

## The complaint

Mrs M (via the way of a representative) complains Oakam Ltd (Oakam) irresponsibly provided her with a number of instalment loans. She says Oakam didn't carry out sufficient checks.

## What happened

Our adjudicator thought Mrs M's complaint should be partially upheld. Oakam disagreed. The complaint was then passed to me.

I issued my provisional decision explaining why Mrs M's complaint should be upheld in part. A copy of the background to the complaint and my provisional findings follow this and form part of this final decision:

## What I said in my provisional decision:

*Oakam investigated Mrs M's complaint and issued its final response letter in February 2020. It didn't uphold her complaint and said it carried out proportionate checks before agreeing to all of the loans.*

*A table of Mrs M's lending based on the information given to us by Oakham can be found below.*

loan number	loan amount*	received date	actual repayment date	term (months)	repayment frequency
1	£565.00	01/02/2013	24/12/2013	12	weekly
2	£654.34	24/12/2013	12/09/2014	12	weekly
3	£957.96	12/09/2014	27/05/2015	18	weekly
4	£1,105.28	27/05/2015	23/10/2015	18	weekly
5	£1,207.02	23/10/2015	27/04/2017	18	weekly
6	£2,000.00	11/01/2018	17/01/2020	24	weekly

*\*taken from the loan agreement.*

*Loans 2 - 5 were refinanced loans. This meant some of the loan amount went towards repaying the previous loan. For example, Mrs M received £300 'new money' when she applied for loan 5. With the remaining amount lent being used to repay the outstanding balance on loan 4.*

*An adjudicator reviewed Mrs M's complaint. She didn't think Oakam had made an error when it approved the first three loans. But she did think Oakam had made a mistake in providing loans 4 - 6 because Mrs M's overall pattern of borrowing led the adjudicator to conclude that these loans were unsustainable.*

*Mrs M appears to have accepted the adjudicator's view.*

*Oakam didn't agree with the adjudicator's view. In response it sent a detailed document outlining its concerns. But in summary it said;*

- The reasons why the adjudicator upheld the loans doesn't appear to be related to the checks that Oakam carried out for each loan.*
- Mrs M could afford the repayments out of her disposable income – based on proportionate and detailed checks Oakam carried out.*
- Mrs M could only refinance her loans due to her positive repayment record and she also showed no signs of being in financial difficulties.*
- Oakam normally offer smaller loans over a short term and as long as the repayment record is satisfactory a consumer can be moved towards larger loans over a longer period of time.*
- Mrs M's final loan, due to the amount and the term, cannot be considered to be a short-term loan.*
- Mrs M only had 6 late payments while she borrowed from Oakam, but payments were made weekly, so these were quickly rectified.*
- Oakam considers there to be a significant break in lending between loans 5 and 6.*
- Oakam provided Mrs M with sufficient information before each loan as granted which outlined the costs of the credit as well as how each loan was structured.*
- Oakam says that Mrs M had the benefit of the funds and Oakam wants to know what impact, there would have been on Mrs M had it not granted this lending. For example, Oakam says that loan 4 was provided so Mrs M could visit a sick relative.*

*The adjudicator considered what Oakam had said, but its comments didn't change his mind about which loans should be upheld.*

*As no agreement could be reached the case has now been passed to me.*

### ***What I've provisionally 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.*

*We've set out our general approach to complaints about this type of lending - including all of the relevant rules, guidance and good industry practice as well as our approach to dealing with similar cases which can be found on our website.*

*And having done so, I'm intending to conclude that Mrs M's complaint should be upheld in part.*

*Oakam initially raised an objection to this service considering the first two loans, because in its view Mrs M made her complaint too late. But, Oakam has received an assessment on this matter and has since commented on the outcome that was reached by the latest adjudicator. So, I no longer intend to revisit whether Mrs M made her complaint on time.*

*Firstly, I will address the regulations in place at the time these loans were provided;*

*the legal and regulatory framework regulation by the Office of Fair Trading (up to 31 March 2014) – loans 1 and 2.*

*Up to the end of March 2014 Oakham was subject to the OFT. During this time it needed a standard licence from the Office of Fair Trading ("OFT"), in order to carry out consumer credit activities.*

Section 25(2) of the Consumer Credit Act 1974 set out the factors the OFT had to consider when deciding whether to grant a consumer credit licence to a lender. It said:

*(1) In determining whether an applicant for a licence is a fit person for the purposes of this section the OFT shall have regard to any matters appearing to it to be relevant including (amongst other things)—*

- (a) the applicant's skills, knowledge and experience in relation to consumer credit businesses, consumer hire businesses or ancillary credit businesses;*
- (b) such skills, knowledge and experience of other persons who the applicant proposes will participate in any business that would be carried on by him under the licence;*
- (c) practices and procedures that the applicant proposes to implement in connection with any such business;*
- (d) evidence of the kind mentioned in subsection (2A)*

*(2A) That evidence is evidence tending to show that the applicant, or any of the applicant's employees, agents or associates (whether past or present) or, where the applicant is a body corporate, any person appearing to the OFT to be a controller of the body corporate or an associate of any such person, has—*

*(a) committed any offence involving fraud or other dishonesty or violence; (b) contravened any provision made by or under—*

