

## The complaint

Miss B says Hamsard 3225 Limited (“Hamsard”) lent to her irresponsibly. She said that proper affordability checks were not completed. She also says that the sheer amount of times that she needed to go back for more lending should have raised alarm bells and Hamsard shouldn’t have continued to lend to her. She said she had up to four loans at one time.

## What happened

Our adjudicator thought the complaint should be partially upheld. Hamsard disagreed with the adjudicator’s opinion. The complaint was then passed to me. I issued my provisional decision saying that Miss B’s complaint should be upheld in part. I’ve included a **copy of the background and findings of my provisional decision** below:

This complaint is about 38 home collected loans Hamsard provided to Miss B between August 2012 and November 2019. I’ve attached a table below that has some of the information I have been provided about this lending.

loan number	date started	amount borrowed	date ended
1	10/08/2012	£60	07/12/2012
2	19/10/2012	£60	18/01/2013
3	29/03/2013	£120	21/06/2013
4	21/06/2013	£160	27/09/2013
5	26/07/2013	£120	17/01/2014
6	27/09/2013	£200	28/03/2014
7	29/11/2013	£100	13/06/2014
8	28/03/2014	£240	24/10/2014
9	13/06/2014	£140	14/11/2014
10	14/11/2014	£200	15/05/2015
11	14/11/2014	£200	15/05/2015
12	19/12/2014	£100	03/07/2015
13	03/07/2015	£80	11/12/2015
14	03/07/2015	£200	11/12/2015
15	03/07/2015	£240	11/12/2015
16	11/12/2015	£176	17/06/2016
17	11/12/2015	£176	17/06/2016
18	11/12/2015	£176	17/06/2016
19	17/06/2016	£264	21/10/2016

loan number	date started	amount borrowed	date ended
20	17/06/2016	£264	21/10/2016
21	21/10/2016	£264	17/02/2017
22	21/10/2016	£264	17/02/2017
23	16/12/2016	£150	30/06/2017
24	17/02/2017	£264	30/06/2017
25	17/02/2017	£264	30/06/2017
26	30/06/2017	£275	22/12/2017
27	30/06/2017	£275	22/12/2017
28	30/06/2017	£175	22/12/2017
29	22/12/2017	£275	15/06/2018
30	22/12/2017	£275	15/06/2018
31	22/12/2017	£175	15/06/2018
32	15/06/2018	£275	14/12/2018
33	15/06/2018	£275	14/12/2018
34	15/06/2018	£175	14/12/2018
35	18/01/2019	£250	26/07/2019
36	08/02/2019	£250	23/08/2019
37	30/08/2019	£200	06/03/2020
38	29/11/2019	£250	outstanding

The first few loans had terms of 14 to 15 weeks, but the majority of the loans were scheduled to be repaid over 26 weeks.

Our adjudicator partially upheld the complaint. He thought that Hamsard shouldn't have approved any lending from loan 6 onwards as the pattern of lending demonstrated that it was harmful to the consumer. Hamsard disagreed with the adjudicator's opinion. It said that:

- the lending is different from payday loans, Hamsard is primarily a “*relationship lender*”
- its affordability checks were rigorous and Miss B confirmed the information she provided was accurate. This showed she could afford the lending
- she said that she could afford the loans
- the Hamsard agent would've built up good relationship with Miss B and would have been able to see if she was in difficulty
- there was no indication from the local agent, or Miss B, that she was in financial difficulty
- Miss B had a very good repayment history
- the industry regulator, the Financial Conduct Authority (FCA) has given no indication that Hamsard was not acting in accordance with the rules and regulations of the time
- it says if the FCA was unhappy with the way it lent then it should have been informed and it thinks we are retrospectively changing the rules around re-lending
- if they were unable to lend to Miss B she would have been forced to lend elsewhere and she may have increased her indebtedness

As no agreement has been reached the complaint has been passed to me.

### **the legal and regulatory framework and other publications**

#### *Regulation by the Office of Fair Trading (up to 31 March 2014)*

Hamsard gave Miss B her first nine loans in the period up to the end of March 2014. 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 irresponsible lending guidance ("ILG").

