Financial Ombudsman Service

complaint

Mr D has complained about a running credit facility he took out with Elevate Credit International Limited (trading as "Sunny") in March 2014. He's said that Sunny should've realised that he couldn't afford this loan and so it shouldn't have given it to him.

background

I attach my provisional decision of 24 January 2017, which forms part of this final decision.

In my provisional decision I set out why intended to uphold Mr D's complaint. I invited both parties to provide any further comments they may've had before I reached a final decision.

Both parties confirmed receiving my provisional decision. Mr D confirmed that he agreed with it and that he had nothing further to add. Sunny said Mr D never exceeded his borrowing limit and he was only allowed to redraw funds when the capital balance fell below his borrowing limit. It also confirmed that the outstanding balance on Mr D's account was sold on to a third party in February 2016.

my findings

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

Having thought about Sunny's further points, I remain of the view that Mr D's complaint should be upheld. I'd like to explain why.

Sunny has said that Mr D never exceeded his credit limit. It hasn't made this clear but I think it is suggesting that Mr D's credit limit was in relation to the maximum amount of capital he could have outstanding at any one time. Be that as it may, I disagree that Mr D didn't exceed his credit limit.

To explain, Mr D was given a running credit facility with a limit of £750. And Mr D had to pay interest on his entire outstanding balance. Mr D's outstanding balance was more than £750 on more than one occasion. The fact that some of his balance was made up of interest that had accrued on previous drawdowns doesn't change the fact that he owed Sunny more than £750. And I still think that Mr D owing Sunny more than the amount of his credit limit was apparent that Mr D may have been experiencing financial difficulty and that Sunny needed to check that he wasn't doing so. So as Sunny didn't do this, I remain of the view that it did something wrong in this case.

I've seen what Sunny has said about it no longer owning Mr D's outstanding debt. So I'd refer it to the putting things right section of my provisional decision, which explains what the implications of this are on what it now needs to pay Mr D.

I've carefully thought about the further points that Sunny has made. But having done so I've not been persuaded to change my conclusion that Sunny did something wrong. And that Mr D lost out as a result of this. So I'm upholding Mr D's complaint.

my final decision

For the reasons set out above and in my provisional decision of 24 January 2017, I'm upholding Mr D's complaint.

Elevate Credit International Limited (trading as Sunny) should pay Mr D compensation in line with the instructions set out in my provisional decision of 24 January 2017.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr D to accept or reject my decision before 7 March 2017.

Jeshen Narayanan
ombudsman

COPY OF PROVISIONAL DECISION

complaint

Mr D has complained about a running credit facility he took out with Elevate Credit International Limited (trading as "Sunny") in March 2014. He's said that Sunny should've realised that he couldn't afford this loan and so it shouldn't have given it to him.

background

One of our adjudicators looked at what Sunny and Mr D said. He thought the checks Sunny carried out before agreeing to give Mr D this loan were proportionate and sufficient. So he didn't uphold the complaint.

Mr D didn't agree with our adjudicator and asked for an ombudsman to review the complaint.

my provisional findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. We've explained how we handle complaints about short term lending on our website. And I've used this approach to help me decide Mr D's complaint.

Having carefully thought about everything I've been provided with, I'm intending to partially uphold Mr D's complaint. I'd like to explain why in a little more detail.

why I don't think that the checks Sunny carried out before initially agreeing to lend to Mr D were proportionate and sufficient

When lending money to a consumer a lender should take proportionate steps to ensure a consumer will be able to repay what they're borrowing in a sustainable manner without it adversely impacting on their financial situation. A lender should gather enough information so that it can make an informed decision on the lending. The guidance and rules don't set out compulsory checks but they do list a number of things a lender might wish to take into account before agreeing to lend. But any checks need to be proportionate and should take into account a number of things, including things such as how much is being lent and when what's being borrowed is due to be repaid.

Mr D took out a running credit facility. The terms and conditions of Mr D's running credit facility said that he had to repay the total amount that he borrowed plus interest over a maximum of five months. And this amount would be collected in five equal payments. So given the terms and conditions of the facility and Mr D was given a credit limit of £750, I think that Sunny had to carry out proportionate checks to understand whether Mr D would be able to pay the amount of capital and interest that would have been owing had he drawn down £750.

Sunny has said that it conducted creditworthiness checks, assessed Mr D's ability to afford the repayments which would fall due under the proposed agreement and considered how he was managing other debts at that time. And based upon these checks it thought it responsible to give this facility to him.

I've thought about what Sunny has said. But overall given everything I think Sunny most likely knew about Mr D at the time, I think that it would've been proportionate to carry out further checks before agreeing to lend to Mr D.

To explain, Sunny has said that it carried out a credit check on Mr D before it agreed to lend to him. It has provided us with some information (which doesn't really show much) on a credit check that it carried out. So we've looked at the information, which Mr D has been able to obtain and provide to us, to get an idea of what the credit checks Sunny carried out are likely to have shown.

