

The complaint

Mr O complains that Gain Credit LLC (trading as Lending Stream) provided him with loans without carrying out sufficient checks to see whether he could afford them.

What happened

Our adjudicator partly upheld Mr O's complaint. Mr O didn't agree with the adjudicator's opinion. The complaint was then passed to me.

I issued my provisional decision explaining the reasons why I was also partially upholding Mr O's complaint but the outcome differed from the one the adjudicator had reached. A copy of the background to the complaint and extracts from the provisional findings follow this in italics and form part of this final decision.

What I said in my provisional decision:

Mr O has complained about a total of 8 instalment loans provided by Lending Stream. A summary of Mr O's borrowing, based on the information provided to us from Lending Stream, can be found below:

<i>loan number</i>	<i>loan amount</i>	<i>received date</i>	<i>final repayment date</i>	<i>number of instalments</i>
<i>1</i>	<i>£300.00</i>	<i>19-04-2016</i>	<i>02-08-2016</i>	<i>6</i>
<i>2</i>	<i>£800.00</i>	<i>13-09-2016</i>	<i>05-02-2017</i>	<i>6</i>
<i>3</i>	<i>£250.00</i>	<i>19-11-2016</i>	<i>28-01-2019</i>	<i>6</i>
<i>4</i>	<i>£200.00</i>	<i>26-11-2016</i>	<i>05-02-2017</i>	<i>6</i>
<i>5</i>	<i>£250.00</i>	<i>09-01-2017</i>	<i>01-02-2019</i>	<i>6</i>
<i>6</i>	<i>£300.00</i>	<i>17-02-2017</i>	<i>debt sold</i>	<i>6</i>
<i>7</i>	<i>£200.00</i>	<i>20-02-2017</i>	<i>debt sold</i>	<i>6</i>
<i>8</i>	<i>£400.00</i>	<i>14-03-2017</i>	<i>debt sold</i>	<i>6</i>

Mr O has had problems repaying some of these loans. Mr O has told us that the final three loans are with a third-party debt collection company and he has a repayment plan in place.

After Mr O complained to Lending Stream it issued its final response letter (FRL) which didn't uphold his complaint. Unhappy with this response, Mr O brought his complaint to our service.

An adjudicator reviewed the complaint and he didn't think Lending Stream had made an error when it provided the first 3 loans. However, he thought Lending Stream shouldn't have provided loans 4 and 5 because proportionate checks would've likely shown Lending Stream that Mr O had a significant amount of outstanding short-term lending with other lenders. And, from loan 6, the adjudicator thought that a harmful pattern of lending had been established so, the complaint about this loan, and all later loans, should be upheld.

Lending Stream responded and have agreed with the adjudicator about which loans it would pay compensation for. It explained that, once the interest had been refunded (for the

upheld loans), and deducted from what Mr O owed for loans 6 - 8, he would still have a balance of around £188 to pay.

However, Mr O didn't agree with the adjudicator's assessment. In response he made a number of points. I want to reassure Mr O that I have read everything he has sent us, but a summary of the points can be found below:

- The adjudicator didn't provide any reason as to why the first three loans haven't been upheld
- The law hasn't been considered when looking at the loans
- The wrong test has been applied when looking at the loans
- Should the ombudsman wish to depart from the legal test they will need to explain their reasons
- Mr O has asked for compensation for everything that has happened – and the basis was set out in his submission
- Mr O has asked for a copy of all his information held with Lending Stream via a Data Subject Access Request (DSAR) and Lending Stream hasn't sent him any information.

The adjudicator went back to Mr O and explained why the above points he had made hadn't made a difference to the outcome to the complaint. In response, Mr O provided further comments. I've not listed everything Mr O provided, but I've noted the main headings that he used:

- this service had applied the wrong legal test;
- the legality of the loans;
- compensation; and
- procedure errors.

As no agreement could be reached the case has been passed to me to make a decision on the lending.

What I've provisionally decided – and why

Mr O has provided a lengthy and detailed response to the adjudicator's assessment explaining why he doesn't agree with the outcome reached. Whilst I haven't specifically addressed every point raised here, I can confirm I've read the response and thought carefully about everything Mr O's said before reaching these provisional findings.

I understand Mr O's concerns about the adjudicator leaving information in their adjudication that could've identified him. This is done because the adjudications are not published. The final decision on this case will be published, and as he'll see from this decision, he has been referred to as Mr O throughout to maintain his anonymity.

It may help if I outline the legal and regulatory environment when the lending was approved. Whilst this is quite lengthy, I think it is useful to be completely clear about what Lending Stream's obligations were in order to lend compliantly at the time of each lending decision. In addition, both Lending Stream and Mr O can find further lead decisions on our website that set out this service's approach to this type of complaint (irresponsible lending).

the legal and regulatory framework and other publications

Mr O says that this service hasn't applied the correct legal test and in his response, he set out the relevant rules and regulations that he says we should be applying, for example from

Consumer Credit Sourcebook (CONC). Mr O is of course right that CONC is applicable as a relevant consideration, and I've set out below the relevant sections of CONC that I have considered.

He also says that no explanation or rationale was provided as to why this service didn't uphold the first three loans that he took, and therefore the view by the adjudicator failed to meet the Wednesbury test of reasonableness. Mr O will see later on in this decision that I have addressed loans 1 – 3 in detail.

