

The complaint

Mr B complains NAYLORS FINANCE LIMITED (“Naylors”) provided him with a loan when he already had multiple defaults on his credit file.

He also says he didn’t receive the default notification letter and finally he says that he couldn’t reach anyone in Naylors’ office to cancel the agreement.

What happened

Mr B signed the credit agreement for the loan on 3 November 2021 but the statement of account suggests the loan was funded on 10 November 2021 for £400. Mr B was due to make 40 weekly repayments of £17.60. Mr B had some problems repaying his loan and was able to do so through a repayment plan that finished on 2 March 2023.

Naylors considered the complaint, and it didn’t uphold it because it says it carried out a proportionate check which showed the loan to be affordable. Unhappy with this response, Mr B referred his complaint to the Financial Ombudsman.

The complaint was considered by an adjudicator, who didn’t uphold it. She said Naylors had reasonable grounds to believe Mr B could afford the loan and that it had carried out proportionate checks.

She also concluded that Mr B had given notice to withdraw from the credit agreement within the timescale that he was required to meet. However, she said the notice of withdrawal had expired, because Mr B hadn’t returned the funds to Naylors within 30 days.

Finally, she concluded that Mr B’s account was sufficiently in arrears to have the default notice issued and Naylors had provided a copy of the default notice that was sent, which explained to Mr B what he needed to do to prevent the default from being added to his credit file.

Mr B didn’t agree and said the main issue is that the default notice wasn’t sent, and he didn’t receive it. Later on, Mr B said that when he called and spoke to Naylors not once did it mention a default notice having been issued.

He also sent copies of emails between himself and Naylors that discussed court action – but Mr B says again there was no mention of a default notice being sent and / or applied. In order to put things right, Mr B wants the default removed.

As no agreement has been reached, the case has been passed to an ombudsman for a final 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.

I have split this decision into three sections, firstly dealing what happened when the loan was approved and what checks were carried out. Secondly, with the issue of the withdrawal and finally the default notice.

Unaffordable lending

We've set out our general approach to complaints about this type of lending - including all the relevant rules, guidance and good industry practice - on our website.

Naylors had to assess the lending to check if Mr B could afford to pay back the amount he'd borrowed without undue difficulty. It needed to do this in a way which was proportionate to the circumstances. Naylors's checks could have taken into account a number of different things, such as how much was being lent, the size of the repayments, and Mr B's income and expenditure.

With this in mind, I think in the early stages of a lending relationship, less thorough checks might have been proportionate. But certain factors might suggest Naylors should have done more to establish that any lending was sustainable for Mr B. These factors include:

- Mr B having a low 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 amounts to be repaid being especially high (reflecting that it could be more difficult to meet a higher repayment from a particular level of income);
- Mr B having a large number of loans and/or having these loans over a long period of time (reflecting the risk that repeated refinancing may signal that the borrowing had become, or was becoming, unsustainable);
- Mr B coming back for loans shortly after previous borrowing had been repaid (also suggestive of the borrowing becoming unsustainable).

There may even come a point where the lending history and pattern of lending itself clearly demonstrates that the lending was unsustainable for Mr B. The adjudicator didn't consider this applied in Mr B's complaint because there was only one loan.

Naylors was required to establish whether Mr B could *sustainably* repay the loan – not just whether he technically had enough money to make his repayments. Having enough money to make the repayments could of course be an indicator that Mr B was able to repay his loan sustainably. But it doesn't automatically follow that this is the case.

Industry regulations say that payments are sustainable if they are made without undue difficulties and, made on time, while meeting other reasonable commitments and without having to borrow to make them. If a lender realises, or ought reasonably to have realised, that a borrower won't be able to make their repayments without borrowing further, then it follows that it should conclude those repayments are unsustainable.

I've considered all the arguments, evidence and information provided in this context, and thought about what this means for Mr B's complaint.