*(i) this Act;*

*(ii) Part 16 of the Financial Services and Markets Act 2000 so far as it relates to the consumer credit jurisdiction under that Part;*

*(iii) any other enactment regulating the provision of credit to individuals or other transactions with individuals;*

*(c) contravened any provision in force in an EEA State which corresponds to a provision of the kind mentioned in paragraph (b);*

*(d) practised discrimination on grounds of sex, colour, race or ethnic or national origins in, or in connection with, the carrying on of any business; or*

*(e) engaged in business practices appearing to the OFT to be deceitful or oppressive or otherwise unfair or improper (whether unlawful or not) [my emphasis].*

Section 25(2B) set out a direct example of the type of practice referred to in Section 25(2A)(e) and said: *For the purposes of subsection (2A)(e), the business practices which the OFT may consider to be deceitful or oppressive or otherwise unfair or improper include practices in the carrying on of a consumer credit business that appear to the OFT to involve irresponsible lending [my emphasis].*

*In March 2010, as required by s.25A, the OFT produced guidance on the test for irresponsible lending for the purposes of section 25(2B) of the Consumer Credit Act 1974 and so it issued its guidance on irresponsible lending ("ILG").*

*So I consider the ILG to be of central importance in reaching a fair and reasonable outcome in Mrs M's case. The foreword to the guidance set out its purpose and it said:*

*The primary purpose in producing this guidance is to provide greater clarity for businesses*

*and consumer representatives as to the business practices that the OFT considers may constitute irresponsible lending practices for the purposes of section 25(2B) of the Consumer Credit Act 1974. It indicates types of deceitful or oppressive or otherwise unfair or improper business practices which, if engaged in by a consumer credit business, could call into consideration its fitness to hold a consumer credit licence.*

*Whilst this guidance represents the OFT's view on irresponsible lending, it is not meant to represent an exhaustive list of behaviours and practices which might constitute irresponsible lending.*

*Section two of the guidance sets out the general principles of fair business practice. Section 2.1 says:*

*In the OFT's view there are a number of overarching principles of consumer protection and fair business practice which apply to all consumer credit lending.*

*Section 2.2 of the guidance*

*In general terms, creditors should:*

- not use misleading or oppressive behaviour when advertising, selling, or seeking to enforce a credit agreement
- make a reasonable assessment of whether a borrower can afford to meet repayments in a sustainable manner
- explain the key features of the credit agreement to enable the borrower to make an informed choice
- monitor the borrower's repayment record during the course of the agreement, offering assistance where borrowers appear to be experiencing difficulty and treat borrowers fairly and with forbearance if they experience difficulties

Section 2.3 lists other expectations of lenders. Amongst other things, it says: In addition to the above there should be:

- fair treatment of borrowers. Borrowers should not be targeted with credit products that are clearly unsuitable for them, subjected to high pressure selling, aggressive or oppressive behaviour or inappropriate coercion, or conduct which is deceitful, oppressive, unfair or improper, whether unlawful or not
- Borrowers who may be particularly vulnerable by virtue of their current indebtedness, poor credit history, or by reason of age or health, or disability, or for any other reason, should, in particular, not be targeted or exploited.

*Section four of the guidance is concerned with the assessment of affordability that lenders were required to carry out before granting credit. Section 4.1 says:*

*In the OFT's view, all assessments of affordability should involve a consideration of the potential for the credit commitment to adversely impact on the borrower's financial situation, taking account of information that the creditor is aware of at the time the credit is granted. The extent and scope of any assessment of affordability, in any particular circumstance, should be dependent upon – and proportionate to – a number of factors (see paragraph 4.10 of this guidance document).*

*'Assessing affordability', in the context of this guidance, is a 'borrower-focussed test' which*

*involves a creditor assessing a borrower's ability to undertake a specific credit commitment, or specific additional credit commitment, in a sustainable manner, without the borrower incurring (further) financial difficulties and/or experiencing adverse consequences.*

Section 4.2 of the OFT guidance says:

*Whatever means and sources of information creditors employ as part of an assessment of affordability should be sufficient to make an assessment of the risk of the credit sought being unsustainable for the borrower in question. In our view this is likely to involve more than solely assessing the likelihood of the borrower being able to repay the credit in question.*

*We consider that before granting credit, significantly increasing the amount of credit, or significantly increasing the credit limit under an agreement for running account credit, creditors should take reasonable steps to assess a borrower's likely ability to be able to meet repayments under the credit agreement in a sustainable manner.*

*"In a sustainable manner" is defined in Section 4.3 of the OFT guidance. And Section 4.3 says:*

*The OFT regards 'in a sustainable manner' in this context as meaning credit that can be repaid by the borrower:*

- without undue difficulty – in particular without incurring or increasing problem indebtedness*
- over the life of the credit agreement or, in the case of open-end agreements, within a reasonable period of time*
- out of income and/or available savings, without having to realise security or assets.*

Section 4.4 goes on to describe "undue difficulty" and says:

*The OFT would regard 'without undue difficulty' in this context as meaning the borrower being able to make repayments (in the absence of changes in personal circumstances that were not reasonably foreseeable at the time the credit was granted):*

- while also meeting other debt repayments and other normal/reasonable outgoings and*
- without having to borrow further to meet these repayments.*