Mr O also set out why the adjudicator hadn't applied the relevant regulation and legislation in reaching their outcome. This was mainly in reference to little explanation being provided about the first three loans. It looks like the adjudicator did use the correct rules and regulations when coming to their conclusions, but didn't set them out explicitly. But I do agree with Mr O that he didn't receive a complete explanation as to why this service didn't uphold the first three loans.

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

Lending Stream gave Mr O all of his loans after the regulation of Consumer Credit Licensees had transferred from the Office of Fair Trading to the Financial Conduct Authority ("FCA") on 1 April 2014. Lending Stream initially obtained interim permission to provide consumer credit before it went on to successfully apply for authorisation. Lending Stream'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 Lending Stream. 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.

However, in CONC there are references to the Irresponsible Lending Guidance (ILG) issued by the Office of Fair Trading (OFT) who were the regulators of this type of lending until the FCA took over.

The starting point for the relevant rule 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 5.2.1 provides some information about where the information can be obtained from.

- A creditworthiness assessment must be based on sufficient information obtained from:
 - the customer, where appropriate; and
 - a credit reference agency, where necessary.
- [Note: section 55B(3) of CCA]

CONC.5.2.3 provides some guidance about what a proportionate check could consider.

The extent and scope of the creditworthiness assessment or the assessment required by CONC 5.2.2R (1), in a given case, should be dependent upon and proportionate to factors which may include one or more of the following:

- (1) the type of credit;
- (2) the amount of the credit;
- (3) the cost of the credit;
- (4) the financial position of the customer at the time of seeking the credit;
- (5) the customer's credit history, including any indications that the customer is experiencing or has experienced financial difficulties;
- (6) the customer's existing financial commitments including any repayments due in respect of other credit agreements, consumer hire agreements, regulated mortgage contracts, payments for rent, council tax, electricity, gas, telecommunications, water and other major outgoings known to the firm;
- (7) any future financial commitments of the customer;
- (8) any future changes in circumstances which could be reasonably expected to have a significant financial adverse impact on the customer;
- (9) the vulnerability of the customer, in particular where the firm understands the customer has some form of mental capacity limitation or reasonably suspects this to be so because the customer displays indications of some form of mental capacity limitation (see CONC 2.10).

But CONC is also quite clear in CONC 5.2.4 that:

- 1) To consider all of the factors set out in CONC 5.2.3 G in all cases is likely to be disproportionate.
- [Note: paragraph 4.11 of ILG]

Like the ILG before it, 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."

While CONC 5.2.4G(3) goes into some detail about the type of information that a lender may wish to gather:

- (3) A firm should consider the types and sources of information to use in its creditworthiness assessment and assessment required by CONC 5.2.2R (1), which may, depending on the circumstances, include some or all of the following:
 - (a) its record of previous dealings;
 - (b) evidence of income;
 - (c) evidence of expenditure;

- (d) a credit score;
 - (e) a credit reference agency report; and
 - (f) information provided by the customer.
- [Note: paragraph 4.12 of ILG]

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.”

By way of explanation, CONC 5.3.1G(2) reads:

“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 5.3.1.4 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.”

(c) its assessment should be based on what the firm knows at the time of the assessment.

[Note: paragraph 4.13, 4.14 and 4.15 of ILG]

CONC 5.3.1.6 then goes on to explain what is meant by ‘sustainable’:

6) For the purposes of CONC “sustainable” means the repayments under the regulated credit agreement can be made by the customer:

(a) without undue difficulties, in particular:

(i) the customer should be able to make repayments on time, while meeting other reasonable commitments; and

(ii) without having to borrow to meet the repayments;

(b) over the life of the agreement, or for such an agreement which is an open-end agreement, within a reasonable period; and

(c) out of income and savings without having to realise security or assets; and “unsustainable” has the opposite meaning.

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).”

Questions for me to consider before deciding whether Lending Stream did anything wrong when it provided Mr O with his 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 consider the overarching questions are:

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

If I determine that Lending Stream did not act fairly and reasonably in its dealings with Mr O and that he has lost out as a result, I will go on to consider what is fair compensation.

Lending Stream accepts that loans 4 to 8 shouldn't have been given and has offered to put things right in line with our approach. Given these loans are no longer in dispute, I don't intend to deal with these loans in any great detail in this decision. But I will include them in the putting things right section at the end of the decision.

Instead this decision will focus on whether Lending Stream was right or wrong to have granted loans 1, 2 and 3. And also to deal with the other complaint points, such as around Lending Stream not complying with Mr O's request for information.

Did Lending Stream, each time it lent, complete reasonable and proportionate checks to satisfy itself that Mr O would be able to repay the credit in a sustainable way?

It is important to note that the FCA didn't, and still 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 customer-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 said earlier on this in this decision, in 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. 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. In short, Lending Stream needed to be prepared to adapt its assessment depending on what it knew about Mr O. So, a dynamic approach to assessing each application's affordability for the customer is vital.

Bearing the above in mind (including the regulations I've set out at the start of this decision), 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.

Certain factors might point to the fact that Lending Stream 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).