Before the loan was approved, Naylors asked Mr B for details of his income, which he declared as being £2,309 per month from full time employment. Mr B also declared he received child benefit payments of £140.60 per month. Naylors broke this down into a weekly income figure of £586.69. As this was the first loan, and Mr B confirmed this figure to be accurate I think it is reasonable for Naylors to have relied on what he declared.

Mr B also declared monthly outgoings of £1,069.80 broken down across a number of different categories such as home, utilities, food and housekeeping for example. Again, Naylor's broke this down into a weekly figure of £241.12. For a first loan it was entirely reasonable and proportionate for Naylor's to have relied on the information it received from Mr B.

After carrying out these checks, Mr B had sufficient disposable income to be able to afford the weekly repayment of around £18. The loan would've looked affordable.

I appreciate that Mr B had some difficulties in making the repayment but these difficulties weren't reflected in either the information that Naylor's gathered at the point the loan was advanced and neither did Mr B let Naylor's know that he was having wider problems.

Naylor's didn't carry out a credit search, and it's worth saying Naylor's wasn't required to do one under the regulations. So, the fact a search wasn't carried out wouldn't be a reason to uphold the complaint.

For a first loan, where the weekly repayments were modest, I think it was entirely proportionate for Naylor's to have relied on the information Mr B gave it about his income and expenditure which showed the loan to be affordable. Which also means it wouldn't have been proportionate for example for Naylor's to have requested copies of Mr B's bank statements. That would've been in my view entirely disproportionate.

I do not uphold Mr B's complaint about this element of his complaint.

Withdrawal from the credit agreement

The adjudicator didn't uphold this part of the complaint, because while she was satisfied notice had been given by Mr B – as he hadn't made the repayment to Naylor's within 30 days she said the notice to withdraw had in effect expired.

Mr B's right to withdraw from the credit agreement is set out in his credit agreement and these rights stem from the – Consumer Credit Act 1974 (as amended) (CCA) ss 66A.

S66A(2) says:

To withdraw from an agreement under this section the debtor must give oral or written notice of the withdrawal to the creditor before the end of the period of 14 days beginning with the day after the relevant day.

In this case, Mr B contacted Naylor's on 16 November 2021 to say that he wanted to cancel the agreement. It seems throughout this period Mr B uses the term right to cancel – but this is a different right enshrined in a different part of the CCA – and which doesn't apply in this instance.

But I think that the import of what Mr B was telling Naylor's would have been understood as often the terms 'withdraw' and 'cancel' are used interchangeably even if technically only one was applicable here. For the purposes of this complaint, Mr B had a right to withdraw and that is what I've considered.

Mr B did give notice to Naylor's within 14 days of taking the loan that he was going to withdraw. So, I'm satisfied that Mr B has complied with the relevant section of the CCA and therefore Mr B did withdraw from the agreement.

However, Mr B didn't return to Nylors the amount he borrowed and any accrued interest within 30 days of giving notice as set out in S66A(10). Instead, he made a payment of £76 on 23 November 2021 and then no further payments until January 2022.

Mr B didn't pay what he ought to have done within the 30 days of giving notice that doesn't mean he didn't withdraw from the agreement – he did because he gave the required notice. And he was only able to repay the balance that was owed through a repayment plan that finished in March 2023.

So, although Mr B did give notice, given what subsequently happened with the repayments, it does lead me to question whether Mr B was actually able to repay what he borrowed when he requested to withdraw, and whether he could do what was required - to pay Nylors within 30 days. Ultimately, and I go on to discuss this in the third part of this decision due to repayment problems Nylors took the decision to default the account.

While Mr B did give notice of his intention to withdraw from the agreement, he didn't make the payment as required. Therefore, I think it's reasonable, as it stands that no further action is taken by Nylors with regards to this part of his complaint.

Defaulting the account

From the emails sent from Mr B to us, it appears that this is his main concern. He says he never received the default notice and when he did speak to Nylors the default wasn't mentioned. I understand Mr B has seen a copy of the default notice Nylors says was sent.