*Building on the proportionality principle set out in section 4.1, section 4.10 deals with the issues that might influence how detailed the affordability assessment should be. It includes factors such as:*

- the type of credit product;*
- the amount of credit to be provided and the associated cost and risk to the borrower;*
- the borrower's financial situation at the time the credit is sought;*
- the borrower's credit history, including any indications of the borrower experiencing (or having experienced) financial difficulty*
- the vulnerability of the borrower*

Section 4.12 is a non-exhaustive list of the types and sources of information that a lender assess affordability, including:

- evidence of income
- evidence of expenditure
- records of previous dealings with the borrower
- a credit score
- a credit report from a credit reference agency
- information obtained from the borrower through a form or a meeting

Section 4.15 concerns the verification of income and expenditure for the purposes of making an appropriate assessment of affordability. It states:

*In our view, creditors who do not require documentary evidence of income and/or expenditure as part of their assessment of affordability, but rather accept information provided by the borrower without any supporting evidence or, in the alternative, do not seek any information on income and/or expenditure at all as part of their assessment, should ensure that whatever means and sources of information they employ are sufficient to make an appropriate assessment. We do not consider that self-certification of income would generally be sufficient in respect of significant long-term credit agreements, particularly those secured on property.*

Section 4.16 specifically touches on the issue of proportionality in the context of short-term credit. It says:

*Whilst the OFT accepts, as a general principle from a proportionality perspective, that the level of scrutiny required for small sum and/or short-term credit may be somewhat less than for large sum and/or long term credit, we consider that creditors should also take account of the fact that the risk of the credit being unsustainable would be directly related to the amount of credit granted (and associated interest / charges etc.) relative to the borrower's financial situation*

Sections 4.18 to 4.33 of the ILG set out some examples of “specific irresponsible lending practices” relating to how businesses assess affordability. Section 4.20 says this would include where a lender is:

*Failing to undertake a reasonable assessment of affordability in an individual case or cases*  
Section 4.21 gives another example:

*Failing to consider sufficient information to be able to reasonably assess affordability, prior to granting credit, significantly increasing the total amount of credit provided, or significantly increasing the credit limit (in the case of a running account credit agreement) This could (but not necessarily) include for example:*

*Where applicable, appropriate and proportionate, failing to verify details of current income and/or expenditure by, for example, checking hard copies of payslip/contract of employment (when a borrower is in employment), accountant's letters (where a borrower is self-employed) or benefit statements (where a borrower is not in employment).*

And Section 4.26 says a business would be acting irresponsibly if:

*Granting an application for credit when, on the basis of an affordability assessment, it is known, or reasonably ought to be suspected, that the credit is likely to be unsustainable.*

Sections 4.29 and 4.31 deal with a lender's treatment of information disclosed by the customer. 4.29 says it would be an unsatisfactory business practice where a lender: fail[s] to take adequate steps, so far as is reasonable and practicable, to ensure that information

on a credit application relevant to an assessment of affordability is complete and correct. And section 4.31 says it would be unsatisfactory for a lender to:

*[Accept] an application for credit under circumstances in which it is known, or reasonably ought to be suspected, that the borrower has not been truthful in completing the application for credit with regards to the information supplied relevant to inform an assessment of affordability*

Section 6 of the ILG sets out other “specific irresponsible lending practices” relating to lender behaviour once loan(s) have been agreed. Section 6.2 says it would be an unsatisfactory practice where a business is:

*Failing to monitor a borrower’s repayment record*

Section 6.2 goes on to say: *The OFT considers that creditors should take appropriate action...when/if there are signs of apparent / possible repayment difficulties.*

#### Section 55B of the Consumer Credit Act 1974

On 1 February 2011 the majority of the legislation implementing the provisions of the Consumer Credit Directive 2008 came into force. At this point the ILG was amended to reflect any changes required by the Consumer Credit Directive and an additional requirement on a lender to carry out an “Assessment of creditworthiness” was set out in section 55B of the Consumer Credit Act.

It’s important to note that both section 25 and section 55 remained in force until regulation of Consumer Credit providers passed to the FCA in April 2014. Section 55B said:  
Assessment of creditworthiness

- 55B (1) *Before making a regulated consumer credit agreement, other than an excluded agreement, the creditor must undertake an assessment of the creditworthiness of the debtor.*
- (2) *Before significantly increasing—*
  - (a) *the amount of credit to be provided under a regulated consumer credit agreement, other than an excluded agreement, or*
  - (b) *a credit limit for running-account credit under a regulated consumer credit agreement, other than an excluded agreement, the creditor must undertake an assessment of the debtor’s creditworthiness.*
- (3) *A creditworthiness assessment must be based on sufficient information obtained from—*
  - (a) *the debtor, where appropriate, and*
  - (b) *a credit reference agency, where necessary.*
- (4) *For the purposes of this section an agreement is an excluded agreement if it is—*
  - (a) *an agreement secured on land, or*
  - (b) *an agreement under which a person takes an article in pawn.”.*

Regulation by the Financial Conduct Authority (from 1 April 2014) Oakham gave Mrs M loans 3 - 6 after regulation of Consumer Credit Licensees had transferred from the OFT to the Financial Conduct Authority (“FCA”) on 1 April 2014.