Loan 1

Mr O first loan was for £300, which was to be repaid via 6 monthly repayments of varying amounts. I've outlined below the payment schedule that I've found in the credit agreement. To be clear, this may not reflect the amount Mr O actually paid on these dates because Mr O would've been able to make over payments (or additional payments), indeed, this loan was repaid in September 2016. But this is what Lending Stream expected Mr O to pay when it was assessing affordability.

1. 31 May 2016 - £103.20
2. 30 June 2016 - £132
3. 29 July 2016 - £115.68
4. 30 August 2016 - £107.52
5. 30 September 2016 - £81.60
6. 31 October 2016 - £60.

So as per CONC 5.2.1(2) Lending Stream was required to assess the impact these payments would have on Mr O's financial situation and his ability to make the repayments as they became due over the life of the agreement. Therefore, when looking at these types of cases, this service considers it reasonable for Lending Stream to establish whether Mr O would be in a position to afford the largest repayment he was committed to making. After all, if Mr O could afford the largest repayment, it is likely that he'd be in position to make all the other payments he was committed to. For this loan, Lending Stream needed to carry out a proportionate check to satisfy itself that it was likely Mr O could afford to pay £132 per month.

When this loan was approved, Lending Stream asked Mr O about his monthly income and his expenditure. On the application form Mr O declared that his monthly income was £3,050 with monthly outgoings of £1,875. This meant Lending Stream was aware that Mr O had disposable income of around £1,057 per month in order to make a maximum repayment to Lending Stream of £132.

In addition to this, Lending Stream also carried out a credit check. The first thing to say about this is that there is no requirement for Lending Stream to carry out a credit check at all, let alone one to a required standard.

CONC just says this is one of the ways that Lending Stream can gather information about Mr O. But what Lending Stream can't do is carry out a credit search and then not react to the information that it gets from that.

I've considered the results that Lending Stream saw, and they don't show any adverse credit file information. There are no indicators to suggest there were any delinquent payment markers or defaults. The credit check showed Mr O had 9 active accounts reported to the credit reference agencies. But Lending Stream didn't appear to know exactly what sort of accounts these are. They could've been anything from a current account, a mortgage, credit card, store card, personal loan or other short-term lending. So merely the existence of an account doesn't necessarily indicate problematic debt.

The credit check results didn't show anything that in my view would've led Lending Stream to either doubt the information Mr O had provided, or to have prompted it to have carried out furthermore in-depth checks. Or to have made it think that Mr O wouldn't be in a position to sustainably repay this loan.

So for this loan, it look likes Lending Stream asked for and gathered information in line with CONC5.2.4.(3) (parts e and f) and I'm satisfied that it thought about the extent and scope of the checks as outlined in CONC 5.2.3, as well as factors that it could consider when deciding what sort of information it needed to gather. In this case, for this loan, thinking about Mr O's declared income and expenditure, the amount Mr O needed to repay Lending Stream, and the fact this was the first loan I conclude that Lending Stream's checks were proportionate.

Based on the information Lending Stream gathered, it was not unreasonable of it to conclude that Mr O would be in a position to afford the repayments that he was committed to making. I'm therefore indenting not to uphold Mr O's complaint about this loan.

Loan 2

Mr O appears to have repaid the first loan without any problem: for example, there were no missed or late payments – which is something that Lending Stream can take into account when thinking about what a proportionate check may look like for loan two.

Just over a month after loan one was repaid, Mr O returned to Lending Stream for further lending. This time Mr O was lent £800. Looking at the credit agreement, had Mr O made all of his payments on time, then his largest repayment would be due in October 2016 when he was committed to paying Lending Stream £358.40.

Again, Lending Stream needed to carry out proportionate checks to satisfy itself that Mr O would be able to make his repayments over the lifetime of the agreement. But, when thinking about that, I think it's reasonable for Lending Stream to have considered the largest single payment that Mr O needed to make. Again, if Mr O was likely to be in a position to repay the largest amount due, it follows that he'd likely to be able to make the remainder of his commitments.

For this loan, again, Mr O declared he worked for the same employer as he did for loan one and had an income of £3,050 per month. On top of this Mr O declared his outgoings came to £1,200. So, again, it would seem that Mr O would likely to be in a position to afford the repayments that he was committed to making.

Although this loan was for a significantly greater amount than his first loan, and therefore had larger monthly credit commitments to Lending Stream, I don't think it would've been proportionate for Lending Stream, at that time, to have made further enquires with Mr O about his living costs, or to have started to verify the information that he was providing.

The loan appeared pound and pence affordable, and there wasn't anything in the credit file data or in the manner the first loan was repaid to suggest to Lending Stream that Mr O wouldn't be able to sustainably repay this loan. It therefore follows that I don't think Lending Stream was wrong to have approved this loan.

Loan 3

When this loan was granted Mr O still had outstanding payments due for loan two. And these repayments needed to be taken into account when Lending Stream was deciding what a proportionate check would look like. Although the largest repayment due for loan three was £114 the actual combined largest repayment (taking into account the repayments due for loan two) was £359.20 due on 30 December 2016.

Mr O had borrowed further funds, and therefore was going to be indebted to Lending Stream for at least a further six months. The largest combined repayment for loans two and three was broadly similar to the largest repayment due for loan two.

