mr D had signed on the day to say he understood what he was buying and that he was doing so with credit. Unhappy with the response, Mr D brought his complaint to our service.

After the complaint was with our service, BPF wrote to Mr D again. BPF noted that the Supplier had provided a credit application form that was filled in at the time of sale. That form showed that Mr D’s gross annual income was £37,000 and it said it wasn’t able to check all available records, such as bank statements or payslips, at the time of lending. Instead, BPF said it relied on the income quoted at application stage and a customer’s credit file when deciding to lend. When BPF checked its lending criteria again, it said that based on Mr D’s credit file at the time of lending, it would have been prepared to lend to him if his income was actually £20,000.

One of our investigators considered the complaint but didn’t think it was one that should have been upheld. She thought that there wasn’t enough to say the loan was unaffordable for Mr D. She also considered how the timeshare was sold, but didn’t think there was anything that BPF was responsible to answer through the operation of the Consumer Credit Act 1974. Mr D disagreed with what was said and asked for his complaint to be passed to an ombudsman to review.

Before the complaint was passed to an ombudsman, a different investigator considered it again. He asked BPF to provide more information about how it assessed Mr D’s ability to repay the loan, but nothing further was provided. He thought that, considering the size of the loan, that BPF hadn’t undertaken proportionate checks on Mr D’s ability to repay the loan. Then, having looked at Mr D, and his wife’s, bank statements at the time the loan was taken, he thought that had the right checks been undertaken BPF should have concluded that the loan was unaffordable. Our investigator recommended BPF unwind the loan, repaying to

Mr D what he'd paid toward it and writing off the outstanding balance, but on the basis that Mr D assigned his rights to the timeshare to BPF. He also thought BPF hadn't treated Mr D sympathetically after he'd said he was in financial difficulty and recommended BPF pay £300 to reflect the harm caused.

Mr D accepted our investigator's view, but BPF didn't respond. As the parties didn't come to an informal agreement, the complaint was passed to me for a decision.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having done so, I agree with our investigator that Mr D's complaint should be upheld for the same reasons.

The regulatory background

At the time of the lending, BPF had to comply with rules and guidance set down by the Financial Conduct Authority ("FCA") and published in the FCA Handbook. Part of that was titled 'Principles of Business' (PRIN) – the most relevant of which was PRIN 2.1.1R(6), which says "*[a] firm must pay due regard to the interests of its customers and treat them fairly.*"

The FCA also set out more specific business guidance for different regulated activities, including when providing consumer credit (CONC). The relevant part is CONC 5, which deals with responsible lending. At the time of Mr D's borrowing, some of the specific rules and guidance included:

- Before entering into a regulated credit agreement, BPF needed to undertake an assessment of Mr D's creditworthiness (CONC 5.2.1R(1)).
- Any assessment needed to consider the potential for any commitments under the agreement to adversely impact Mr D's financial situation, taking into account the information of which BPF was aware at the time of lending, and Mr D's ability to make repayments over the life of the loan (CONC 5.2.1R(2)).
- Any assessment needed to be based on sufficient information obtained from Mr D and a credit reference agency, where necessary (CONC 5.2.1R(3)).
- Any assessment was dependent upon and proportionate to factors that included the type of credit, the amount borrowed, the cost of credit, Mr D's financial position at the time of lending, Mr D's credit history and existing financial commitments, any future financial commitments or changes in circumstances and any vulnerability; but this list wasn't exhaustive (CONC 5.2.3G).
- It may have been disproportionate to consider every factor in every case, but that was dependent on the particular circumstances (CONC 5.2.4G(2)).
- BPF should have considered the type of information it needed to use in its assessment, which could have included evidence of income and expenditure, a credit score, a credit reference agency report and information provided by Mr D (CONC 5.2.4G(3)).
- A creditworthiness assessment was more than just assessing Mr D's ability to repay the credit (CONC 5.3.1G(1)) and any such assessment should have included BPF taking reasonable steps to assess Mr D's ability to meet the repayments in a sustainable manner and without incurring financial difficulties or experiencing significant adverse consequences (CONC 5.3.1G(2)).
- If BPF took Mr D's income into account in the creditworthiness assessment (which it said it did), it wasn't generally sufficient to rely solely on a statement of income from

Mr D (CONC 5.3.1G(4)(b)).¹

- In these rules and guidance, 'sustainable' meant that the repayments Mr D made under the loan could be made without undue difficulty over the life of the agreement and out of his income and savings, in particular that he would be able to meet his repayments while meeting other reasonable commitments and without having to borrow more to meet the repayments (CONC 5.3.1G(6)).

