DRN-4311694

Complaint

Mr B complains that Fund Ourselves Limited ("Fund Ourselves") is incorrectly reporting on loans, which he says he cancelled within the 14-day 'cancellation' period, to Credit Reference Agencies.

Background

Fund Ourselves provided Mr B with a total of eight loans between June 2021 and April 2022. Mr B repaid all of the loans within 14 days. It's also worth noting that seven of the eight loans were repaid in the last week of the month and six of the seven were settled in the last three or four days of the month.

Mr B says he believed that he'd cancelled these loans and so they wouldn't be reported to Credit Reference Agencies. But he later noticed that rather than being removed, these loans were actually reported as having been settled early with Credit Reference Agencies.

Mr B was unhappy with Fund Ourselves' actions and decided to complain about this matter.

Fund Ourselves didn't uphold Mr B's complaint. It said that it was up to a lender how to report withdrawn loans to credit reference agencies. Mr B remained dissatisfied and referred the complaint to our service.

One of adjudicators looked at Mr B's complaint and concluded that Fund Ourselves needed to remove loan 1 from Mr B's credit file. However, she also thought that Fund Ourselves didn't need to do anything in relation to loans 2 to 8 as Mr B hadn't provided notice of his intention to withdraw from these agreements prior to settling these loans.

Both Fund Ourselves and Mr B disagreed with our adjudicator's assessment. So the case was passed to an ombudsman as per the next stage of our dispute resolution process.

My provisional decision of 14 August 2023

I issued a provisional decision – on 14 August 2023 - setting out why I intended to partially uphold Mr B's complaint. I won't copy that decision in full, but I will instead provide a summary of my findings.

I started my consideration of this complaint by looking at the arguments that Mr B had made about why all reference to the loans he was provided with should be removed from his credit file.

Mr B's arguments in relation to 'cancelling' his loans with Fund Ourselves

Mr B said that he cancelled all of his loans in accordance with the terms and conditions of his agreements and as a result they should have been removed from his credit file. In particular, he referred to having complied with section 14.3 of the terms and conditions of his agreement and having cancelled all of his loans within 14 days.

I thought about what Mr B said.

Section 14 of all of the loan agreements Mr B signed is entitled *'Right to Cancel'. Section 14.3 goes on to state*:

> *"14.3 To exercise the right to cancel, you must inform Fund Ourselves Limited of your decision to cancel this contract by a clear statement (e.g. a letter sent by post, telephone or email) or follow the early repayment procedures".*

In the first instance, I started by saying that both Mr B and Fund Ourselves had used the terms cancellation and withdrawal interchangeably as if they were one and the same. But cancellation and withdrawal are separate and distinct mechanisms for existing a credit agreement. I accepted that to the lay person this might have seemed like a rather pedantic distinction for me to make. But the method used to exit an agreement had the potential to affect the consequences of doing so.

The right to cancel a credit agreement (which is a distance contract) exists under the provisions set out in Section 11.1.1R of the regulator's Consumer Credit Sourcebook; whereas the right to withdraw from a regulated credit agreement exists as a result of Section 66A of the Consumer Credit Act 1974 ("S66A CCA"). S66A typically applies to a regulated agreement as long as it is not excluded for one of the reasons set out in subsection 14. And cancellation usually only applies to a distance contract which S66A doesn't apply.

Mr B's agreements

Mr B's agreements were regulated agreements not excluded for one of the reasons set out in subsection 14 of S66A CCA. And as far as I could see neither CONC 11.1.2 (2) or CONC 11.1.2 (3) apply here.

So this meant that Mr B only had the right to withdraw from his agreements using S66A CCA. He did not have the right to cancel under CONC 11.1.1R.

Which agreements, if any, did Mr B withdraw from?

I considered whether Mr B did withdraw from all of his agreements. When doing so, I considered what S66A CCA – and in particular subsection 2 - states. It states:

> *66A Withdrawal from consumer credit agreement*
>
> *(1)The debtor under a regulated consumer credit agreement, other than an excluded agreement, may withdraw from the agreement, without giving any reason, in accordance with this section.*
>
> *(2)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.*
> *…*

I'd already explained Mr B's agreements weren't excluded agreements so he didn't have to provide a reason for doing so, should he have wished to withdraw. However, while Mr B wasn't required to provide a reason to withdraw, subsection 2 did require Mr B to provide notice of his intention to withdraw ahead of doing so. And it wasn't in dispute that Mr B, at best (it was unclear whether the notice was provided before he settled the loan as the email stated *"I have paid the loan back in full, I have also given you notice of the cancellation"*), only provided the required oral or written notice in relation to loan 1.