So I consider the ILG to be of central importance in reaching a fair and reasonable outcome in Miss B'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 Office of Fair Trading (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 says:

*"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 might use to 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."*

*By the time of loan 9, and for all of Miss B's subsequent loans (1 April 2014 onwards) this requirement to assess creditworthiness moved from S55B of the Consumer Credit Act to the rules of the new regulator the Financial Conduct Authority.*

***Regulation by the Financial Conduct Authority (from 1 April 2014)***

Hamsard gave Miss B the majority of these agreements after the regulation of Consumer Credit Licensees had transferred from the OFT to the Financial Conduct Authority ("FCA") on 1 April 2014. I understand that Hamsard initially obtained interim permission to provide consumer credit before it went on to successfully apply for authorisation. Hamsard's interim permission to provide consumer credit and its eventual authorisation to do so meant that it was subject to the FCA rules and regulations from 1 April 2014.

The FCA's Principles for Business set out the overarching requirements which all authorised firms are required to comply with. 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 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 Hamsard. 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).”*

## **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 irresponsible lending - including all of the relevant rules, guidance and good industry practice - on our website.

These loans are considered to be high cost credit by the industry regulator FCA. And I agree with this. There are many instances where the FCA has confirmed this, for example its High Cost Credit Review (CP 18/43) contained a section about home collected credit and the home collected credit market. So Hamsard is a high cost credit provider and the rules regarding high cost credit apply to it.

Of course, I accept there are differences between products in the high cost credit market. And the cost of a Hamsard loan may be lower than some alternatives, particularly shorter-term high cost products. But it is still high cost credit and is typically taken by consumers who do not have access to mainstream credit due to their financially precarious situation. And so, similar to short term high cost credit, this is a higher cost and a higher risk option for Miss B.

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:

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

If I determine that Hamsard did not act fairly and reasonably in its dealings with Miss B and that she has lost out as a result, I will go on to consider what is fair compensation.

I've decided to uphold Miss B's complaint in part and have explained why below.

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

It is important to note that the FCA didn't, and doesn'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.

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 flexible. That is to say, 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 the above in mind, I would expect an assessment of creditworthiness to vary with circumstance. 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.

Certain factors might point to the fact that Hamsard 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).

Hamsard has said that its checks were rigorous throughout the lending relationship. But for the earlier loans, there really hasn't been enough information provided by either side to allow me to say if this was reasonable. Hamsard has only been able to provide basic information about the earlier lending and Miss B hasn't provided any detail about her circumstances at this time which would allow me to say the lending wasn't sustainable. So, I can't comment extensively on the checks Hamsard did for loans 1 to 5.

And in any event Miss B didn't disagree with our adjudicator's opinion about loans 1 to 5. Because of this I don't think there is any ongoing disagreement about these loans. So I won't comment further on them, or the level of individual checks Hamsard did before approving these loans. But they were part of the borrowing relationship Miss B had with Hamsard. So they are something I will take into account when considering the other loans she took.

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

I also think it's fair and reasonable to look at the *overall pattern* of lending and what unfolded during the course of Miss B's lending history with Hamsard. This is because there may come a point where the lending history and pattern of lending itself demonstrates that the lending was unsustainable.

Looking at the relevant rules and guidance as summarised in the earlier part of my decision, Hamsard was required to establish whether Miss B 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 a consumer could sustainably make their repayments. But it doesn't automatically follow this is the case. This is because the ILG defines sustainable as being without undue difficulties and in particular the customer should be able to make repayments on time, while meeting other reasonable commitments; as well as without having to borrow to meet the repayments.