#### The FCA Principles for Business (“PRIN”)

The FCA’s Principles for Business set out the overarching requirements which all authorised firms are required to comply with. PRIN 1.1.1G, says

*The Principles apply in whole or in part to every firm.*

*The Principles themselves are set out in PRIN 2.1.1R. And the most relevant principle here is PRIN 2.1.1 R (6) which says:*

*A firm must pay due regard to the interests of its customers and treat them fairly.*

*The Consumer Credit sourcebook ("CONC")*

*The FCA's Consumer Credit sourcebook (CONC) is the specialist sourcebook for credit related regulated activities. It sets out the rules and guidance specific to consumer credit providers, such as Oakam. CONC 5 sets out a firm's obligations in relation to responsible lending. And CONC 6 sets out a firm's obligations after a consumer has entered into a regulated agreement.*

*The starting point for the relevant rules is Section 5.2.1R(2) of CONC which sets out what a lender needs to do before agreeing to give a consumer credit of this type. It says a firm must consider:*

*(a) the potential for the commitments under the regulated credit agreement to adversely impact the customer's financial situation, taking into account the information of which the firm is aware at the time the regulated credit agreement is to be made; and*

*(b) 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, to make repayments within a reasonable period.*

*CONC also includes guidance about 'proportionality of assessments. CONC 5.2.4G(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.*

*CONC 5.3 contains further guidance on what a lender should bear in mind when thinking about affordability. And CONC 5.3.1G(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 5.3.1G(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 respect of the need to double-check information disclosed by applicants, CONC 5.3.1G(4) states:*

*(b) it is not generally sufficient for a firm to rely solely for its assessment of the customer's income and expenditure on a statement of those matters made by the customer.*



And CONC 5.3.7R says that:

*A firm must not accept an application for credit under a regulated credit agreement where the firm knows or ought reasonably to suspect that the customer has not been truthful in completing the application in relation to information supplied by the customer relevant to the creditworthiness assessment or the assessment required by CONC 5.2.2R (1).*

Section 140A of the Consumer Credit Act 1974

*All of Mrs M's loans were given to her after Section 140A of the Consumer Credit Act came into force on 6 April 2007. Section 140A sets out circumstances where the court may determine that the relationship between a creditor and a debtor is unfair to the debtor. Section 140A says:*

*140A Unfair relationships between creditors and debtors*

*(1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following-*

- (a) any of the terms of the agreement or of any related agreement;*
- (b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;*
- (c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).*

*(2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor).*

*(3) For the purposes of this section the court shall (except to the extent that it is not appropriate to do so) treat anything done (or not done) by, or on behalf of, or in relation to, an associate or a former associate of the creditor as if done (or not done) by, or on behalf of, or in relation to, the creditor.*

*(4) A determination may be made under this section in relation to a relationship notwithstanding that the relationship may have ended.*

*(5) An order under section 140B shall not be made in connection with a credit agreement which is an exempt agreement [for the purposes of Chapter 14A of Part 2 of the Regulated Activities Order by virtue of article 60C(2) of that Order (regulated mortgage contracts and regulated home purchase plans)]*

*Section 140B sets out the types of order the court could make should it determine that the relationship between the creditor and debtor is unfair to the debtor. Section 140B says:*  
*140B Powers of court in relation to unfair relationships*

*(2) An order under this section in connection with a credit agreement may do one or more of the following—*

- (a) require the creditor, or any associate or former associate of his, to repay (in whole or in part) any sum paid by the debtor or by a surety by virtue of the agreement or any related agreement (whether paid to the creditor, the associate or the former associate or to any other person);]*

*(b) require the creditor, or any associate or former associate of his, to do or not to do (or to cease doing) anything specified in the order in connection with the agreement or any related agreement;*

*(c) reduce or discharge any sum payable by the debtor or by a surety by virtue of the agreement or any related agreement;*

*(d) direct the return to a surety of any property provided by him for the purposes of a security;*

*(e) otherwise set aside (in whole or in part) any duty imposed on the debtor or on a surety by virtue of the agreement or any related agreement;*

*(f) alter the terms of the agreement or of any related agreement;*

*(g) direct accounts to be taken, or (in Scotland) an accounting to be made, between any persons.*

*On 6 March 2019, The FCA wrote a 'Dear CEO' letter to the Chief Executive Officer of all firms allocated to the 'High Cost Lenders' portfolio, which I understand Oakam to be part of. This letter was published after Miss M's agreements were entered into. But given that this letter didn't include any new interpretation of the rules and deals with how firms ought to be handling complaints about whether their previous lending was unaffordable, I do think that it offers some insight on the FCA's perspective on the rules. So, I do consider it to be of some relevance in this case. Indeed, this is reinforced by what the FCA says on page one;*

*Firms in this portfolio vary significantly in size and have a wide variety of specific business models and products. However, customers who use high cost credit products tend to share some key characteristics – for example, they tend to have poor credit histories and low financial resilience. Many of them are also likely to be vulnerable. Given these characteristics, lack of appropriate affordability checks and poor treatment of customers in default or arrears creates a risk of considerable harm. Firms are reminded of their obligations to treat customers fairly and appropriately. They should also ensure that they take an appropriate approach to creditworthiness assessment and treat customers in default, or in arrears, with forbearance and due consideration.*

