

## Complaint

Mr H has complained that Gain Credit LLC (trading as “Drafty”) irresponsibly provided him with unaffordable open-ended credit facilities.

## Background

Drafty provided Mr H with a total of seven open-ended credit facilities. These were running account facilities where a consumer could request funds up, to their credit limit, which would then be deposited into their bank account. The first one was provided in September 2016 and the last one was provided in August 2018.

One of our adjudicators looked at Mr H’s complaint. She thought that Drafty shouldn’t have provided the second to seventh facilities. Drafty disagreed and asked for an ombudsman to look at the case.

## 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’ve also taken into account the law, any relevant regulatory rules and good industry practice at the time the loans were offered.

Having carefully thought about everything I’ve been provided with, I’m upholding Mr H’s complaint in part. I’d like to explain the reasons for my decision.

### ***The relevant regulations in place at the time Mr H was given his running account credit facilities***

I think it would be helpful for me to start by explaining that Drafty gave Mr H these facilities when it was regulated by the Financial Conduct Authority (“FCA”). And the relevant regulatory rules in place at the time were set out in the Consumer Credit Sourcebook (“CONC”) section of the FCA Handbook of rules and guidance.

Section 5.2.1(2) of CONC set out what a lender needed to do before agreeing to give a consumer a loan of this type. And it says a firm had to consider *“the potential for the commitments under the regulated credit agreement to adversely impact the customer’s financial situation”* as well as *“the ability of the customer to make repayments as they fall due over the life of the regulated credit agreement, or for such an agreement which is an open-end agreement (like Mr H’s facilities), to make payments within a reasonable period.”*

CONC 5.2 also includes some guidance on the sorts of things a lender needs to bear in mind when considering its obligations under CONC 5.2.1. Section 5.2.4(2) says *“a firm should consider what is appropriate in any particular circumstances dependent on, for example, the type and amount of credit being sought and the potential risks to the customer. The risk of credit not being sustainable directly relates to the amount of credit granted and the total charge for credit relative to the customer’s financial situation.”*

And CONC 5.3 contains further guidance on what a lender should bear in mind when thinking about affordability. CONC 5.3.1(1) says *“In making the creditworthiness assessment*

*or the assessment required by CONC 5.2.2R (1), a firm should take into account more than assessing the customer's ability to repay the credit."*

*CONC 5.3.1(2) then says "The creditworthiness assessment and the assessment required by CONC 5.2.2R (1) should include the firm taking reasonable steps to assess the customer's ability to meet repayments under a regulated credit agreement in a sustainable manner without the customer incurring financial difficulties or experiencing significant adverse consequences."*

In practice all of this meant that a lender had to take proportionate steps to ensure a consumer would've been able to repay what they were borrowing in a sustainable manner without it adversely impacting on their financial situation. Put simply the lender had to gather enough information so that it could make an informed decision on the lending.

Although the guidance didn't set out compulsory checks it did list a number of things a lender could take into account before agreeing to lend. The key thing was that it required a lender's checks to be proportionate. And any checks had to take into account a number of different things, such as how much was being lent and when what was being borrowed was due to be repaid.

I've kept all of this in mind when thinking about whether Drafty did what it needed to before agreeing to Mr H's Drafty facility. As explained, Mr H was given what were open-ended credit facilities. So overall I think that this means the checks Drafty carried out had to provide enough for it to be able to understand whether Mr H would be able to both service and then repay his facilities within a reasonable period of time.

*Why I think Drafty needed to do more before agreeing to give Mr H his second and subsequent facilities*

Mr H made 22 drawdowns on his first facility. And I can see that he asked for the second one a mere matter of days after settling his first one. The credit limit on this facility was also for substantially more than the amount of the first one. In these circumstances, I think that Drafty needed to get a more thorough understanding of Mr H's financial circumstances before agreeing to provide him with his second facility. And as Drafty didn't do this, I don't think that it did enough to establish whether Mr H would be able to sustainably repay these facilities.

*What I think Drafty would've most likely found out if it had asked further questions*

Even though I think that Drafty should've asked Mr H further questions before giving the second to seventh facilities this doesn't, on its own, mean Mr H's complaint should be upheld. After all if further checks would've simply shown Drafty that Mr H would most likely have been able to repay these facilities within a reasonable period of time (and so there was no reason why Drafty shouldn't have lent to Mr H), then further enquiries wouldn't have made a difference. This is because Mr H won't have lost out because of Drafty's failure to carry out proportionate checks and there'd be no reason for me to uphold the complaint.

But if further checks would most likely have shown Mr H was unlikely to have been able to repay these facilities then Drafty would've seen that it shouldn't have lent to him. And this would mean that Mr H lost out because of Drafty's failure to carry out proportionate checks. So there'd be grounds to uphold Mr H's complaint.

As proportionate checks weren't carried out I can't know what exactly they would have shown. But Mr H has provided us with more information on his financial circumstances. So I've been able to get a picture of what they were like.

Of course I accept this isn't perfect as different checks show different things. And just because something shows up in the information Mr H has provided it doesn't mean it would've shown up in any extra checks Drafty might've carried out. But what Mr H has provided is the best indication I have of his financial circumstances at the time of the applications. And in the absence of anything else I think it's perfectly reasonable to rely on it.

I've carefully looked through everything Mr H's provided and I've also thought about everything both parties have said. Having done so, I don't think Mr H had the capacity to take on these facilities. As our adjudicator explained, it is clear that Mr H was using the funds he was drawing down do gamble.

I've seen what Drafty has said about gambling being a form of discretionary expenditure. But the question I'm thinking about here is whether proportionate checks would more likely than not have shown Drafty that Mr H would be able to sustainably repay his loan. And, in this case, proportionate checks would more likely than not have shown Mr H's ability to make his payments was going to come down to, in large part, his success as a gambler.

In these circumstances, I don't think it's reasonable to conclude that Mr H would more likely than not have been able to make his payments without borrowing further or experiencing difficulty. And, in these circumstances, I'm satisfied that the second to seventh running account credit facilities were unsustainable for Mr H.

Overall I think not only did Drafty fail to carry out proportionate checks before giving Mr H his second to seventh running account facilities, but that Mr H also lost out as a result of this.

### **What Drafty should do to put things right**

To put things right for Mr H, Drafty should:

- refund all the interest and charges applied to Mr H's second to sixth running account facilities; 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 †;
- all interest and charges applied to the seventh facility should be removed from the outset. Any payments Mr H has made should be deducted from the new starting amount – in order words, Mr H should pay back no more than the amount he was lent;
- remove any adverse information recorded on Mr H's credit file as a result of the second to sixth facilities having been given to him. If the outstanding balance on the seventh facility is cleared once all adjustments have been made then any adverse information recorded as a result of the seventh facility should also be removed from Mr H's credit file.

I understand that Mr H has an outstanding balance remaining on his seventh Drafty facility. If after having removed all the interest and charges applied from the outset, an outstanding balance remains, Drafty can deduct this from the amount it now needs to pay Mr H.

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

### **My final decision**

For the reasons given above, I'm partially upholding Mr H's complaint. Gain Credit LLC should pay Mr H compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 20 April 2020.

Jeshen Narayanan  
**Ombudsman**