It follows that a lender should realise, or it ought fairly and reasonably to realise, 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 that the point where this should have been clear to Hamsard was reached by loan 6. I say this because:

- At this point Hamsard ought to have realised Miss B was not managing to repay her loans sustainably. Miss B had taken out 6 loans in just over a year. Both the length of time she had now borrowed for, and the number of loans she had taken, suggest to me that at this point Ms B had become reliant on this type of lending to meet her day to day needs and this would cause long term financial problems.
- Miss B's first loan was for £60 and loan 6 was for £200. So, Miss B's need for money was increasing during this early time of borrowing from Hamsard. And related to the above, this suggests to me that this reliance was not decreasing, but it would either continue to be a problem for Miss B or that her situation would worsen over time.
- Hamsard ought to have realised it was more likely than not Miss B's indebtedness was unsustainable. This is because it was evident that Miss B was "*incurring or increasing problem indebtedness*". And the guidance (Section 4.3 of the OFT guidance) says a business would be lending irresponsibly where this is the case.
- Right from the start Miss B was provided with a new loan before she had fully settled her previous lending. She would often have more than one loan running at the same time which again indicates an increasing need for, and/or a reliance on this credit. Loans 1 to 3 all ran at the same time and this set the tone for a pattern that would continue throughout this lending relationship.
- Miss B wasn't making any real inroads to the amount she owed Hamsard over loans 1 to 6. As I've explained above this pattern suggests to me that Miss B was reliant on this credit and this would continue. So, Miss H had financial problems that she couldn't easily resolve.
- Miss B had paid large amounts of interest to, in effect, service a debt to Hamsard over an extended period. This is a very long time to be using high cost credit.
- I appreciate that Miss B may not have communicated that she was in difficulty over this time, and the agent may not have realised this. But I think this lending pattern itself, particularly over the first year, demonstrates that she was in difficulty. And Hamsard should've noticed this, rather than relying on Miss B's silence.

I think that Miss B lost out because Hamsard continued to provide borrowing from loan 6 onwards because:

- these loans had the effect of unfairly prolonging Miss B's indebtedness by allowing her to take expensive credit intended for short-term use over an extended period of time; and
- the number of loans and the length of time over which Miss B borrowed was likely to have had negative implications on Miss B's ability to access mainstream credit and so kept her in the market for these high-cost loans.

One of the main areas of Hamsard's response to the adjudicator's opinion concerns our approach to repeat lending. It says that the FCA hasn't said this was wrong and that Miss B showed no discernible signs of financial difficulty. Her close relationship with the representative would've highlighted any difficulty she was having with her finances. It has said that its contact with the regulator, and its publications, have not said that longer term borrowing is harmful in the home credit sector and this service is departing from the regulator's guidance if we say that repeat lending in home credit is harmful.

I don't agree that this is the case and I've set out why below:

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 Hamsard is part of. This letter was published after Miss B's agreements were entered into. But given that this letter didn't include any new 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.

The letter 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:

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

Turning to the 'Dear CEO' letter issued by the FCA on 15 October 2018, the third paragraph of this letter said:

*“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)”.*

The FCA's High-Cost Credit Review (CP 18/43) said that those who use home credit over longer periods do not appear to suffer significant harm *in the same way* as other parts of the high cost credit markets, it does not mean that they do not suffer harm at all, and in fact is worded in such a way that leaves open the possibility that harm *can* be suffered.

Indeed, the high cost credit review also highlights says that: *'there are existing controls that reduce the risk of unaffordable debt and financial distress'*. In brief these are assessing creditworthiness, monitoring repayment patterns, and not encouraging unsustainable lending. As I've explained, I've seen little to no evidence of Hamsard deploying these controls in how it managed its lending relationship with Miss B.

And the FCA's consultation paper (CP 18/12) section 3.14 says that:

*“we are concerned that there is a small core of customers who are using home- collected credit over an extended period and that some customers are being unduly influenced by firms' representatives to keep borrowing.”*

By the time she applied for loan 6, Miss B had owed Hamsard money for an unbroken period of around a year. And more importantly the increasing size and number of loans suggested that this would continue. So I think it's eminently possible that the regulator had customers such as Miss B in mind with the above statement concerning the "small core". And looking at the overall time period of this lending relationship, I certainly think it is

entirely reasonable to describe seven years as “*an extended period*”. As I’ve said I think the history of borrowing itself showed that the lending had become unsustainable and Miss B could reasonably be considered within that cohort.

To be clear, I’m not finding that the loans should be upheld as Miss B’s circumstances are similar to market concerns the FCA has about this lending. I’m highlighting this similarity to show that the regulator, is now, and has been in the past, concerned with repeat lending in the home credit market.