*It then goes on to say;*

*While not all of the findings of our letter may apply to your firm, we have seen a number of specific causes of harm across the firms in this portfolio. We therefore encourage you to read and reflect on the entire letter. If we have contact with your firm in the future, we will expect you to be able to explain what you did in response to this letter.*

*The letter then goes to set out the FCA's view of the key risks that High Cost Lenders pose to consumers and the markets they operate in. On page two of this letter, the FCA sets out its view of the key causes of harm. It says:*

*"To assess how firms in the High Cost Lenders portfolio could cause harm, we analysed their strategies and business models. We considered a wide range of information and data, including firms' regulatory histories, the number and nature of complaints, and findings from the HCCR. We also carried out diagnostic work on guarantor lenders, which involved issuing a data request to firms in October 2018.*

*Following our analysis, we see two key ways that consumers may be harmed.*

*High Cost Lenders portfolio:*

- *a high volume of relending, which may be symptomatic of unsustainable lending patterns*
- *firms' affordability checks may be insufficient, leading to loans that customers may not be able to afford".*

*The FCA sets out its areas of focus for all firms in the portfolio on page three of the letter. The section entitled 'Relending' says:*

***"Relending:*** *We have seen a high volume of relending across all credit products in the portfolio. We aim to carry out diagnostic work across the portfolio so that we can better understand the motivation for, and impact of, relending on both consumers and firms. This work will examine aspects of relending such as customers' borrowing journeys, firms' marketing strategies for offering additional credit and the costs of relending for consumers. We want to understand what harm, if any, relending may cause consumers. As part of this work, we will proactively engage with home-collected credit firms to ensure they understand our expectations. We will also discuss any changes to their processes as a result of the new rules and guidance on relending which we issued in our December 2018 Policy Statement on high-cost credit".*

*The section entitled 'Affordability' says:*

***Affordability:*** *We recognise that there is an inherent challenge for these firms in assessing affordability for both new loans and repeat borrowing. High-cost credit customers' finances are often squeezed and they may have poor credit histories and low financial resilience. Nevertheless, firms must ensure that they are complying with all our affordability requirements. We gave an outline of these requirements in the Dear CEO letter we sent to HCSTC firms in October 2018. While this letter was aimed at HCSTC firms, the main principles are relevant to all firms in this portfolio.*

*Finally, under the section entitled '**Complaints**' it says:*

***"Complaints:*** *We know that there have been increasing numbers of complaints about many of the products in this portfolio. Firms should ensure that they are handling complaints appropriately. We expect firms to fulfil all relevant obligations, including analysing the root causes of complaints and taking into account the Financial Ombudsman Service's relevant decisions. We gave further detail about what we expect from firms' complaint-handling procedures in the Dear CEO letter we issued to HCSTC firms in October 2018. This is equally relevant to all firms in the portfolio".*

*Turning to the 'Dear CEO' letter issued by the FCA on 15 October 2018, which was mentioned in the 'Affordability' section of the March 2019 FCA letter.*

*"We note that the Ombudsman has recently published four examples of determinations of individual complaints about payday loans to illustrate its approach to the issues raised in those complaints (see: <https://www.financial-ombudsman.org.uk/publications/technical.htm>). If relevant, firms should take these examples of determinations into account as part of establishing their own effective procedures for complaints handling (see DISP 1.3.1R)".*

*Paragraph eight of the letter went on to say:*

*"We would highlight in particular the risks in relation to repeat borrowing. These were flagged*

*in our price cap proposals in CP14/10, in July 2014, in which we said that we were concerned that repeat borrowing could indicate a pattern of dependency on HCSTC that is harmful to the borrower. We noted that rigorous affordability assessments were key to avoiding harm in this area, and firms should ensure they are making responsible assessments of the sustainability of borrowing”.*

*Finally, I'll turn to the FCA's "re-lending in High Cost Credit" paper that was issued in August 2020. This is useful, because it shows the underlying concerns the FCA had about consumer's increased indebtedness. But to be clear, the FCA didn't propose any new rules or regulations. Instead, in my view, it reinforces the regulations that were reinforced at the time when the majority of the loans were granted.*

### **Why we conducted this review**

*Our Portfolio Strategy letter issued in March 2019 set out our view of the key risks that firms within the high-cost lenders portfolio pose to their customers or the markets they operate in. We identified one of the key ways consumers may be harmed was by the high volume of relending, which may be symptomatic of unsustainable lending patterns.*

### **Firms should ensure that relending leads to positive customer outcomes and does not cause harm**

*Our analysis of data provided by firms and our consumer research shows breaches of specific rules as well as breaches of our principles for business. In this report, we set out what we have found, our expectations and examples of what firms can do to meet these principles.*

*From developments in the market, including trends in Financial Ombudsman Service complaints and a number of high-cost short-term credit (HCSTC) firms entering administration as a result of liabilities for complaints, we can see the consequences for firms that fail to adequately assess affordability or relend in a way that is sustainable for their customers.*

*Across the portfolio, we have seen levels of debt increasing as customers take additional loans. We did not generally observe additional credit being used to maintain existing levels of debt. Some customers told us they have experienced financial difficulties caused by relending and related anxiety and stress. Many regret their additional borrowing and the consequent financial position they find themselves in.*