There didn't appear to be any dispute that Mr B didn't provide any oral or written notice before settling loans 2 to 8. It was unclear to me why Mr B chose not to submit written notification of his intention to end his agreement before repaying loans 2 to 8, in the same way that he did for loan 1.

But Mr B said that this did not matter as he, in any event, followed the early repayment procedures as per section 14.3 of his agreements. I looked through all of his agreements and I couldn't see that the early repayment procedures were defined anywhere. So I assumed that Mr B considered that his making of the relevant payment, in itself, constituted him following the early repayment procedures.

I went on to explain that, in any event and perhaps more importantly, even if I were to have given Mr B the benefit of the doubt in relation to this matter and agree that his actions in repaying the loans early did meet the early repayment procedures, section 14.3 didn't say that meeting these conditions would result in any loan not being reported to Credit Reference Agencies. At best, all meeting the terms of this section did was ensure that the amount Mr B had to repay was limited to the sum lent plus interest at 0.8% per day for the number of days he had the funds.

As far as I was aware, Mr B wasn't charged any more than this for any of his loans. So it seemed to me that Fund Ourselves hadn't done anything wrong in relation to loans 2 to 8. More importantly, I didn't think that Mr B repaying loans 2 to 8 within 14 days meant that he withdrew from those agreements, in the way that he believed he did.

Why I thought that Fund Ourselves needed to take action in relation to loan 1

Fund Ourselves argued that irrespective of whether Mr B correctly withdrew from loan 1 or in fact or all of his loans, it, in any event, did nothing wrong as, in its view it is up to a lender whether or not to report on loans that a consumer has withdrawn from.

I thought about what Fund Ourselves said. And when doing so, I kept in mind subsection 7 of S66A CCA, which states:

> *(7) Subject as follows, where the debtor withdraws from a regulated consumer credit agreement under this section—*
>
> *(a) the agreement shall be treated as if it had never been entered into*

Although Mr B referred to cancelling his agreements, this was the subsection Mr B was relying upon to support his argument that his agreements shouldn't be reported to Credit Reference Agencies.

However, I explained that while subsection 7 of S66A CCA refers to how a withdrawn agreement itself should be regarded, it is silent on how such an agreement should be treated for the purposes of reporting to Credit Reference Agencies. The only reference to how such agreements should be reported is found in paragraph 11.21 of the Department for Business Innovation & Skills ("BIS") guidance on the implementing *Consumer Credit (EU Directive) Regulations 2010/1010.* The requirement to implement this directive was the reason S66A came into being in the first place.

Paragraph 11.21 of the BIS guidance states:

> ***"11.21** Section 66A(7)(a) is intended to be binding on the parties to the agreement rather than more generally. CRAs could have regard to section 66A(7)(a) and treat*

agreements where the borrower has exercised the right of withdrawal as never having existed, removing the agreement from their database. However, they could also record the agreement as having been repaid. The important thing is that the consumer should not be disadvantaged in any way by having withdrawn from and repaid a credit agreement."

It was my view that the BIS guidance did provide a lender with some latitude in terms of reporting. And it would be down to the particular facts and circumstances of the lending in question in terms of what it would be fair and reasonable for a lender to report to Credit Reference Agencies in relation to any loan, or loans, that a consumer withdraws from.

As I'd by this stage explained, Mr B only met the prescribed criteria to withdraw from loan 1. I could see that he 'withdrew' from and repaid loan 1 ten days after he entered into the agreement. Given this was a first loan, Mr B followed the prescribed criteria for withdrawing from the agreement; the BIS guidance stated Mr B should not be disadvantaged by having withdrawn from and repaid this loan; and most importantly, at the time at least, there was no indication Mr B was doing anything other than exercising his right to withdraw, I was satisfied that Fund Ourselves should remove all reference to loan 1 from Mr B's credit file.

When reaching this conclusion, I kept in mind what Fund Ourselves had said about receiving a final decision, on another case, where the ombudsman didn't require it to remove the loans concerned from the consumer's credit file.

I looked at the copy of the decision provided. And I agreed that the ombudsman did state that it wasn't unfair for Fund Ourselves to report that the consumer's loans in that case as having been early settled rather than removed entirely. But I couldn't see that that final decision went as far as saying that it would never be appropriate to remove a withdrawn loan from a borrower's credit file.