The FCA published a paper on 6 August 2020 aimed at the whole high cost credit market about repeat lending, and home-collected credit was again included. And, again, it covers the FCA’s view of past events and so it isn’t a retrospective application of the rules. It said that:

*“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.”*

And

*“At some point, rising levels of overall debt and repayments will become unsustainable for customers. From our consumer research, we are concerned that firms are lending to customers beyond levels which they can sensibly manage and causing customer harm as a result.”*

While I acknowledge that the FCA has said that repeat lending won’t *always* lead to an unfair outcome for consumers, the FCA’s publications don’t state that repeat lending (where home- collected credit is concerned) will *always* be fair reasonable and proportionate in all circumstances. And I don’t think the repeat lending here was reasonable.

It is worth adding that, while I don’t consider that my findings are inconsistent with the content of the FCA’s publications, I am, in any event, required by statute to decide what I think is fair and reasonable in the particular circumstances of Miss B’s case.

So, I’m upholding the complaint about loans 6 to 38 and Hamsard should put things right.

*Did Hamsard 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 Hamsard acted unfairly or unreasonably towards Miss B in some other way.

### **Putting things right – what I currently think Hamsard should do**

In deciding what redress Hamsard should fairly pay in this case I’ve thought about what might have happened had it stopped lending to Miss B from loan 6, 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 Miss B may have simply left matters there, not attempting to obtain the funds from elsewhere – particularly as a relationship existed between her and this particular lender which she may not have had with others. If this wasn’t a viable option, she may have looked to borrow the funds from a friend or relative – assuming that was even possible.

Or, she 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 she 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 Miss B in a compliant way at this time.

And I don't think it's reasonable to say that Miss B would have necessarily borrowed from a more expensive, or unregulated lender, if she didn't borrow from Hamsard. As I've said above, we have no reasonable way of knowing what Miss B would've done if she didn't borrow from Hamsard. And it's just as reasonable to assume she may have, for example, seen a debt management organisation and improved her finances as it is to assume she would use an unregulated lender.

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

### **Final Decision continued**

Hamsard, and Miss B, received my provisional decision. Miss B accepted my findings

Hamsard didn't agree with my provisional decision. I've read all of the documentation it has provided, but in brief it said that:

- Miss B didn't raise any issues about her circumstances, or with the loans themselves, before making her complaint. So, it's not reasonable to say she was struggling financially.
- The creditworthiness assessments were thorough and included looking at her bank statements online. These consistently showed that Miss B was not in financial difficulty. As earlier, Miss B didn't suggest at any point that this was the case, and her situation seems to have improved by the later loans.
- The agent would have checked if Miss B was taking out a loan for subsistence, a one-off purchase or for another reason. Miss B didn't say she was taking out the loans for subsistence, she was borrowing for one-off purchases or events. This is what these loans are for.
- Hamsard included a report by a third party into various aspects of high cost credit. This was mainly focussed on a cost cap in this market. Hamsard has noted that this report confirms that home credit is often used for significant purchases rather than subsistence.
- Repeat lending is considered as a factor in all of Hamsard's creditworthiness assessments.
- The FCA has not raised any concerns with how Hamsard considers repeat lending.
- Miss B has started loan contracts with other providers since making the complaint. These loans were for much greater amounts than Hamsard ordinarily lent to her. So, it's not credible to say the Hamsard loans '*made her feel*' trapped when she was borrowing larger amounts elsewhere.
- Miss B would more likely have gone to another lender. This is because she has received two items of further credit after she stopped borrowing from Hamsard. And it is unlikely that she would have had access to the mainstream credit market. So, any award needs to reflect the costs she would have incurred in doing this.

### **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.

Hamsard has said that Miss B didn't complain about the lending, or say it was unaffordable, until after the lending relationship had ended. This shows that she may not have been concerned about the lending at the time.

Whilst I have taken on board what Hamsard has said, I don't think this shows that Miss B wasn't struggling financially or reliant on the loans. It's just as reasonable to say that if she was reliant on the credit then she wouldn't have alerted Hamsard to this, as it may not have lent to her again. In any event Hamsard had a responsibility to fully find out about her circumstances and lend responsibly each time it gave a loan. I've reconsidered if it did this below.