When thinking about what I've said about the loans above, Lending Stream needed to consider whether Mr O could repay this loan over the lifetime of the agreement, and whether Mr O had sufficient funds to afford the December payment, it being the largest one. If so, it's not unreasonable to conclude that Mr O would likely to be able to afford the remaining payments that he had to make.

Mr O was again asked for his income and expenditure when he applied for this loan, he declared to Lending Stream that his monthly income was £3,050 and his outgoings were £1,450 per month. Based on this information alone it was reasonable for Lending Stream to have believed Mr O could afford the repayments he was committed to making. However, that doesn't automatically mean it hasn't done anything wrong. There was, in my view, emerging information that needed to be taken into account. This leads me to conclude that the checks Lending Stream carried out weren't proportionate, and I'll explain why.

Mr O's credit file didn't show any defaults or delinquent accounts and showed one new account had been opened since the previous loan, which it wouldn't be unreasonable to conclude was likely to be Mr O's second loan from Lending Stream. However, the credit checks also showed that Mr O's total outstanding debt had increased by more than the value of the second loan, which in my view indicates that Mr O had either taken other lending or was using more of his available credit.

As part of the credit check Lending Stream also obtained what it calls in its results 'Experian Credit Score'. This maybe the score that was actually seen on Mr O's credit file or it could've been a score that is made up of the score from Experian in addition to other factors that Lending Stream use to generate the final score. But what this does show is, in my view, a fairly significant drop from that showing at the time of loan two, bearing in mind this application was made only two months later. As I understand it, the higher the 'Experian credit score', the better. So, while the credit check didn't show anything adverse in terms of information about individual loans, the overall picture indicates a potentially worsening position.

Lending Stream was also aware, based on Mr O's income and expenditure information, that he had around £1,800 per month disposable income. This ought, in my mind, to have led Lending Stream to question why, if Mr O had so much disposable income, he was coming back to take his first overlapping loan.

These factors together lead me to conclude that Lending Stream needed to do more than rely on the information it was given by Mr O in line with CONC 5.2.4G(3), because I don't

think Lending Stream had considered the risk to Mr O of repaying this loan. And therefore, in line with CONC 5.3.1G(2) it needed to do more by way of verification of the information Mr O had given it.

CONC 5.3.1G(2) provides some examples of information Lending Stream may have wanted to have taken into account in order to satisfy itself that Mr O could repay the loan. But I do think by this point, and as a result of the factors set out above, it had reached the stage where Lending Stream needed to be verifying Mr O's income and expenditure. Lending Stream could've done this a number of ways, it could've for example asked to see copies of his wage slips and then evidence of his outgoings via bills. Or it could've asked to see a copy of Mr O's bank statements.

I accept that Lending Stream may not have seen everything that I've seen while reviewing Mr O's bank statements, but this is the most accurate record we have of Mr O's actual financial position at the time this loan was approved, so I don't think it is unreasonable to rely on this information.

Looking at the bank statements, I can see that at the end of November 2016 Mr O made repayments towards seven other payday loans with four other high cost credit firms, Mr O's other loan that he had outstanding with Lending Stream, as well as one high cost credit loan. These payments alone came to over £1,400 which is close to 50% of Mr O's monthly income before the potential repayments for loan three should have been taken into account, as well as any of his other regular living costs to be considered.

In these circumstances I think this ought to have alerted lending Stream that it was unlikely Mr O could afford the repayments to loan three in a sustainable manner. I say this because, in line with CONC 5.2.4G(2), he was already significantly indebted to other high cost lenders and further lending to Mr O was not sustainable.

So, the information Lending Stream would've likely discovered by carrying out a proportionate check would have highlighted to it that Mr O was unlikely to be able to repay this loan sustainably. It therefore follows that I don't think this loan should've been granted, and I'm intending to uphold Mr O's complaint about his third loan.

Irresponsible lending redress

Mr O describes these agreements as "unlawful". He says that, as we've found some of the loans ought not to have been lent, that this is a breach of the FCA rules, and the outstanding balance shouldn't need to be repaid.

To be clear, I have not made a decision on the lawfulness of the loans. This service isn't a court and its role isn't to assess statutory duty or the enforceability of the loan – only a court can do that.

The awards this service looks to make are awards of fair compensation that reflect the fact something may have gone wrong and what needs to be done to put the consumer back into the position they would've been in had an error not been made (as far as this is possible).

This award is also required to be in line with what the ombudsman considers to be fair and reasonable in all the circumstances of the case. This means the awards are not designed to punish a lender for granting loans that it shouldn't have done.

Ideally, when a complaint is upheld, this service would aim put the consumer back into the position they would've been in had the error not occurred. Such awards can be difficult to put into practice. This is because Lending Stream has granted loans that Mr O has had the

benefit of. The funds have been deposited into Mr O's bank account and he has used them.

So, it's not just a matter of unwinding the loans, because Mr O has received and then spent the money (as well as making some repayments). It therefore wouldn't be fair or reasonable to not expect Lending Stream to recover at least the value of the sums that were lent.

