DRN-4878161

Financial Ombudsman Service

The complaint

Miss A complains that Marsh Finance Limited (MFL) shouldn't have lent to her as she couldn't afford the lending.

Miss A is represented by a third party in bringing her complaint. But for ease of reading I will only refer to Miss A in my decision.

What happened

Miss A acquired a car in June 2022 when she entered into a hire purchase agreement with MFL. The cash price of the car was £13,493, Miss A paid a £1,000 deposit and used another car in part exchange. After interest and charges were applied the total amount repayable was £17,929.60 over 60 months with monthly repayments of £298.66, with a final payment of £308.66.

Miss A said she struggled to meet the repayments as she was unemployed. She said if MFL had properly checked they would have seen that her only income was made up of benefit payments and that she couldn't afford to maintain her repayments. She complained to MFL.

MFL said Miss A's application had met their affordability checks. And when they'd spoken to her she'd confirmed she was in full time employment.

Miss A wasn't happy with MFL's response and referred her complaint to us.

Our investigator said MFL should have checked Miss A's financial situation before agreeing to lend to her as her indebtedness had increased substantially just prior to the lending. And if they had they'd have seen Miss A wasn't in employment and as it's MFL's policy not to lend to a consumer who was unemployed, they shouldn't have lent to her. He said to settle Miss A's complaint MFL should:

- End the agreement and collect the car with nothing further to pay.
- Refund the deposit, adding 8% simple interest per year from the date of payment to the date of settlement.
- Calculate how much Miss A has paid in total and deduct £4,947.43 for fair usage. If Miss A has paid more than the fair usage figure, they should refund any overpayments, adding 8% simple interest per year* from the date of payment to the date of settlement.
- Remove any adverse information recorded on Miss A's credit file regarding the agreement.
- If there were any arrears after the settlement has been calculated, MFL should arrange an affordable repayment plan. And treat Miss A with forbearance and due consideration.

MFL didn't agree, they said Miss A had passed their affordability checks based on the information she'd given at the time of her application. They asked for an ombudsman to decide.

A provisional decision was issued in May 2024 that said:

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'm currently minded to uphold Miss A's complaint. I'll explain why.

I've considered the relevant rules, guidance and good industry practice when someone complains about irresponsible and/or unaffordable lending. There are two overarching questions I need to consider in order to decide what's fair and reasonable in all of the circumstances of the complaint. These are:

1. Did MFL complete reasonable and proportionate checks to satisfy themselves that Miss A would be able to repay the credit in a sustainable way?

a. if so, did MFL make a fair lending decision?

b. if not, would reasonable and proportionate checks have shown that Miss A could sustainably repay the borrowing?

2. Did MFL act unfairly or unreasonably in some other way?

The Consumer Credit Conduct of Business sourcebook (CONC) requires MFL to carry out a reasonable assessment of whether Miss A could afford to repay the loan in a sustainable manner. This is sometimes referred to as an "affordability assessment" or "affordability check".

The affordability checks should be "borrower-focused", meaning MFL need to think about whether repaying the loan sustainably would cause difficulties or adverse consequences for Miss A. Basically, it's not enough for MFL to only think about the likelihood of Miss A being able to pay them back (credit risk) they must also consider the impact of repayment on Miss A herself (affordability risk).

There's no set list for what reasonable and proportionate checks are. But I'd expect lenders to consider the specific circumstances of the loan application. What constitutes a proportionate affordability check will generally depend on several factors such as the specific circumstances of the borrower, their financial history, current situation and whether there are any indications of vulnerability or financial difficulty.

MFL said Miss A passed their auto affordability check. And they've sent us the details of what they saw. From this I can see that in the preceding 12 months her total credit balances had increased by £22,594, and in the preceding three months Miss A's indebtedness had increased further to £27,007. She'd two current accounts, one credit card and five loans.

And from Miss A's application they took that she was in full time employment as a teaching assistant with an annual salary of £39,216 and she was living with her parents. MFL said they'd checked Miss A's income using a variety of data sources and application data. They also checked Miss A's credit history through credit reference agencies and used the Office for National Statistics (ONS) data to establish Miss A's likely expenditure.

Miss A has provided her credit report. And from this I can see that in May 2022 she'd also acquired a car through a finance agreement for around £20,000 payable at £477 over 60 months. But this may have been too soon to show on Miss A's credit file when MFL checked *her financial situation. Of Miss A's loans, one had ended in March 2022, and another which was also for a hire purchase agreement ended when Miss A took out her new lending with MFL as the finance was settled upon her taking on this new agreement. I can also see that she'd a mail order account and mobile phone agreements.*

CONC 5.2A.19 allows for the use of statistical data in an affordability assessment, unless there is reason to suspect non-discretionary spending is higher than that described in the data. And considering Miss A had increased her indebtedness by nearly £28,000 over the course of 12 months and she'd five active loans, I don't think it was proportionate or reasonable for MFL to rely on ONS data to determine Miss A's expenditure.