I accept that the information provided might not exactly replicate what Sunny would've seen. But in the absence of anything else and as Sunny own information doesn't show much that makes sense, it remains the best indication I have of what Sunny is likely to have seen. And, in these circumstances, I think it's perfectly reasonable to rely on this information.

The credit check Mr D has provided us with shows that he'd taken a significant amount of short-term lending in the period leading up to this application. I accept that there are lots of reasons why a consumer may wish to take out short-term lending. And a consumer taking out more than one short term loan, on its own, doesn't mean that a borrower won't be able to repay a later one. But where a lender is aware of such things, I don't think it's unreasonable or disproportionate to expect it to carry out further, more rigorous, enquiries in order to find out whether a consumer is going to be able to repay what they are committing to.

So, in this case, given what Sunny is likely to have uncovered in its credit checks, I don't think it was reasonable to ignore this information (or at least not place more weight on it) and simply agree to lend based on the information Mr D had provided about his monthly income. Instead I think it would've been proportionate for Sunny to have carried out further checks to verify whether Mr D would be able to make the payments he was committing to, over the period of time the facility was intended to be used for. And overall having carefully thought about everything, I think that Sunny failed to carry out proportionate and sufficient checks before agreeing to lend Mr D his running credit facility.

what I think proportionate and sufficient checks would most likely have shown

Even though I don't think that the checks Sunny carried out were proportionate and sufficient, this doesn't, on its own, mean that Mr D's complaint should be upheld.

After all if further checks would've simply shown Sunny that Mr D would most likely have been able to sustain the payments to his running credit facility (and so there was no reason why Sunny shouldn't have lent to Mr D), then further checks wouldn't have made a difference. This is because Mr D won't have lost out as a result of Sunny's failure to carry out proportionate and sufficient checks and there'd be no reason for me to uphold the complaint.

But if further checks would most likely have shown that Mr D was unlikely to have been able to sustain this facility and make his payments when they became due then Sunny would've seen that it shouldn't have lent to him. And this would mean that Mr D lost out because of Sunny's failure to carry out proportionate and sufficient checks. So there'd be grounds to uphold Mr D's complaint.

As proportionate and sufficient checks don't appear to have been carried out I can't say for sure what these checks would have shown. But Mr D has provided us with evidence of his financial circumstances at the time he applied for the loans. And I've been able to get a picture of what his financial circumstances were like. Of course I accept that this isn't perfect as different checks show different things. And just because something shows up in the information Mr D has provided it doesn't mean that it would've shown up in any checks that Sunny might've carried out. But the information Mr D has provided is the best indication I have of what his financial circumstances were like at the time. And in the absence of anything else I think it's perfectly reasonable to rely on it.

As previously explained, the checks that Sunny has told us it made would most likely have shown that Mr D had a taken a significant amount of short-term lending elsewhere in the period leading up to this application. So I think it would've been both reasonable and proportionate for Sunny to have asked Mr D just how much short-term lending he already had elsewhere and what payments he still had to make. And I would've expected Sunny to have asked Mr D what his regular monthly living expenses were as well.

Having looked at Mr D's bank statements from the time, while I accept there was a significant amount of short-term lending that was due to be repaid, I think that Sunny would've still given Mr D his running credit facility loan if it had carried out proportionate checks. I say this because I think that Sunny would quite reasonably have relied on the repayment schedule, on Mr D's credit agreement, to determine whether he'd be able to make the payments to the facility. And I think that Sunny would've seen that Mr D would've still had enough to keep to the payment schedule, even after his regular living expenses and his existing credit commitments (including other short-term lending) were deducted from his monthly income.

I've not seen any reason to doubt that Mr D would've provided honest and accurate information on his routine expenditure if he'd been asked for this information at the time. This may not have reflected Mr D's overall spending habits. But I have to think about what proportionate checks would've shown Sunny. And as I only would've expected Sunny to have asked Mr D about his regular monthly living expenses and any other monthly credit commitments, I don't think that Sunny would've found out why Mr D's overall financial position was significantly worse than this.

So given everything I've seen here, I don't think proportionate checks would've prevented Sunny from giving Mr D the running credit facility. In this case, Sunny would reasonably have checked to see whether Mr D would be able to keep to the repayment schedule set out on the credit agreement. And proportionate checks wouldn't have shown Sunny anything to suggest Mr D wouldn't be able to keep it.

why I think Sunny acted irresponsibly during the period of time Mr D's running credit facility account was open

Given the type of facility the running credit facility account was and what proportionate checks had to show Sunny in this case, I also think that Sunny needed to take steps to ensure that the facility was being used in the way it was designed to be, in the period of time Mr D had it.