For loans that have been taken out and fully repaid, Lending Stream shouldn't be able to benefit from having provided them. This means that we'd ask the lender to refund anything that was paid by the consumer above the principal that was borrowed. This in effect creates an interest free loan. In addition, as Mr O would've been deprived of the use of the funds (the interest part of the repayment) then it's reasonable that he receive 8% simple interest on the sums refunded.

For loans where the balance hasn't been repaid, we also think no interest and charges should be added to the balance, so the only amount that a consumer should repaid is the principal that was borrowed. And, if needed, a lender is entitled to use a refund to offset any outstanding principal balance remains.

In addition, just because Lending Stream, in my view didn't carry out proportionate checks before providing some of the loans, that in and of itself doesn't mean a payment of compensation should be paid. And, taking into account the circumstances of the complaint, I'm not persuaded that a separate payment of compensation for distress and inconvenience is warranted in relation to the lending decisions because what I'm going to be asking Lending Stream to do in relation to the interest and the 8% is in my view reasonable.

I'm sorry to hear about the health problems that Mr O has had, and I do hope things are now improving for him. But I've not seen any evidence that he made Lending Stream aware of his health and the impact he says these loans had on it. Equally, it may well be that all of Mr O's financial difficulties impacted him – far above and beyond the impact of Lending Stream.

In saying all of the above, I've not seen enough to make me think I should depart from the well-established approach this service has when coming to redress for this complaint, and I've outlined towards the end of the decision what Lending Stream needs to do to put things right as a result of issuing loans to Mr O which it shouldn't have done.

Did Lending Stream act unfairly or unreasonably in some other way?

However, that doesn't mean there aren't other things that may have gone wrong and I've dealt with Mr O's additional points below.

The Final Response Letter

Mr O has questioned the legality of the final response letter, because of how Lending Stream assessed the affordability of the complaint. However, Mr O made a complaint and Lending Stream provided him with an answer – which is what it is required to do by the regulator's rules.

If Mr O wasn't happy (as was the case here) he had the right to bring the case to this service – which is what he's done. So, while Mr O may have concerns with the content of the final response letter, he has correctly exercised his right to bring this matter to our service to investigate. I've already outlined above what I think about the checks Lending Stream carried out for the loans that continue to be in dispute, and what this may have shown, so I don't intend to revisit that here.

Mr O's request for information, under a data subject access request (DSAR)

Mr O is unhappy that Lending Stream initially didn't respond to his DSAR and then when it did provide the information (following the involvement of the ICO) Mr O had concerns about what was actually provided to him, this led to further letters from the ICO to Lending Stream.

I'm satisfied that I am in position to consider this element of the complaint. I'm able to do this despite the fact that data subject access request isn't expressly listed as one of the main activities or regulated activities covered under DISP 2.3.1R. Because in my view the wording is sufficient to say that a complaint can be considered if it 'relates to an act or omission by a firm in carrying on' one or more of the activities this service covers – such as in this case lending money. In particular, DISP 2.1.4G explains that carrying on an activity includes:

1. offering, providing or failing to provide a service in relation to an activity;
2. administering or failing to administer a service in relation to that activity; and
3. the manner in which a respondent has administered its business, provided that the business is an activity subject to the Financial Ombudsman Service's jurisdiction.'

But, even if it were argued that the complaint isn't one of the main activities identified, or fell under carrying on an activity as explained by DISP 2.1.4G, I'm still satisfied that I have jurisdiction to consider this element of the complaint. DISP 2.3.1R states that;

'the Ombudsman can consider a complaint under the Compulsory Jurisdiction if it relates to an act or omission by a firm in carrying on one or more of the following activities:

...

or any ancillary activities, including advice, carried on by the firm in connection with them.'

Therefore, under DISP 2.3.1R, this service has jurisdiction over any ancillary activity, including data related matters, which are carried out by a business 'in connection' with a main activity (in this instance lending money). It therefore follows, that I am satisfied that I can consider the expression of dissatisfaction in connection with the subject access request as part of this complaint.

I would start by confirming that I've read the letters and emails Mr O provided us about this matter in April 2021. I think it's also worth noting at this point that Mr O has raised this issue with the Information Commissioner's Office (ICO). They are the regulator set up to deal with matters such as these.

The issue here is that in June 2020 Mr O asked for information from Lending Stream, that he was entitled to ask for. The information wasn't received by the deadline, and Mr O escalated this matter to not just this service, but also to the ICO.

It's worth noting that as far as I'm aware there is an ongoing investigation with the ICO and Lending Stream. I can see from Mr O's submission there have been numerous letters and emails between all parties, and it doesn't yet seem that this matter has been concluded.

Lending Stream has told this service it has complied with the DSAR – or at least has supplied Mr O with some of the information he asked for. But Mr O has outlined in his letter why he considers Lending Stream still hasn't fully complied with his request. This was sent to Lending Stream on 22 February 2021 via email. And since then the ICO provided Lending Stream with further deadlines.

I accept that Mr O is entitled to information that Lending Stream holds about him. Mr O didn't

receive this by the initial deadline of 8 July and so he has escalated this matter to the ICO – which I think was the prudent thing to do. I'm not intending to comment too much on this matter, solely because the ICO is the most appropriate body to deal with matters that involve DSARs.

I can award compensation if I'm satisfied that Mr O has been caused distress and inconvenience as a result of, for example, having to chase Lending Stream for a response to the DSAR.