*And*

### **The level of debt and repayments can increase significantly, to the point where it is no longer affordable or sustainable for some customers**

*We reviewed a sample of the borrowing history of around 250,000 customers to better understand the customer journey with each firm in our sample. We saw that relending caused both the level of debt and repayment amount to increase nearly every time further borrowing was taken.*

*We remind firms of our Dear CEO letter from October 2018, sent to all HCSTC firms (but which equally applies to other firms in the high-cost lenders portfolio). In that, we highlighted the risks in relation to repeat borrowing given that it could indicate a pattern of dependency on credit that is harmful to the borrower. Rigorous affordability assessments are key to avoiding harm in this area, and firms should ensure they are making proportionate and responsible assessments of the sustainability of borrowing. Further, firms must not*

*encourage a customer to refinance a regulated credit agreement if the result would be the customer's commitments are not sustainable.*

*We are concerned in some instances to see levels of debt and repayments increase significantly. We saw levels of relending often double within a 2 to 3 year period.*

*Questions for me to consider before deciding whether Oakam did anything wrong when it provided Mrs M with her loans.*

*I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Taking into account the relevant rules, guidance and law, I think the overarching questions I need to consider in deciding what's fair and reasonable in the circumstances of this complaint are. When doing, and thinking about our established approach (which can be found on our website) for investigating irresponsible lending complaints, I've considered three questions which are;*

- Did Oakam, each time it lent, complete reasonable and proportionate checks to satisfy itself that Mrs M would be able to repay in a sustainable way? If not, would those checks have shown that Mrs M would've been able to do so?*
- Bearing in mind the circumstances, at the time of each application, was there a point where Oakam ought reasonably to have realised it was increasing Mrs M's indebtedness in a way that was unsustainable or otherwise harmful and so shouldn't have provided further credit?*
- Did Oakam act unfairly or unreasonably in some other way?*

*If I determine that Oakam did not act fairly and reasonably in its dealings with Mrs M and that she has lost out as a result, I will go on to consider what if anything it needs to do in order to put things right.*

*Did Oakam, each time it lent, complete reasonable and proportionate checks to satisfy itself that Mrs M would be able to repay the credit in a sustainable way?*

*It is important to note that both the OFT and the FCA that I've referenced above didn't, and don't, specify exactly how an assessment of affordability is to be carried out but the "extent and scope" and the "types and sources of information to use" needed to be enough to be able to reasonably assess the sustainability of the arrangement for the consumer. Although, the OFT's ILG guidance does provide some examples of information a lender may wish to gather and use.*

*In other words, the assessment needs to be consumer-focussed. It is not an assessment of the risk to the lender of not recovering the credit but of the risk to the consumer of incurring financial difficulties or experiencing significant adverse consequence as a result of the decision to lend.*

*As set out in the ILG and CONC, the risk to the consumer directly relates to the particulars of the lending and the circumstances of the consumer. Therefore, a lender's assessment of creditworthiness would likely need to be adaptable to the individual needs and circumstances of a consumer. What is sufficient for one consumer might not be for another, or indeed what might be sufficient for a consumer in one circumstance might not be so for the same consumer in other circumstances.*

*Bearing in mind the above, I would expect an assessment of creditworthiness to vary with the circumstance of each request for credit. In general, I'd expect a lender to require more*

*assurance, the greater the potential risk to the consumer of not being able to repay the credit in a sustainable way.*

*But, certain factors might point to the fact that Oakam should fairly and reasonably have done more to establish that any lending was sustainable for the consumer. These factors include, but are not limited to:*

- the lower a customer's income (reflecting that it could be more difficult to repay a given loan amount from a lower level of income);*
- the higher the amount due to be repaid (reflecting that it could be more difficult to meet a higher repayment from a particular level of income);*
- the longer the term of the agreement (reflecting the fact that the total cost of the credit is likely to be greater and the customer is required to make payments for an extended period); and*
- the greater the number and frequency of credit agreements, and the longer the period of time during which a customer has been given the credit (reflecting the risk that ongoing use of these agreements may signal that the borrowing had become, or was becoming, unsustainable).*

*There may even come a point where the lending history and pattern of lending itself clearly demonstrates that the lending was unsustainable.*

*Oakam was required to establish whether Mrs M could sustainably repay her loans – not just whether the loan payments were affordable on a strict pounds and pence calculation. The loan payments being affordable on this basis might be an indication Mrs M could sustainably make her repayments. But it doesn't automatically follow that this is the case.*

*I've carefully considered all of the arguments, evidence and information provided in this context and what this all means for Mrs M's complaint.*

*Generally, Oakam has told this Service it carried out detailed and extensive checks before agreeing to lend to Mrs M. It says it asked Mrs M about her income and monthly expenses. It also said it carried out a check of her credit file. All of this, Oakam says was sufficient for each lending decision and based on the checks it carried out it believed that Mrs M would be in a position to afford the repayments he was committed to making.*

### *Loans 1 – 3*

*As neither Oakam nor Mrs M appear to dispute the adjudicator's findings that Oakam was acting reasonably when it approved loans 1 - 3, I don't think there is a need for me to consider this lending any further. So, I make no further finding about these loans in this decision.*

*But what I have done, is kept in mind that these loans were provided, and considered them in the overall context of Mrs M's lending relationship.*

*Bearing in mind the circumstances, at the time of each application, was there a point where Oakam ought reasonably to have realised it was increasing Mrs M's indebtedness in a way that was unsustainable or otherwise harmful and so shouldn't have provided further loans?*

*The adjudicator that considered the complaint thought the point, at which Oakam ought to have realised it was more likely than not that these loans were unsustainable for Mrs M was*

loan four.