Also relevant (and referred to in CONC 5.2) was the Office of Fair Trading's ("OFT") Irresponsible Lending Guidance. This guidance helped set out good industry practice prior to the FCA taking over the regulation of consumer credit in April 2014. At para 4.1 it was said:

"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."

In summary, BPF's assessment of Mr D's circumstances before agreeing to lend to him had to be borrower-focused. In practice, that meant that as well as BPF deciding for itself its own level of acceptable risk, it also had to assess the risk of lending to Mr D as a borrower. In doing that, it needed to assess whether he could afford the repayments in a sustainable way over the term of the loan.

The Financial Ombudsman Service has set out its approach to lending complaints on its website, so in keeping with that and what I've set out above, when deciding a fair and reasonable outcome to this complaint, I need to consider:

1. Did BPF carry out reasonable and proportionate checks to satisfy itself that Mr D was likely to have been able to repay the borrowing in a sustainable way?
 - i. If BPF carried out such checks, did it lend to Mr D responsibly using the information it had?
or
 - ii. If BPF didn't carry out such checks, would the right checks have shown that Mr D was unlikely to have been able to repay the borrowing in a sustainable way?
2. Did Mr D lose out as a result of BPF's decision to lend to him?

Did BPF carry out reasonable and proportionate checks?

I've set out above the FCA's rules and guidance that applied at the time of Mr D's lending. The FCA recognised that what constituted a proportionate check depended on a number of factors. So there wasn't a set check that BPF had to undertake in every lending decision.

Given the set of non-exhaustive factors set out, it's clear that some factors were related to the type of credit and some were focused more on the potential borrower's own circumstances. So I think proportionate checks ought to have been more thorough:

- the lower a consumer's income as it could be more difficult to make loan repayments from a lower income,
- the higher the amount due to be repaid as it could be more difficult to make higher

¹ Although if the information provided was false *and* BPF had no reason to know that was the case, BPF wouldn't have contravened this guidance.

- repayments, particularly from a lower level of income, and the longer the term of the loan as the cost of credit is likely to be greater and the payments are likely to run for an extended period.

BPF has said that, when assessing Mr D's creditworthiness, it considered his credit file and what was said in his application. However I've not been provided with a copy of what BPF actually considered. I've seen that BPF wrote to the Supplier on the date the loan was arranged to say that it would offer the loan as long as Mr D was able to confirm his income was £37,000, if required. I can't see that he was ever asked to confirm this and, when bringing his complaint, Mr D said he never had this level of income.

There is also a 'finance sale checklist' on BPF headed paper that was filled in by the Supplier's salesperson at the time of sale. It confirmed that various formalities were undertaken, including providing Mr D copy of the loan agreement and explanatory documentation. The salesperson signed to state they believed Mr D understood the loan terms, that Mr D had been asked to consider if he could afford the loan repayments if his circumstances changed, that all information given by Mr D was accurately recorded in the application and there was no reason to disbelieve what Mr D had said. However, I've not seen that Mr D ever acknowledged this was the case at the time of sale.

So it appears to me that the creditworthiness assessment BPF undertook was based on Mr D's credit file and an unsubstantiated statement of Mr D's income provided by the Supplier. But, as set out above, the purpose of the creditworthiness assessment was to ascertain whether Mr D was able to repay the borrowing in a sustainable way. But I can't see that any assessment of that was undertaken. In both answering Mr D's initial complaint and in responding to our investigator's view, BPF has failed to say how it assessed Mr D's ability to repay the borrowing by giving any indication of what it expected his disposable income to be to cover the repayments. It follows, I can't say that BPF carried out reasonable and proportionate checks given the circumstances of this complaint.

What would reasonable and proportionate checks have shown?

As I've already explained, there weren't specific checks that BPF needed to carry out, so it's not possible to say with certainty what reasonable and proportionate checks would have shown. But what I am considering with the likelihood that reasonable and proportionate checks would have shown that wither Mr D would or wouldn't have been able to sustainably repay his loan.