What I can't do is make an award to Mr O merely for the fact that Lending Stream hasn't supplied him with the request information, this is because this is a regulatory issue that the ICO will need to look into.

But I am satisfied that it took Mr O several months to receive any information at all, and in that time, I can see that he was in contact with both Lending Stream and the ICO to try and get the matter resolved. Despite raising this matter with Lending Stream a number of times, he didn't seem to get a satisfactory answer – or the information that he had asked for.

I do consider it reasonable that an award is made for the distress and inconvenience this matter has caused to him. Mr O reasonably believed that he'd receive a prompt response, which he did not. So, I do think that an award is due in this case, and I've outlined below what that should be.

Compensation – payment for distress and inconvenience to Mr O

In response to the adjudicator's view on the case Mr O summarised why he felt a compensation payment of £5,000 was due. He says this should be paid for the following reasons:

- Non-financial loss arising from ongoing significant distress;*
- Impact on Mr O's health and professional embarrassment; and*
- His rights have been curtailed under the law for Lending's Stream failure to respond to his DSAR.*

I've already explained that I don't believe additional compensation is due in connection with the lending itself, taking into account what I've seen and what Mr O has provided. Instead I'll explain why I think that a £200 for the issue Mr O has experienced with the DSAR is appropriate.

Mr O has said that he should be paid a significant amount for the distress and inconvenience he's been caused by Lending Stream in the way it handled his request for personal information.

It may help if I explain that any payment for distress and inconvenience that this service may award is down to the individual circumstances of each case and a reflection of fair compensation. The award isn't designed to be punitive, so I'm not looking to fine or punish the lender for the errors. The award is there to recognise that a particular consumer has been caused some distress and inconvenience in the circumstances that gave rise to the complaint.

So, while I've noted the level of award that Mr O would like, I don't agree with him that an award of more than £5,000 would be reasonable. Our website has some examples of the different level of awards that could be made².

These are split into different categories. Looking at the circumstances of this case, any

payment of distress and inconvenience, in my view, falls into the moderate band (less than £500). Our website says that an example of a case in need of a moderate award could be:

“A customer had to contact you repeatedly to get something quite basic sorted out. For example, their address wasn’t updated when it should have been, or paperwork containing their personal information was shared with a third party by mistake. This may have caused the customer frustration and inconvenience.”

Again, the fact that Lending Stream approved loans that it shouldn’t have done doesn’t automatically mean that a payment of compensation should be paid for this matter. I’ve taken on board what Mr O says about the impact these loans had on him, but I’m not satisfied, based on what I’ve seen, that a separate award (beyond what I’ll be directing Lending Stream to do about the loans) should be paid to Mr O. I’m satisfied that the refund of the sums paid over the loan amounts, together with interest, is sufficient to address the deprivation of the sums, and the distress and inconvenience associated with the lending.

However, in relation to the DSAR, it’s quite clear that Mr O was entitled to ask for the information that Lending Stream held about him. And this wasn’t supplied when it ought to have been. And as I’ve said, that is for the ICO to investigate. But I’m satisfied that Mr O did chase Lending Stream for the information and there is no dispute about that.

This leads me to think it’s reasonable to say that he’s had to chase Lending Stream for something that ought to have been provided within a reasonable time. As it didn’t provide this information, Mr O had to seek to involve the ICO. I appreciate Mr O says that not all the information has yet been received, but that is a matter for the ICO.

Taking into account the purpose of any award for trouble and upset, the modest nature of the awards and the facts of this case, I feel an award of £200 is fair and reasonable taking into account what our service may typically award in similar cases.

This, of course, fits within the moderate band I’ve outlined above. And I’ve considered whether in this case Mr O should have a higher award within the band (or a lower award). But, I don’t think, given the circumstances of this case, that more compensation should be paid. I say this because although it took Lending Stream a significant period of time to provide him with some of the information (and he was prompt in referring the case to the ICO).

But, I am satisfied, given the emails that I’ve seen, that Mr O has spent and has had to invest an unnecessarily amount of time, and had to invest in trying to get his own information via a number of emails to Lending Stream, which he really ought not needed to do. Whilst that is inconvenient for Mr O, I am satisfied that this type of issue falls within a moderate award of distress and inconvenience.

Finally, I can’t see that Mr O has lost out financially as a result of the delay in providing information – for example, the delay wouldn’t have prevented Mr O from bringing his complaint to this service.

But taking account, the obvious distress and inconvenience that Mr O has been caused by Lending Stream, I feel, in the circumstance of this case, and making reference to the purpose of compensation, that £200 is a fair award.

Response to the provisional decision

I asked both Mr O and Lending Stream to provide any further comments, information or evidence they wanted the Financial Ombudsman to consider before the final decision is issued.

Lending Stream responded to the provisional decision, and it agreed to the findings that I reached. Although it made no mention of the compensation payment that I thought was fair.

It offered to put things right for Mr O in line with my recommendation. Lending Stream confirmed the following:

- The redress due on loans 3 – 8 amounts to £1,070.72 (which includes interest, fees and charges, 8% simple interest and minus tax at the mandatory rate of 20%).
- Mr O's credit file would be updated in line with the redress.
- There is an outstanding balance of £880, so after this amount is subtracted than Mr O would receive a refund of £190.72.
- The refund would be paid into Mr O's account ending 3195. Lending Stream has said, that if Mr O wants the funds paid into a different bank account, he will need to speak to it and provide evidence for the account that he wants the funds paid into.

