

The complaint

Mr P, a partner in a business “B”, complains about the way Funding Circle Ltd has sought to recover payment under a loan it arranged for him and his business partner. Mr P believes Funding Circle should show greater forbearance as he and his partner are in financial difficulty following alleged fraudulent activity by one of their employees.

What happened

I recently wrote to both parties to set out my provisional conclusions in respect of the complaint. I’ve reproduced my provisional decision here. In it, I said:

“In 2018 Mr P and his partner entered into a loan agreement arranged on their behalf by Funding Circle. The loan of £261,184 was made for business purposes and was placed with a corporate investor “C” through Funding Circle’s peer-to-peer lending platform. Under the loan arrangements, Funding Circle administered the loan on C’s behalf.

By mid-2020 the loan had fallen into arrears. Mr P has described the chain of events that led to this position in some detail. For the purposes of this decision I will simply say that he has attributed the partnership’s financial problems to the activities of a former employee, which he has reported to the police. Mr P is unhappy that having explained the situation to Funding Circle, it has maintained the stance that he and his business partner are liable to repay at the contractual rate, and that it has expressed the intention to pursue legal action in respect of the money owed.

Funding Circle says that it is not responsible for the situation Mr P and his partner found themselves in, and while it is sympathetic it has an obligation towards the lender to recover payment. Funding Circle has said it accepts the loan will be repaid over time and that it is amenable to agreeing a reduced payment plan based on the borrowers’ affordability. However, it has said Mr P’s proposal of £80 per month is significantly lower than the contractual amount of £5,613.87. It has asked the partners to provide security for the loan to avoid the need for legal action.

Our initial assessment

Our investigator didn’t think we could deal with the complaint. She noted that our compulsory jurisdiction (to which Funding Circle is subject) only covers peer-to-peer lending where it meets the definition of the credit-related regulated activity of ‘operating an electronic system in relation to lending’, as set out in Article 36H of The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (as amended). I’ll call this the “RAO” for ease of reading.

The investigator thought the arrangements between the business partners and Funding Circle didn’t meet the RAO definition because the lender was an incorporated company and the borrowing – while undertaken by the partners as relevant recipients of credit – was for business purposes and rather more than the £25,000 limit set out in Article 36H.

Mr P has asked for this review. He feels that Funding Circle was wrong to construct the lending arrangements in a way that would take the borrowing outside the regulatory and legal protections he believes he is afforded by the FCA and by the Consumer Credit Act 1974 ("CCA"). And he argues that Funding Circle is acting unreasonably towards him in seeking repayment in the amount it has, taking into account the background circumstances.

My provisional findings

I'll deal first with the question of our power to deal with the complaint. Our investigator correctly identified the boundaries at play under the RAO in terms of Article 36H activity. The reasons she explained as to why the lending arrangements fell outside the defined regulated activity were correct, and for the sake of completeness, I share her view on this aspect.

As an observation, I see no reason to think Funding Circle wasn't entitled to structure the loan in the way it did. The RAO recognises the possibility that lending arrangements might be structured in a way that takes them out of regulated activity, and the CCA also excludes most loans for business purposes at a much lower level than the amount Mr P and his partner borrowed. So while I appreciate the way he feels about that situation, it's worth recognising that neither Parliament nor the FCA sought to provide the same level of protection to this business borrowing as they did to consumer borrowing.

But I'm conscious that Mr P's cause for concern isn't in relation to the lending activity. He hasn't sought to complain about the decision to approve the borrowing. And while he's said he's unhappy with the way in which Funding Circle structured the arrangements, that wasn't the basis of the complaint he made – that's something that he only discovered in the course of our review of the complaint.

Rather, Mr P has complained about the way Funding Circle has dealt with the partners in relation to the administration of the debt. That is a different credit-related regulated activity under Article 39G of the RAO, to which the exceptions relating to business and financial limits do not apply. As Funding Circle was acting on behalf of the lender, rather than acting as lender itself, I find it was carrying on Article 39G activity and as such, the complaint is within our jurisdiction.

However, I'm not minded to agree with Mr P's assertion that seeking repayment of the debt he and his partner agreed they would be liable for amounts to disproportionate action, or an unreasonable stance for the lender to take. I don't doubt the partners found themselves in an incredibly difficult financial situation following their discovery of their employee's actions, and I have every sympathy with the steps Mr P says he had to take and the impact those actions had on his business.

But I'm minded to say that Funding Circle has demonstrated forbearance in its response to those difficulties. It has said it is willing to consider the partners' financial circumstances and a suitable repayment plan. I don't think it's inherently unfair that as part of that plan, Funding Circle asks the partners to provide security for the debt on a voluntary basis. It's quite common in the event of a court judgment for a debt of this size for the claimant to seek an order for a legal charge. If such an agreement can be reached prior to proceedings, then that seems to me entirely appropriate.

I do hope Mr P and his business partner are able to recover the money they believe they are owed by their former employee, and that they are then in a position to use this to address the debt Funding Circle is administering on the lender's behalf. In the meantime, I'm minded to say that the fair way to resolve the dispute is for the parties to try to come to a reasonable repayment plan as an interim measure, as Funding Circle has indicated. Currently, I don't think it's for me to stand in the way of a reasonable request that some form of security is offered to achieve this."

I invited the parties to provide further submissions or comments before making my final determination.

Responses to my provisional decision

Mr P raised a number of points relating to the ongoing police investigation and why he felt it would be appropriate for Funding Circle to suspend recovery action until the underlying issue was resolved. He said he had asked the police for an update and would forward new evidence to us. Mr P also noted the impact charges over his property would have and suggested what he considered a suitable alternative.

I put Mr P's response to Funding Circle – who didn't respond directly to my provisional decision – to see whether it was minded to change its stance. Funding Circle acknowledged the background circumstances and that the employee's activity had impacted on B's ability to manage the loan payments. However, it told us that C had sold the debt to another party, "A", and that as a result Funding Circle no longer serviced the debt. Consequently it couldn't comment on any steps that might be taken to recover the debt.

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.

Neither party has disagreed with my proposed conclusion in terms of our power to deal with the complaint. Nor have they given me reason to reach a different conclusion in respect of the approach Funding Circle took towards Mr P and his business partner in administering the debt on C's behalf.

I'm conscious Mr P said he intended to send additional evidence relating to the police investigation. While that might give some background as to how that matter is progressing, and when it might be concluded, I don't see that it has a material bearing on the way Funding Circle dealt with the debt that led to his complaint.

Further, given that Funding Circle is no longer acting as administrator of the debt, the current status of the police investigation and any forbearance that might be offered is a matter for him to take up with the new debt owners, rather than Funding Circle. After all, if Funding Circle isn't acting as the debt administrator, it won't be taking legal proceedings in relation to the balance.

I trust Funding Circle has been in touch with Mr P to tell him who now owns the debt and to whom he should direct any future correspondence. If it hasn't yet done so, I'm sure it understands the need to do so, and that it will be taking those steps without further delay.

Taking all of this into account, I am adopting my provisional findings in full as the basis for my final decision.

My final decision

For the reasons I've set out here and in my provisional decision, I don't require Funding Circle Ltd to take any action to resolve this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 22 August 2023.

Niall Taylor
Ombudsman