I've firstly considered whether, Nylors was even in a position to issue a default notice in June 2022. When thinking about this I've considered the repayment history as well as the Information Commissioner's Office (ICO) guidance entitled *"Principles for the Reporting of Arrears, Arrangements and Defaults at Credit Reference Agencies"*. This provides guidance to lenders as to how arrears and defaults should be reported and so I consider this to be good industry practice.

Principle 4 of the guidance says a default can be reported when an account enters arrears:

"As a general guide, this may occur when you are 3 months in arrears, and normally by the time you are 6 months in arrears."

Having looked at Mr B's credit agreement, he was required to make weekly payments of £17.60. And by the time Nylors says the default was sent, Mr B had only paid £152 towards the balance – which if you break this down as a weekly amount it works out to be around 8 weeks' worth of payments. Given this, by June 2022 Mr B's account was sufficiently in arrears for the default notice to be issued. And so, the fact Nylors decide the 9 June 2022 was the date to issue a default notice, isn't in my view incorrect.

Nylors has also supplied a copy of the default notice. This is dated 9 June 2022 (so the date it says it was sent) and it was correctly addressed to Mr B.

In additional, Nylors' statement of account, is noted when arrears letters were sent, and the default letter has been noted on there as being sent on 9 June 2022 – which matches the date on the actual default notice. So, I can only reasonably conclude, that on 9 June 2022, Nylors issued the default notice.

I've also reviewed the default notice, and this does contain all that it should do to make it valid – as set out in Section 88 of the CCA. It explains to Mr B what the breach is, the action required by Mr B to remedy the breach – in this case needing to make a payment of £304 in

full. Finally, the default notice gave the date that this payment needed to have been made by – 7 July 2022.

When the required payment of £304 wasn't made, Naylor's in effect terminated the agreement and then subsequently started court proceedings on 18 July 2022. However, these proceedings were suspended once a payment plan was agreed.

Mr B says he didn't receive a copy of the notice – which is of course possible and there could've been a problem with the post – but I need not speculate. Naylor's obligation is to send such notice and given the evidence provided I am satisfied the notice was sent to the correct address held on Mr B's account. So, while Mr B may not have received the notice, that doesn't mean the default isn't valid.

Naylor's has provided a copy of a call between itself and Mr B on 24 June 2022 – this is the one mentioned in Mr B's email to Naylor's of 20 July 2022. This was a call where Mr B spoke to Naylor's in order to set up a repayment plan.

And I agree, that on the call with Mr B a repayment plan was going to be set up from 27 of each month but due to Mr B just being paid the call agent said it would be set up from July 2022. Mr B also asked to pay more than the amount the agent suggested - £100. The agent asked Mr B whether he would want to make a payment on the day. Mr B declined but said he would call back on "*Monday*" to do that. Based on the statement of account this didn't happen.

I would agree with Mr B that the default notice wasn't mentioned on the call – but even if it had been, I'm not satisfied that it would've altered Mr B's actions considering the account was significantly in arrears and he would've needed to have paid Naylor's more than £300 by the start of July 2022. Which was significantly more than Mr B said he could afford as part of the payment plan.

I appreciate that Mr B says that during the contact with Naylor's it didn't mention the account had a default notice issued or that the account had defaulted. And I can see from the emails Mr B has sent us – following the commencement of court proceedings the default wasn't mentioned. But by this date, the default notice had already expired, and Naylor's had taken further action – to begin court proceedings in order to receive payment.

I am not upholding Mr B's complaint about the default; his account was at least six months in arrears and so under the ICO guidance a default notice could be issued. And I'm satisfied, based on the evidence that Naylor's sent such a notice, and the notice was compliant with the relevant sections of the CCA.

Overall, I am not upholding Mr B's complaint.

My final decision

For the reasons I've explained above, I'm not upholding Mr B's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 6 October 2023.

Robert Walker
Ombudsman