It's worth noting that the 8% simple interest will be paid to the date of settlement, so the final redress figure that Mr O will be due, could be more than the above amount that Lending Stream outlined.

Mr O has provided this Service with further correspondences. I want to say to Mr O that I have read his submissions in full. But a summary of his response to the provisional decision can be found below and I've used the six sub-headings, which Mr O used in his response.

Loan 1

- The ombudsman hasn't reconciled errors within the FRL with the evidence supplied to him.
- There are inconsistencies between Lending Stream's FRL, the evidence submission and the ombudsman's conclusions.
- Lending Stream hasn't provided any evidence to show that for loan 1, it considered the largest repayment due in order to assess the affordability of the loan. Indeed, the FRL supports the fact that Lending Stream only considered a repayment of £100.
- From the evidence provided, Lending Stream carried out an affordability assessment for a lower loan amount.
- The ombudsman, in his findings ought to have considered a loan repayment amount of £100.
- The only rational conclusion is that for loan 1, Lending Stream failed to carry out a proportionate check.

Loan 2

I've not reproduced all the comments Mr O provided in relation to loan 2 because they are similar in nature to the comments, he gave in relation to loan 1. But he also said:

- The loan agreement was generated some time after the application for funding was granted.
- Lending Stream, in the FRL admits it used a lower monthly figure for loan repayments than the ombudsman used when coming to his conclusions.

Irresponsible lending redress

- Mr O accepts, that this Service can't rule on the lawfulness of the lending, only a court can do that.
- But that doesn't stop the ombudsman from making a finding on what he considers to be the likely outcome.
- In failing to reach any conclusion on this position, the ombudsman has failed to have regard to the legal position.
- As there is no active conclusion, it isn't clear whether the ombudsman has followed the law or has considered and has departed from it.
- The ombudsman is required to form a view on the legal position with respects to the loan and reach a conclusion which is fair and reasonable.

Legality of the final response letter (FRL)

- Mr O says the FRL issued by Lending Stream doesn't comply with DISP 1.4.1.
- Mr O is therefore says; *"Accordingly, the challenge raised is not the legality of the letter itself, but of its effect."*
- The FRL outlined Lending Stream's response along with the figures it used when assessing affordability. These are different to the one used by the ombudsman in the provisional decision.
- If the ombudsman concluded the FRL isn't accurate or contains errors, then Lending Stream is in breach of the DISP rules.
- If Lending Stream used the incorrect figures in the FRL, then Lending Stream's FRL isn't accurate and there is further claim for compensation due for a breach of DISP.
- In conclusion, when Lending Stream carried out its assessment for loans 1 and 2, it didn't take into account the proper repayment amounts as and when they fell due. Therefore, Mr O says the complaint about loans 1 and 2 should also be upheld.

DSAR request

- There were factual errors in the provisional decision, the ICO (Information Commissioner's Office) has completed its investigation and concluded Lending Stream has breached its obligation.
- The ICO can't award compensation for the breach and so it isn't correct to say that the matter should be left to the ICO to remedy such a breach.
- Although, the ombudsman has awarded compensation for the delays in dealing with the request, no compensation was given for Lending Stream failing in its obligation to provide the information.
- Mr O says, Lending Stream's failure was the untimely response to the DSAR, which went on for nearly a year during which multiple requests for the information were made. As such, Mr O says this award should fall into the substantial damages category. It is appropriate for the ombudsman to deal with these aspects of the complaint, given the ICO has looked and finished its investigation into the complaint.

Compensation

- The compensation award failed to take into account a number of other factors.
- It failed to take into account that there has been a breach of the ICO rules.
- Compensation can be awarded for wider reasons beyond whether a financial loss has been incurred.
- The ombudsman has unlawfully restricted the scope for compensation.

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.

Lending Stream agreed with the findings I reached in the provisional decision, so I don't intend to say anything further about its response.

It's worth noting that Mr O agrees with the reason why I upheld loan 3, so I don't intend to produce additional reasoning on this loan further (or the other loans that Lending Stream had already agree to uphold). But these loans do form part of the redress that Lending Stream will need to pay (and has agreed to pay). So, these loans are mentioned in the 'putting things right' section at the end of the final decision.

Instead, I will take this opportunity here to address the points Mr O raised in response to the provisional decision about loans 1 and 2.

I've thought very carefully about what he has to say. But in this case, and for the reasons I've outlined below, I am satisfied that Lending Stream does not need to do any more than what it has already agreed to do and what I outlined in the provisional decision. I've explained why.

Mr O highlighted in his response to the provisional decision some references to a third-party lender, who he quite rightly says had no bearing on this complaint. I've, therefore, removed these references from the provisional decision above.

Mr O also has referred to himself as a 'Claimant' in the correspondence that he has provided to this Service. It is worth reiterating at this point the Financial Ombudsman Service is not a Court. While, as an ombudsman, I issue legally binding decisions our remit isn't the same as the courts. The ombudsman service has a wholly independent fair and reasonable remit. I decide complaints on the basis of what is fair and reasonable in all of the circumstances of the case.