*But before I address what the adjudicator concluded, I need to consider what Oakam says about the gap in lending of just over eight months between Mrs M repaying loan 5 and taking out loan 6. Our adjudicator appears to have felt that the gap wasn't enough because she kept all the loans as part of the same chain of lending. Oakam, appear to say that this gap is sufficient to have broken the lending relationship.*

*I've thought about what Oakam says, and there are occasions where we would think a gap of around eight months is long enough to effectively re-set the lending relationship. For example, if a consumer had only been borrowing for a couple months. Then it would be reasonable to think a new chain had started.*

*However, looking at the individual circumstances of this case, I don't think Oakam could reasonably consider the break of eight months to be sufficient. I say this for two reasons. Firstly, when loan 5 was repaid, Mrs M had been indebted to Oakam, continuously for a period of over four years – which, I consider to be a significant period of time.*

*Secondly, when Mrs M returned for further borrowing, Oakam gave Mrs M her largest loan and this was to be repaid and over the longest term to date. So, thinking about these factors, like the adjudicator, I consider Mrs M's borrowing to be part of one chain of borrowing.*

*In addition to assessing the circumstances behind each individual loan provided to Mrs M by Oakam, I also think it's fair and reasonable to look at the overall pattern of lending and what unfolded during the course of Mrs M's lending history with Oakam. This is because, there may come a point where the lending history and pattern of lending itself demonstrates that the lending was unsustainable.*

*What this means, is that there are some situations, and indeed a point in the lending relationship whereby we would consider the loan was unsustainable, even if Oakam's checks carried out showed that the loan may have been affordable.*

*I acknowledge that for these loans Oakam gathered information from Mrs M including details about her income and expenditure and this information suggested to Oakam Mrs M would be in a position to afford these loans.*

*But at the start of this decision I've referenced the relevant rules and guidance that Oakam needed to adhere too and what is clear is that Oakam had to consider more than just whether the loan payments were affordable on a strict pounds and pence calculation.*

*It follows that a lender should realise, or it ought fairly and reasonably to have realised, that a borrower won't be able to make their repayments sustainably if they're unlikely to be able to make their repayments without borrowing further. I think this point was, like the adjudicator, reached by loan 4.*

*So, by loan 4, Oakam ought to have realised Mrs M was not managing to repay her loans sustainably. Mrs M had been indebted to Oakam for around 27 months, which is unsurprising given the term of each loan.*

*The, majority of the later loans were refinanced loans. What I mean by this is, that Mrs M was granted a new loan, before the previous loans term had come to an end (as per the credit agreement). Instead, any new loan was used to repay the balance on the previous loan.*

*For example, for loan 4 while Mrs M borrowed over £1,105, she actually only received*

around £360 of 'new money' because the remainder of the loan went towards settling loan three.

*And I think that it ought to have been apparent to Oakam that Mrs M was unlikely to have been using these loans as a useful means of managing income shortfalls – especially as the loan amounts and total repayments weren't decreasing in any meaningful way. Indeed, as they were refinanced loans, Mrs M was having to borrow ever increasing amounts to settle previous loans – and she wasn't always getting more money. For example, loan five was the largest total loan given to date, yet she only received £300 of new money.*

*Mrs M's first loan was for £565 and loan 4 was for £1,1015. So, there was a steady increase throughout Mrs M's borrowing relationship. And due to the way the loans worked, Mrs M's weekly repayment commitment had increased. Which would lead to it become more difficult to make the repayments over time, which would in turn increase the risk of further borrowing. At this point Oakam ought to have known that it was likely Mrs M an ongoing need for this type of credit and was dependent on it.*

*In my view, Mrs M wasn't making any real inroads to the amount she owed Oakam. Loan 6 was taken out nearly five years after Mrs M's first (including the break in lending I mentioned above). And it was the largest loan Mrs M had taken. To me, the overall, lending relationships suggests that Mrs M had become reliant on this type of lending.*

*Indeed, what is of an additional concern to me, is that by loan 5 was taken, Mrs M had been indebted to Oakam for 32 months, had taken five loans and her weekly repayments were the highest they have been (but not by much). So, what has effectivity happened, is that Mrs M is refinancing loans and taken new lending, but actually isn't making headway into what she owed Oakam. She was in effect, paying large amounts of interest to service a debt over an extended period of time.*

*I think that Mrs M lost out because Oakam continued to provide borrowing from loan 4 onwards because:*

- *these loans had the effect of unfairly prolonging Mrs M's indebtedness by allowing her to take credit over an extended period of time.*
- *the length of time over which Mrs M borrowed along with the number of loans was likely to have had negative implications on Mrs M's ability to access mainstream credit and so kept her in the market for these loans.*