I've looked at the documentation Mr D was provided with at the time and specifically the "explanation of your running credit agreement document". I've seen that on page one of this document (in the section entitled 'Is a running credit account suitable for the type of credit you are looking for?) it says:

"We may also reduce your Credit Limit (if your risk profile changes, for example) as part of our responsible lending obligations. You may borrow up to the level of your Credit Limit on your first Credit Advance and may apply for further Credit Advances up to your available Credit limit. Credit Advances will be granted at our discretion and where we are satisfied it is responsible to advance you more credit. This credit is expensive; you are required to repay each Credit Advance within a period of up to 5 months. It is unsuitable for supporting sustained borrowing over long periods, as it would be a very expensive means of longer term borrowing"

And as previously explained, the credit agreement also included a repayment schedule. This is set out on the following page and set out the payment schedule Mr D would need to follow in order to repay what he was borrowing on time. This schedule was worked out on the basis of Mr D drawing down the maximum £750 immediately after opening the account and then repaying it over five months.

The credit agreement referred to Sunny's responsible lending obligations. I accept that Mr D took out his loan just before the FCA took over the regulation of Consumer Credit (and so before Sunny was FCA authorised). Although I would say that Mr D still had this facility when Sunny became FCA authorised. In any event, the Office of Fair Trading ("OFT") (which was responsible for regulating lenders before the FCA) had guidance in place, for this type of lending, when Mr D was given this facility.

The relevant guidance is set out in the "General Principles of fair business practice" section of the OFT guidance on irresponsible lending. Section 2.2 of the relevant guidelines says:

"creditors should monitor the borrower's repayment record during the course of the agreement, offering assistance where borrowers appear to be experiencing financial difficulty."

So Sunny's own documentation said that this facility wasn't suitable for long term or regular borrowing. It also set out strict parameters for further advances being granted. And the OFT guidance said that Sunny should monitor Mr D's repayment record and step in where financial difficulty becomes apparent. In my view, all of this together meant that Sunny had a responsibility to monitor Mr D's facility to ensure that it was being used for short-term borrowing and that he wasn't experiencing financial difficulty maintaining the facility.

I don't think that Sunny did any of this here. To explain, I think that Sunny had enough to know that Mr D may have been having difficulties making the payments due on the facility by mid-April 2014. By this stage, Mr D's additional drawdowns and the interest due meant that he exceeded his credit limit, only a few weeks after his first drawdown. I see that Mr D did get back on track by clearing the balance on the facility a few days later. But Mr D then once again drew down the entire amount of the facility a couple of weeks later. And once again by the time interest was added this took him over his credit limit.

By the middle of May it becomes clear that Mr D isn't clearing his balance as quickly as he'd done in the previous month. And it looks like Sunny allowed him to drawdown a further £121 on 20 May 2014 which took substantially over his credit limit. This was despite Mr D's agreement saying he'd have to apply for an increase and that it wouldn't be granted unless it was responsible for Sunny to do so.

I can't see that Sunny took any steps (such as contacting him) to ascertain whether Mr D would be able to afford the payments once the credit limit was increased, or to see whether he was experiencing financial difficulty at this stage. I also think that Mr D exceeding his credit limit pushed him quite far away from being able to keep to the payment schedule set out at the outset, which Sunny's initial affordability checks would've been based on. So I think that Sunny had a responsibility to carry out further checks on Mr D's financial circumstances, his use of the facility and his ability to pay what he owed within a reasonable period of time – given him substantially exceeding his credit limit.

As I can't see that Sunny did contact Mr D at this time, I don't think it was right for it to add any interest and charges from this point - it wasn't properly monitoring his repayment record, was advancing him further credit without properly establishing he'd be able to repay it and it didn't offer assistance when it was apparent Mr D might've been experiencing financial difficulty.

So given the particular circumstances of this case, I, at the moment, think Sunny has done something wrong here. And I think that Mr D has lost out as a result of this.

putting things right – what I intend to tell Sunny to do

To put things right for Mr D, I'm intending to say that Sunny should:

- refund all the interest and charges applied to Mr D's running credit facility from 20 May 2014 onwards (which is when Sunny allowed Mr D to draw down more than the amount of his credit limit); and

- add interest at 8% per year simple on the above interest and charges from the date they were paid to the date of settlement †;

- remove any adverse information recorded on Mr D's credit file as a result of this loan;

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

I understand that Sunny wrote off an outstanding balance on this loan. Sunny will be able to offset the amount it wrote off against what it needs to pay Mr D.

my provisional decision

For the reasons I've explained, I'm intending to uphold Mr D's complaint and tell Elevate Credit International Limited (trading as Sunny) to pay redress as set out above.

So unless the comments and evidence I get by 24 February 2017 changes my mind, that's what I will tell Sunny to do in my final decision.

Jeshen Narayanan
ombudsman