

The complaint

Miss I complains that Santander Consumer (UK) Plc provided her with car finance that she couldn't afford to repay. She believes it acted irresponsibly in approving the finance.

What happened

In September 2019 Miss I entered into a conditional sale agreement with Santander to buy a car from "E", a car dealer. E also acted in a credit broking capacity to arrange the finance. At around the same time, she also entered into a finance agreement with a different provider to acquire another car, again through E, which is the subject of a separate complaint to our service.

As I understand it, Miss I had agreed with other parties (I'll call them "B") to acquire the cars in her name, and that B would then sub-lease the cars to someone else. The arrangements unravelled fairly quickly and Santander took possession of the car it had financed.

Santander instigated legal action against Miss I, and she in turn issued a counterclaim disputing liability. According to the legal papers, Miss I's counterclaim was founded on (among other things) her having been the victim of a scam and on Santander's failure to undertake appropriate checks when it agreed to the finance. The legal proceedings were closed under an agreement reached between the parties and ratified by a consent order issued by the court.

More recently, Miss I has brought her concerns to us, citing the significant difficulty she's experienced in repaying Santander, the legal costs and other charges she's incurred as a result of entering into the arrangements.

Our adjudicator wasn't persuaded Santander had carried out reasonable and proportionate checks before approving the lending. But he didn't think that this would have affected Santander's decision to lend. He noted Miss I had entered into the settlement agreement under which she would (and did) pay a monthly amount over and above the amount required under the credit agreement. He didn't think it appropriate to uphold the complaint.

Miss I didn't agree with our investigator's conclusions. She submitted further evidence in respect of her monthly income and expenditure, which she felt demonstrated that approving the lending had caused her financial hardship. Miss I said she'd only been able to meet the payments by borrowing from friends, and that she only settled the legal proceedings because she couldn't afford to continue with them. She's asked for this review.

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 understand the points Miss I has sought to make, and I have sympathy with the circumstances she found herself in, having perhaps entered into the contract without a full understanding of the implications of doing so. Having seen evidence of her financial

circumstances I don't dispute that on the basis of these alone, the repayments under the credit agreement would likely have had a significant adverse impact on her financial situation, contrary to relevant provisions in the Consumer Credit Sourcebook (CONC)¹.

But that isn't the only consideration. CONC also says that a firm can also take account of income received by the customer jointly with another person or income received by another person in so far as it is reasonable to expect such income to be available to the customer to make repayments under the agreement². Miss I was expecting to receive such income from the arrangements she had with B; indeed, her submissions state that this was her purpose in entering into the agreements in the first place.

So it might have been reasonable for Santander to take this additional income into account when assessing the credit application, even if it failed to undertake reasonable and proportionate checks³. As our investigator noted, it doesn't necessarily follow that a failure to undertake such checks means the lending should be deemed unaffordable.

There is a counter to that argument, which is that the credit agreement expressly excluded the sub-leasing arrangements that would have provided that income. That might make any decision to take such income into account unreasonable.

Further, given the provisions of section 56 of the Consumer Credit Act 1974, any discussions Miss I had about those arrangements with E would be deemed to have been conducted with Santander. Santander might not have lent if the known purpose of doing so ran contrary to the credit agreement. Or Santander might simply have removed the sub-leasing and other associated conditions from the agreement. It's not for me to speculate here on this point, however, given Miss I's evidence is that she was not involved in the discussions with E at all.

While I've thought about the situation carefully, there is another factor that I need to take into account, which has a significant bearing on what is, in all the circumstances, fair and reasonable. That is the issue mentioned by our investigator; the fact that Miss I made an agreement with Santander, ratified by means of a consent or 'Tomlin' order issued by the court, in relation to matters that included the arguments that appear to form the basis of her current complaint.

While the order includes a clause permitting disclosure of its terms where such disclosure is in regard to alleged misconduct, wrongdoing or serious breach of regulatory requirements, that doesn't mean I can interfere with the agreement reached between the parties. Indeed, I don't believe I have power to do so. Such an agreement can only be set aside by order of the court, and in limited circumstances.

With this in mind, I'm afraid I'm again going to disappoint Miss I when I say that I'm not going to order Santander to reimburse or compensate her. I can't see how I can fairly do so when she has entered into a contractual agreement which was clearly intended to compromise the substantive dispute between the parties. That is the view I must take, irrespective of the reasons Miss I gave for entering into it.

My final decision

My final decision is that I can't uphold this complaint.

¹ The relevant provision referenced here is CONC 5.2A.12(5)R. The full CONC sourcebook can be found in the Financial Conduct Authority (FCA) Handbook, available on the FCA's website

² see CONC 5.2A.12(2)R

³ see CONC 5.2A.20R and relevant guidance in CONC 5.2A.21-25(G)

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss I to accept or reject my decision before 18 October 2023.

Niall Taylor
Ombudsman