This is difficult as my decision is taking place several years after the date that the loan was granted, and so I've used the evidence available to get a picture of Mr D's circumstances at the time. In doing so I've considered Mr D's employment records and bank statements (and that of his wife), but I'm not making any finding that BPF needed to see those documents at the time of lending in order to carry out reasonable and proportionate checks.²

I've seen five months of statements from Mr and Mrs D's joint account from May to October 2016, Mrs D's bank statements covering the same period and Mr D's P60 for the tax year to April 2016.

Having looked at the two sets of statements, I think they provide an adequate picture of Mr D's household income and expenditure. The bank statements show that Mr D had an average income from his employment of around £1,480 a month in the three months prior to the loan. In the same period of time, Mrs D received around £140 a month in benefit

² These are the sorts of documents that might go towards providing evidence of income and expenditure as suggested in CONC 5.2.4G(3)

payments, giving a total household income of £1,620. This also fits with Mr D's P60 for the tax year to April 2016 that showed his gross income for the year was around £21,000 (net of around £19,000).

In each of the three months prior to the lending, Mr and Mrs D's outgoings effectively matched their incomings, spending around £290 more than they had coming in and leaving a total balance of around £1,120 in their accounts. From Mr and Mrs D's joint account, a payment was made every month to Barclays by direct debit for the same amount, so I've assumed that this was for the repayment of the loan refinanced by the lending considered in this complaint. I've also seen that a payment to a credit card was made each month from Mrs D's account, but it's not clear whether this card was in the name of Mr or Mrs D. Finally, I haven't seen any discretionary spending from their accounts, save for a £40 regular monthly payment that appears to be for a family savings plan.

Mr D has said that he worked on a zero-hours contract and his income was therefore not guaranteed every month, although at the time of the lending it appears to be relatively steady. He has said that occasionally he had to borrow money from friends and neighbours to get by and often used a credit card to pay for necessities – this fits with the payment's I've seen from Mrs D's account for a credit card. On balance, I think Mr and Mrs D were just about living within their means, but I can't see that they any significant room for discretionary spending.

Had BPF asked for evidence of income and expenditure, I think it would have discovered all of this for itself. But I can't see that any evidence was requested, nor was Mr D asked to provide a schedule of income and outgoings.

Mr D's existing payments to Barclays were just under £160 a month. But the new loan was £339.81 a month. Further, Mr D had to pay an annual maintenance fee to the Supplier to use the timeshare. At the time of sale, this was €1,462 per year, so this was an additional cost that further increased Mr D's monthly outgoings by around £100 a month. Having looked at Mr D's household income, I simply can't see how he was going to find an extra £280 a month to pay for the timeshare membership and associated loan. It's also worth noting that the total cost toward the timeshare membership in loan repayments and maintenance fees was more than 25% of Mr D's household income.

I think that reasonable and proportionate checks were likely to have shown BPF that Mr D was unlikely to have been able to repay what he borrowed sustainably over the course of the loan, without a real risk of undue difficulty given his particular circumstances.

Did Mr D lose out financially?

When bringing his complaint to our service, Mr D has explained the difficulties caused by his loan with BPF. He explained that it has made him significantly financially worse off, as well as causing him considerable stress and worry. In particular, he prioritised paying back the loan over spending for his family. He also said that when he approached BPF to explain he was in financial difficulty, it didn't help or come up with any proposals to alleviate the burden on him.

From what I've set out above, I have no doubt that Mr D has had the difficulties repaying the loan that he said he had. From his income that I'd seen, I don't think he could have afforded the loan without making major sacrifices on other household expenses and, as I said before, I don't think those sacrifices would have come from discretionary spending, rather from forgoing normal day-to-day living expenses.

I've considered whether Mr D bore any responsibility for the declaration made to BPF that

his income was £37,000. But as set out above, I've not seen any evidence that Mr D was aware of that declaration and he wasn't asked by the Supplier to provide any evidence of his income. In fact, Mr D said that he didn't understand how the Supplier recorded that his income was £37,000 as it wasn't the case. He said that BPF should have checked this and, had it looked at his bank statements, it would have realised that his income was a lot less.

Mr D has been clear and consistent throughout his complaint that he never gave the Supplier this level of income and I have no reason to disbelieve what he's said. But even if Mr D had given false or incorrect level of income, that wouldn't be enough for me to say BPF were absolved of responsibility. CONC was drafted in such a way as to protect consumers and imposed on BPF a responsibility to assess whether Mr D could repay the loan in a sustainable way. CONC stated that it wasn't generally sufficient to rely on self-declared income and I find there was a duty on BPF, acting proportionally, to verify Mr D's income and expenditure. After all, CONC 5.3.3G required BPF to take adequate steps, insofar as it was reasonable and practicable to do so, to ensure that information provided in the application relevant to a creditworthiness assessment was complete and correct. And, as set out above, I find BPF simply didn't do that.