Hamsard has said that it conducted adequate checks throughout the period of lending. And it says these checks showed that Miss B wasn't in difficulty. It said that its representative would've looked at online bank statements before lending, and the point of sale documents showed that she used the loans for 'one off purchases', rather than subsistence. These checks were proportionate and showed it was reasonable to lend to Miss B.

As I said in my provisional decision I haven't relied on the checks Hamsard did for loan 6 onwards, and what these showed about Miss B's circumstances, in order to uphold this complaint. I still think the checks it did for loans 1 to 5 were likely to be proportionate. And after this I think the lending pattern itself was harmful, and so I don't think there is a need to look at Miss B's circumstances surrounding these loans in detail. But Hamsard has essentially said that the checks it did showed that Miss B wasn't reliant on the lending and she could afford the loan repayments. So, I've looked to see if this is reasonable.

The application forms that Hamsard has provided show that Miss B lived with her partner and she had two dependents. Her income was shown as originating from benefits and I think it's reasonable to describe it as modest.

The forms also show that Miss B confirmed that the loans were for a 'one off purchase' each time. Although there were only three 'options' to choose from (there were three boxes to tick) the other two being 'subsistence' and 'other'. And there isn't any detail about what the loans were for. These are very broad categories that I think, without further detail, don't add much to why the loans were taken.

And in any event it doesn't mean that the loans were sustainably lent. Any lending must ultimately be for some kind of purchase. So even if Miss B did use the money for discrete purchases, the fact that she did this 38 times over a protracted period still would be an indication of financial problems.

And Miss B has provided some details about her circumstances. This includes some bank statements, some communications from her bank, and some excerpts from her credit report. These aren't complete, particularly during the early part of the lending. Hamsard said it would've seen her bank statements at the time of sale.

What the information shows is that Miss B was significantly overdrawn at an early point in the lending. And later on she was using other short term and high cost credit providers and it looks to me like she was making regular payments to a debt management organisation. All of this suggests that Miss B was having problems managing her money. So, I don't think it's reasonable to say that Miss B was in good financial shape. Indeed, it seems likely she was reliant on this type of credit to make ends meet.

So, I don't think it's reasonable to say that Hamsard conducted an in-depth consideration of

Ms B's circumstances and the checks it did do showed that she wasn't in financial difficulty. I don't think the point of sale information Hamsard has supplied shows that Miss B wasn't reliant on this lending.

But as I've said, this isn't a material reason why I have upheld this complaint. I don't think what I said in my provisional decision is unreasonable about the pattern of lending. I still think the amount, frequency and overall timeframe shows that this lending was likely to be unsustainable by loan 6. Hamsard should've seen this and not lent to Miss B. That she was also likely to be in financial difficulty supports this.

Hamsard hasn't commented further on what I said about repeat lending (save to say it disagrees). So, I won't reiterate my earlier findings. I will say that the essence of what I said was that Miss B borrowed a significant amount over a very long time. There were 38 loans in total over a roughly eight-year period. This is expensive credit intended for shorter timeframes than mainstream credit. So, borrowing for this length of time, and for these amounts, I think makes it reasonable to say that Miss B was reliant on this type of credit.

I have read the report that Hamsard has provided that was prepared by the University of Bristol. This relates to a review of the high cost credit market before the FCA decided to impose a cost-cap in 2015. But since that report there have been many others reports, guidance changes and consultations made by a large number of organisations. The market is in a very different place now than it was in 2013. It does provide some interesting background and commentary on the market as a whole at the time but it doesn't provide evidence to persuade me to change my decision about Miss B's case. Crucially, an academic report does not form the basis of how a financially regulated, responsible, business should operate. That basis comes from the regulations published by the regulator, the FCA, as I discussed at length in my provisional decision.

Hamsard has said that it thinks no compensation is due. This is because it is evident that Ms B was borrowing from other lenders. And so, she would have done this anyway had Hamsard stopped lending to her. It has noted that she has taken two loans after she stopped borrowing from Hamsard that it says evidences this. These were two credit agreements with telecommunications providers started in June and August 2020. The credit amounts were £732 and £269 respectively.