This doesn't automatically mean MFL shouldn't have lent to Miss A as I need to consider whether these checks would have shown that the repayments were unaffordable for her – or in other words that she lost out because of MFL's failure to complete proportionate checks. I can't be sure exactly what MFL would have found out if they'd asked or what Miss A would have told them about her financial situation. In the absence of anything else, I think it would be reasonable to place significant weight on the information set out in Miss A's bank statements.

Miss A has provided bank statements for both of her current accounts. And these show that she was in receipt of universal credit and carers allowance. I can also see several large transfers In and out of Miss A's accounts from and to family members that would have inflated her account turnover. Miss A has said that this was money paid in by a relative whilst they were overseas for another relative as they didn't have the other party's bank details.

And I can see most of these payments were transferred out almost immediately after they credited Miss A's account. I can see one large payment into the account was used for the purchase of another car. Miss A has said this was a car purchase made on behalf of her relative. So, I've not considered these as income in my assessment as I can't see that Miss A had any benefit from them.

I can see Miss A had an average monthly income of around £1,460. And as shown on her credit file several active loans, a credit card, mail order account, car insurance and mobile phone accounts. Miss A was also regularly using her overdraft and incurring overdraft fees.

Miss A's non-discretionary spending including food and petrol was around £810 a month. There are also a number of cash withdrawal transactions across the three months, the majority of which are small denominations. I can see that Miss A made large cash withdrawals around the 10th and at the end of the month, amounting to on average of around £375 a month which she said she used to pay towards rent and utilities whilst living with her parents. So, I've considered this as non-discretionary expenditure. This would have left Miss A with a disposable income of only £275, and the new lending was for around £298 a month.

Also, I haven't taken into account the new car finance agreement Miss A had taken out the month before the lending which had repayments of £477 a month. Miss A has told us that she realised the insurance for this car was too high and she'd looked to return it to the dealer which was why she acquired the car under this agreement. But the dealer didn't agree to take back the other car, so she was left with two cars.

Had MFL considered Miss A's actual financial situation they would have seen that Miss A wasn't employed and earning £39,216. She was consistently using her overdraft facility with direct debits being returned as there was insufficient monies in the account to cover the payments. And from around May 2022, I can see Miss A started to receive child benefit, so she now also had at least one dependant. While this would have increased her income it *would have also increased her outgoings.*

MFL when agreeing to lend to Miss A carried out a verification call in which Miss A confirmed to them that she was in full time employment. So, I can't know what Miss A would have told MFL if they'd asked further about several transactions showing on her statements. Or whether Miss A would have told them about the other car finance agreement she'd recently taken out. But had MFL seen the evidence I've considered I think its unlikely they would have agreed to lend to Miss A as I don't think she could sustain the repayments.

As I don't think MFL should have lent to Miss A she should be refunded the repayments she's made. But Miss A did have use of the car for around 22 months, and this should be taken into account. I'm not persuaded the monthly repayments of £298.66 to be a fair reflection of what fair usage would be. This is because a proportion of those repayments went towards repaying interest.

There isn't an exact formula for working out what a fair usage should be. In deciding what's fair and reasonable I've thought about the amount of interest charged on the agreement, Miss A's likely overall usage of the car and what her costs to stay mobile would likely have been if she didn't have the car. Our investigator considered fair usage to be £224.88 a month, in total £4,947.43 which I think is fair and reasonable.

Responses to my provisional decision

Miss A accepted my provisional decision but asked for compensation to be considered for the distress and inconvenience caused to her.

MFL said Miss A had declared her monthly income as being £2,500. They said every attempt was made to verify Miss A's application information, they'd checked her employment status with her when they completed a validation call in which she'd confirmed her employment and said she was still actively working. They'd accepted what Miss A had told them. But if Miss A had said she wasn't employed when asked in the verification call she would have failed their lending criteria so the lending would have been declined.

They said they'd conducted a credit search which demonstrated a well-paid credit file with no adverse or arrears. The check showed Miss A had a history of well-paid settled loans and credit cards. And that she was settling a hire purchase agreement for £6,549 with their agreement. The repayments for the replaced hire purchase agreement were £234 a month whereas their agreement was for £298.66, so an increase of around £65 a month. MFL said this and their checks didn't show any signs of Miss A's indebtedness increasing.