In conclusion, I think BPF entered into the credit agreement with Mr D in breach of its regulatory requirements. Further, I find that had a significant effect on him by him entering into long-term financial commitments in the form of the timeshare membership and the loan agreement. I think that, had BPF carried out its affordability assessment in the way it should have done, it would have realised Mr D wasn't in a position to repay the loan sustainability and therefore he wouldn't have taken on the financial burden of both the loan and the timeshare.

Did BPF treat Mr D fairly after he took out his loan?

BPF has provided a copy of the records it holds for its contacts with Mr D.

I can see that in April 2017, Mr D contacted BPF and it recorded the call as "*Entered/Exited Account in Error*". Mr D called to say the credit needed to be cancelled and BPF recommended he speak with the Supplier.

The following month Mr D called to complain that the loan term and interest rate was too high and he wasn't aware of this when the loan was taken out. It's recorded that Mr D said he didn't read the loan agreement and just signed it, relying on what the Supplier told him. But BPF said the information was clear on the face of the loan.

In August 2017, Mr D called BPF again to ask about the loan. By this point he wasn't making payments toward it and BPF recorded that he was told there was no evidence of the loan being mis-sold and it was his responsibility to come to our service if he was still unhappy. I've seen that Mr D was told that the loan was designed to be over a long time to make them affordable, but if he wanted to reduce the term and interest paid, he could make overpayments.

In December 2017, Mr D contacted BPF again to ask why it granted the loan without checking his circumstances properly. He was told to bring a complaint to our service.

I think it was plain that Mr D was concerned about the loan soon after taking it out. Within twelve months he was in arrears and said it was mis-sold to him. BPF had a duty to treat him fairly (CONC 7.3.2G and PRIN 6). Given that, I think it needed to do more beyond simply answering the bare complaint that the terms of the loan weren't properly explained to him and it should have talked about his circumstances and explored his options in a meaningful way. It follows, I don't think BPF acted fairly towards him.

Putting things right

I don't think BPF should have lent to Mr D in the way it did and as a consequence, I don't think he would have been able to take out the timeshare membership with the Supplier. I find it would be fair and reasonable for BPF to put Mr D, so far as is possible, in the position he would have been in had he not entered into either agreement at the time of sale. So I direct BPF to:

1. refund:
 - i. Mr D's repayments made to it under the credit agreement³; and
 - ii. The annual management charged paid by Mr D to the Supplier under the timeshare agreement.

("the Repayments")

I don't think Mr D took any holidays using his membership, and so I see no reason for the compensation to be reduced to factor in any usage of his holiday rights.

2. Write off the outstanding balance under the credit agreement.
3. Add simple interest at the rate of 8% per year to each of the Repayments from the date they were made until the date BPF settles this complaint.

HM Revenue and Customer may require BPF to deduct tax on this interest. If that is the case, BPF should provide Mr D a certificate showing how much tax has been paid if he asks for one.

4. Remove any adverse information about this loan recorded on Mr D's credit file.
5. Arrange for the cancellation of Mr D's timeshare membership so that there are no ongoing liabilities and, if not possible, indemnify Mr D against any ongoing liabilities arising from the timeshare membership on the basis that Mr D assigns any rights he has under the agreement to BPF.
6. Pay Mr D a further £300 to reflect the distress and inconvenience caused by BPF's failure to treat him fairly when he was unable to keep up the monthly payments on the loan.

My final decision

I uphold Mr D's complaint against Clydesdale Financial Services Limited, trading as Barclays Partner Finance.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 22 March 2024.

Mark Hutchings

³ This includes what Mr D paid toward the loan that was refinanced at the time of sale. I wrote to BPF for information about this earlier loan and it failed to respond by the deadline set. I then explained that if it didn't provide the information, I would assume that this earlier loan was used to finance a previous timeshare. BPF again didn't respond to this. From what I know about how the Supplier worked and the size of the earlier loan, I think it's likely it was for a 'trial' membership that was then used as part payment for the purchase of the timeshare funded by the loan that forms the subject of this complaint.

Ombudsman