Hamsard has referred to a recent court case, *Kerrigan v Elevate Credit International Limited (t/a Sunny)* [2020] EWHC. In this the judge commented that where it has been demonstrated that a loan was mis-sold than if it can be shown that the consumer may have compliantly borrowed elsewhere (under the guidelines and rules given in CONC) then the compensation could be reduced proportionately to reflect this.

I've carefully thought about this, but I don't think Hamsard's submissions change anything here. The two credit agreements that Hamsard has referred to were started shortly outside of the time Miss B took the loans with Hamsard. And they seem to be a very different type of credit. I can accept that there is some proximity with this lending to some of the later Hamsard loans, and Miss B would have (presumably) been making repayments to this credit as well as the Hamsard loans. So, it's not necessarily reasonable to say that they were a suitable 'replacement' for any of the Hamsard loans. And it doesn't follow that because she was granted credit elsewhere after she stopped lending from Hamsard that she could have taken other lending earlier, whilst she was borrowing from Hamsard.

But most importantly the judge in the *Kerrigan* case said that in order for it be reasonable to reduce any compensation it had to be shown that any other lending could have been given compliantly, that is, within the rules applicable at the time. And this should be considered on a case by case basis.

I don't think this is likely here. I've found enough evidence to say that Miss B's lending had become unsustainable far earlier than 2020. In fact, over six years earlier. She continued to take unsustainable loans, on a non-compliant basis, from between 2013 and 2019. Which was just before she took the other credit that Hamsard refers to.

So, given all the evidence I've seen, I don't think it's likely that another business would have been able to lend compliantly over this period. I don't think the further evidence that Hamsard has provided shows this. So even if these loans were broadly interchangeable, and made over the same time period, I don't think this would alter my findings on this issue.

Overall, I still think Miss B's complaint should be upheld for loans 6 to 38 and for broadly the same reasons that I gave in my provisional decision.

### **Putting things right**

Hamsard shouldn't have given Miss B loans 6 to 38.

If Hamsard has sold the outstanding debts Hamsard should buy these back if it is able to do so and then take the following steps. If Hamsard is not able to buy the debts back then Hamsard should liaise with the new debt owner to achieve the results outlined below.

A) Hamsard should add together the total of the repayments made by Miss B towards interest, fees and charges on all upheld loans without an outstanding balance, not including anything it has already refunded.

B) Hamsard should calculate 8% simple interest\* on the individual payments made by Miss B which were considered as part of "A", calculated from the date Miss B originally made the payments, to the date the complaint is settled.

C) Hamsard should remove all interest, fees and charges from the balance on any upheld outstanding loans, and treat any repayments made by Miss B as though they had been repayments of the principal on all outstanding loans. If this results in Miss B having made overpayments then Hamsard should refund these overpayments with 8% simple interest\* calculated on the overpayments, from the date the overpayments would have arisen, to the date the complaint is settled. Hamsard should then refund the amounts calculated in "A" and "B" and move to step "E".

D) If there is still an outstanding balance then the amounts calculated in "A" and "B" should be used to repay any balance remaining on outstanding loans. If this results in a surplus then the surplus should be paid to Miss B. However if there is still an outstanding balance then Hamsard should try to agree an affordable repayment plan with Miss B. Hamsard shouldn't pursue outstanding balances made up of principal Hamsard has already written off.

E) The overall pattern of Miss B's borrowing for loans 6 to 38 means any information recorded about them is adverse, so it should remove these loans entirely from Miss B's credit file. Hamsard does not have to remove loan 38 from Miss B's credit file until it has been repaid, but Hamsard should still remove any adverse information recorded about these loans.

\*HM Revenue & Customs requires Hamsard to deduct tax from this interest. Hamsard should give Miss B a certificate showing how much tax Hamsard has deducted, if they ask for one.

**My final decision**

For the reasons I've explained, I partly uphold Miss B's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss B to accept or reject my decision before 29 July 2021.

Andy Burlinson  
**Ombudsman**