MFL said their checks were proportionate in determining Miss A's non–discretionary spending. They'd used statistical data and even though Miss A was living with her parents they'd included and inflated her household costs. So, they were satisfied with their affordability assessment. MFL said as they didn't require bank statements as Miss A's affordability was auto verified, any bank account conduct should be excluded from the findings.

MFL has also said their notes show that Miss A changed her mind about part exchanging to settle one of her agreements, so she'd have had three car finance agreements.

I've carefully considered the points raised. And I can understand MFL's position about Miss A's lack of probity when answering their questions about her employment. And that theirs is an automated verification process.

But as I outlined in my provisional decision any affordability check should be "borrower-focused", meaning MFL need to think about whether repaying the loan sustainably would cause difficulties or adverse consequences for Miss A. MFL said their checks hadn't shown Miss A's indebtedness would have increased. But I can't accept this point. From Miss A's credit report I can see Miss A had five active loans and that her total balance was £22,594 in the preceding 12 months, and had increased further to £27,007 in the three months before the new lending was agreed, a further £4,413.

MFL used statistical data to assess Miss A's non-discretionary spending, which CONC 5.2A.19 allows a lender to do, unless the lender knows or has reasonable cause to suspect that the consumers non-discretionary expenditure is significantly higher than that described in the data or that the data is unlikely to be reasonably representative of their situation.

Its unlikely to be appropriate to place reliance on statistical data, for example, where the level of the consumers existing indebtedness, differs significantly from that of the sample of persons on which the statistical data is based. I think Miss A's credit report showed she'd increased her total indebtedness to £27,007 having five active loans.

Miss A's indebtedness had increased over the preceding three months and she was going to be indebted a further £17,929.60 over 60 months – meaning her total balance potentially would have been around £45,000 (her existing balance plus the new lending). I think this should have caused MFL to question Miss A's level of debt in her circumstances, given she'd declared she'd an income of around £39,000 and said she was living with her parents. So, I don't think MFL's checks were proportionate or reasonable as I think they should have checked Miss A's actual financial situation rather than a reliance on statistical data.

While MFL has said they wouldn't have checked Miss A's bank statements as its not part of their verification process. I can't see they asked Miss A about her level of indebtedness or discussed her non-discretionary spending with her. I'd listened to the verification call as part of the evidence provided for my consideration before issuing my provisional decision. In the call Miss A is asked for details of her employer, job role, whether she was actively employed and was she aware of anything that could impact her income. Miss A wasn't asked about her monthly income, her non-discretionary spending or about her level of indebtedness.

As I mentioned in my provisional decision I can't be sure exactly what MFL would have found out if they'd asked or what Miss A would have told them about her financial situation. I'm not saying that MFL had to ask Miss A for her bank statements but in the absence of anything else, I think it would be reasonable to place significant weight on the information set out in Miss A's bank statements. And having done so as detailed in my provisional decision I don't think the lending was affordable for her.

I've also considered Miss A's request for consideration to be taken into account for the distress and inconvenience caused to her. But I think Miss A had opportunity to provide details about her employment situation to MFL at the time of the verification call. So, I'm not compensating Miss A for any distress and inconvenience she'd experienced as she could have mitigated her financial situation at the time of this call.

But if MFL had carried out further checks into Miss A's actual income and expenditure at the time of her application they would have seen Miss A couldn't repay the credit in a sustainable way. So, after considering the representations made by MFL and Miss A I haven't been persuaded to change my decision as I don't think MFL should have lent to her.

My final decision

I uphold this complaint. And ask Marsh Finance Limited to:

- End the agreement and collect the car with nothing further to pay.

- Refund the cash deposit, adding 8% simple interest per year* from the date of payment to the date of settlement.
- Calculate how much Miss A has paid in total, excluding the deposit, and deduct £4,947.43 for fair usage. If Miss A has paid more than the fair usage figure, they should refund any overpayments, adding 8% simple interest per year* from the date of payment to the date of settlement.
- Remove any adverse information recorded on Miss A's credit file regarding the agreement.
- If there are any arrears after the settlement has been calculated, they should arrange an affordable repayment plan. And treat Miss A with forbearance and due consideration.

Should HM Revenue & Customs require Marsh Finance Limited to take off tax from this interest. Marsh Finance Limited must give Miss A a certificate showing how much tax they have taken off if she asks for one.

Under the rules of the Financial Ombudsman Service, I’m required to ask Miss A to accept or reject my decision before 26 July 2024.

Anne Scarr
Ombudsman