*I've thought about the fact that Oakam has said, given the term and the amount of the final loan, it shouldn't be considered as a short-term loan. And I agree, with this. Clearly, the term of the loan on its own shows that it wasn't a short-term loan. But, Oakam is part of the FCA's high cost credit portfolio (as I've explained in the first part of the decision). So, the rules and regulations that Oakam had to adhere to when approving this loan are the same as for it was say for a shorter term loan.*

*I've also explained, why, I didn't think the sixth and final loan formed part of a new chain of lending. And because of that, I've considered the overall impact of approving the final loan, in the context of the rest of Mrs M's borrowing.*

#### Other considerations



*I've also considered what Oakam says about the small amount of arrears that at times accrued on these loans. I must say given what I have said above, I don't intend to make a further finding about these arrears, as I don't think I need to. In order to reach a fair and reasonable outcome for the complaint.*

*Equally, looking at the loan agreements that Oakam has provided, I think it is fairly clear that it provided information to Mrs M to tell her how much she was borrowing, how much and how often her repayments were. But much like, the arrears, I don't think I need to make a finding on this point. Because, in view, it doesn't matter whether Mrs M understood the terms she was agreeing too because the regulations at the time, means Oakam had to carry out effective creditworthiness assessment.*

*In deciding what redress Oakam should fairly pay in this case I've thought about what might have happened had it stopped lending to Mrs M from loan 4, as I'm satisfied it ought to have. Clearly there are a great many possible, and all hypothetical, answers to that question.*

*For example, having been declined this lending Mrs M may have simply left matters there, not attempting to obtain the funds from elsewhere – particularly as a relationship existed between them and this particular lender which they may not have had with others. If this wasn't a viable option, they may have looked to borrow the funds from a friend or relative – assuming that was even possible.*

*Or, they may have decided to approach a third-party lender with the same application, or indeed a different application (i.e. for more or less borrowing). But even if they had done that, the information that would have been available to such a lender and how they would (or ought to have) treated an application which may or may not have been the same is impossible to now accurately reconstruct. From what I've seen in this case, I certainly don't think I can fairly conclude there was a real and substantial chance that a new lender would have been able to lend to Mrs M in a compliant way at this time.*

*Having thought about all of these possibilities, I'm not persuaded it would be fair or reasonable to conclude that Mrs M would more likely than not have taken up any one of these options. So, it wouldn't be fair to now reduce Oakam's liability in this case for what I'm satisfied it has done wrong and should put right.*

*Did Oakam act unfairly or unreasonably in some other way?*

*I've thought about everything provided. Having done so, I've not seen anything here that leads me to conclude Oakam acted unfairly or unreasonably towards Mrs M in some other way.*

*Did Mrs M lose out as a result of Oakam's shortcomings in relation to lending from loan 4?*

*I think that Mrs M suffered adverse consequences as a result of Oakam unfairly giving her loans 4 - 6. I say this because Mrs M had to pay interest and charges on agreements she shouldn't have been provided with.*

### **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.*

Oakam hasn't supplied any further comments or evidence that it wants me to consider. Mrs M accepted the provisional decision and she didn't raise any new points for me to consider.

An no new evidence has been provided, I've reached the same outcome, for the same reasons as I did in my provisional decision. And I still think Oakam was wrong to have provided Mrs M with loans 4 – 6.

I've outlined below what Oakam needs to do to out things right for Mrs M.

### **Putting things right**

In deciding what redress Oakam should fairly pay in this case I've thought about what might have happened had it stopped lending to Mrs M from loan 4, as I'm satisfied it ought to have. Clearly there are a great many possible, and all hypothetical, answers to that question.

For example, having been declined this lending Mrs M may have simply left matters there, not attempting to obtain the funds from elsewhere – particularly as a relationship existed between Mrs M and Oakam which she may not have had with others. If this wasn't a viable option, they may have looked to borrow the funds from a friend or relative – assuming that was even possible.

Or, they may have decided to approach a third-party lender with the same application, or indeed a different application (i.e. for more or less borrowing). But even if they had done that, the information that would have been available to such a lender and how they would (or ought to have) treated an application which may or may not have been the same is impossible to now accurately reconstruct. From what I've seen in this case, I certainly don't think I can fairly conclude there was a real and substantial chance that a new lender would have been able to lend to Mrs M in a compliant way at this time.

Having thought about all these possibilities, I'm not persuaded it would be fair or reasonable to conclude that Mrs M would more likely than not have taken up any one of these options. So, it wouldn't be fair to now reduce Oakam's liability in this case for what I'm satisfied it has done wrong and should put right.

In order to put things right for Mrs M, Oakam needs to do the following;

- Oakam should refund all interest, fees and charges Mrs M paid on loan 4 - 6.
- Add 8% simple interest\*, calculated from the date Mrs M originally made the payments, to the date the complaint is settled.
- Oakam should remove any information about these loans from Mrs M's credit file.

\*HM Revenue & Customs requires Oakam to deduct tax from this interest. Oakam should give Mrs M a certificate showing how much tax it has deducted, if she asks for one.

### **My final decision**

For the reasons I've explained above, and in my provisional decision, I partly uphold Mrs M's complaint.

Oakam Ltd should put things right by doing what I've said above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M to accept or reject my decision before 15 January 2021.

Robert Walker  
**Ombudsman**