Furthermore I went on to explain that while I could understand why Fund Ourselves might find it strange to have received different outcomes on complaints which it perceived to be materially the same, I am nonetheless required to consider the facts of a case and reach my own conclusion. I cannot be bound by the conclusions that another ombudsman has reached on a completely different case.

That said, I did agree that consistency is important. I had already explained that the particular facts and circumstances of the lending in question will determine what it would be fair and reasonable for a lender to report to Credit Reference Agencies in relation to any loan, or loans, that a consumer withdraws from. I didn't know the particular circumstances of the case that Fund Ourselves had provided. But I thought it unlikely that it would be exactly the same as Mr B's.

So while I was not required to replicate the outcomes reached by other ombudsmen, nonetheless I did not consider that it necessarily followed that my answer was incompatible or inconsistent with the one Fund Ourselves received on the other case it had referred to, notwithstanding the differing outcomes.

What if Mr B had met the requirements of subsection 2 S66A CCA for loans 2 to 8?

For the sake of completeness, given the arguments that Mr B had made, I also thought that it would be helpful for me to explain why it was the case that even if Mr B had met the conditions to withdraw from loans 2 to 8 in accordance with S66A CCA, I still wouldn't have asked Fund Ourselves to remove these loans from Mr B's credit file.

I reached this conclusion because Mr B wasn't really withdrawing from these loans. His pattern of borrowing suggested that he was using these loans for extra short terms. Mr B's pattern of borrowing suggested that he was taking out loans with Fund Ourselves using the funds and then repaying the amount owing after he was paid. Indeed, by this stage, I had already set out that the vast majority of these loans were settled in the last few days of the month.

It was my view that Mr B's use of these loans was more akin to early settlement rather than withdrawing from them - he appeared to have repaid the loans ahead of the scheduled repayment dates rather than returned the funds because he didn't have a need for them. So I didn't think that it was unfair for Fund Ourselves to report on these loans in this way.

I did appreciate that Mr B might have felt that S66A CCA provided some kind of loophole in relation to how his usage of this type of lending should be reported to Credit Reference Agencies. And bearing in mind that prospective lenders could draw certain conclusions about prospective borrower's creditworthiness as a result of using payday type lending, I could fully understand why Mr B wanted these loans removed from his credit file and why he was disappointed that Fund Ourselves hadn't placed him in the position he'd hoped he'd be in when he settled these loans.

However, I thought that asking Fund Ourselves to remove all reference to these loans and make it appear as though Mr B didn't use the funds, in circumstances where his pattern of lending suggested that he did, simply did not reflect what happened here. Indeed, Mr B was asking us to place him in a more advantageous position that he should be in. And this did not seem to me to be in keeping with my remit to determine what was fair and reasonable in all the circumstances of the case.

Furthermore, I also thought that it would arguably be counterproductive and not in Mr B's interests or that of any prospective future lender for this many loans to be removed from Mr B's credit file and potentially make it appear as though Mr B is more creditworthy than he actually is. This was particularly the case as what is currently recorded about loans 2 to 8 effectively, appropriately and accurately mirrors what happened here.

So I explained that notwithstanding the fact that Mr B did not comply with the requirements of subsection 2 S66A of the CCA, I any event wouldn't have required Fund Ourselves to cease reporting on loans 2 to 8 to Credit Reference Agencies even if Mr B had complied with the requirements.

I concluded by setting out that it was my intention to issue a final decision which directed Fund Ourselves to remove all reference to loan 1 from Mr B's credit file and cease reporting on it to Credit Reference Agencies. However, I was not intending to require Fund Ourselves to take any action in relation to loans 2 to 8.

Responses to my provisional decision

Mr B confirmed receiving my provisional decision. He said he thought that it had some very good points and that he had nothing further to add.

Fund Ourselves also confirmed receiving my provisional decision. It also confirmed that it had nothing further to add.

My findings

I've considered all the available evidence and arguments to decide what's fair and

reasonable in the circumstances of this complaint.

I set out in some detail why I intended to uphold Mr B's complaint in my provisional decision of 14 August 2023. As I've not been provided with anything further by the parties to consider, I've not been persuaded to alter my conclusions.

So I'm still partially upholding Mr B's complaint and Fund Ourselves needs to remove all reference to loan 1 from Mr B's credit file and cease reporting on it to Credit Reference Agencies.

My final decision

For the reasons I've explained above and in my provisional decision of 14 August 2023, I'm partially upholding Mr B's complaint. Fund Ourselves Limited should remove all reference to loan 1 from Mr B's credit file and cease reporting on it to Credit Reference Agencies.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 20 September 2023.

Jeshen Narayanan
Ombudsman