If Mr O is seeking an outcome based upon the strict application of the law and the judgment of a court, he may wish to seek appropriate legal advice. I cannot issue a judgment of a court and I do not decide complaints in the same manner.

It is also clear from submissions that Mr O has spent a considerable amount of time and effort in his arguments to this Service and I thank him for his patience while the case has been reviewed by this Service. But I also wish to manage expectations that the ombudsman service considers complaints as per the statutory scheme.

Looking back at Mr O's response, I have read that a lot of what he has said relates to the powers that I have as an ombudsman and what I should be considering and what I can or can't award for. To be clear as to my powers, I've set out below the relevant powers as per DISP 3.:

DISP 3.6.1

The Ombudsman will determine a complaint by reference to what is, in his opinion, fair and reasonable in all the circumstances of the case.

and

DISP 3.6.4

In considering what is fair and reasonable in all the circumstances of the case, the Ombudsman will take into account:

(1) relevant:

- (a) law and regulations;*
- (b) regulators' rules, guidance and standards;*
- (c) codes of practice; and*

(2) (where appropriate) what he considers to have been good industry practice at the relevant time.

DISP says I'm required to decide a complaint on what is fair and reasonable, taking into account what is relevant such as relevant law, regulators rule, code of practice, good industry practice, etc. But, that isn't the same as just making a finding on a pure legal position – which Mr O does suggest should happen in this case.

This Service, is an informal alternative to the courts and I am not making a legal ruling as to the law, breaches of law, etc. If Mr O wants a legal ruling or application of the strict legal position on a particular point, as above, he may wish to seek legal advice on the matter. I've included the reference to DISP 3.6 because I think it's important when discussing some of the points Mr O raised in response to the provisional decision and which I mention below.

Final response letter and loans one and two

I'll deal with the FRL and the points Mr O has raised about the outcome for loans 1 and 2 together. I've done this because the three sections are linked to the outcome and some of the points cross over.

When looking at whether Lending Stream did something wrong when these loans were granted, I considered the full file, along with following pieces of evidence;

1. The details Mr O provided as part of his applications.
2. The credit agreements that set out the repayment schedule for each loan.
3. The loan spreadsheet that Lending Stream provided, which contained a summary of all the information it collected about each loan as well as the loan history.
4. To a lesser extend the final response letter, this is because this was completed after the complaint and sometime after the loans were granted.

Having looked at the loan application information for loans one and two, I can see that these were completed on the same day the credit agreements were electronically completed.

I'm also satisfied, based on the evidence that I've listed above that I am able to reach a fair and reasonable outcome in relation to loans one and two based on what has been provided by Lending Stream and has also been shared with Mr O.

This is because the complaint about these loans turns on whether Lending Stream carried out a proportionate check before providing the loans, and it has already been accepted that the majority of the loans Lending Stream provided Mr O shouldn't have been provided by following the same test.

The approach that I have taken in this case is based on the relevant rules that I've highlighted above and my remit to come to a fair and reasonable decision. The outcome I've proposed on this case reflects this and, in my view, does produce a fair outcome. To be clear, I have always kept in mind the requirement for me to come to a fair and reasonable outcome in all the circumstances.

This means that I have placed more evidential weight on the details contained within the loan applications and the credit agreements rather than the final response letter. I've done this because the final response letter is Lending Stream's response to the complaint Mr O raised and was produced some time after the loan applications.

The credit agreement contains the terms that both parties are bound to – for example the repayment term and interest rate. It also is the information that I've considered whether Lending Stream did or didn't carry out a proportionate check before it advanced these loans.

So, I think it's reasonable to rely on those documents rather than the final response letter, which as I've said is a response to a complaint.

I accept that the information Lending Stream has put into the final response letter about the monthly repayment amount isn't correct. This information doesn't relate to any figures that are contained within the credit agreements and no explanation has been provided as to why those figures have been used when assessing the complaint.

I don't know why Lending Stream has used the figures that it has in the table in the final response letter. So, while I've noted what it says, I've used the figures contained within the credit agreements because as I've said above those are the amounts Mr O was contracted to repay.

When looking at what Lending Stream needed to do before these loans were approved, (and is what I consider to be fair and reasonable – DISP 3.6), it had to satisfy itself that by carrying out a proportionate check, Mr O would be in a position to afford to repay the loan – in this case, it is reasonable to consider the largest scheduled repayment he was due to make for each loan.

I say this because if Mr O could afford the largest repayment it follows that he'd be able to afford the smaller repayments. There is in my view, nothing controversial about this and is entirely consistent with this Service's approach and I see no reason to find for a different outcome in this instance.

It is clear, from the FRL that for loan 1, Lending Stream says it used a repayment amount of £100. For loan 2, it used £250.03. Both of these figures are *smaller* than the largest singular monthly repayment that Mr O would need to make according to the credit agreement. But these figures are *larger* than the average cost per month. I reached the average by adding up the total value of the repayments due and then dividing them by the number of contractual repayments.

Lending Stream says for loan 1 the repayment, was £100, but 4 of the 6 payments Mr O was contracted to make were for larger than this amount. And, the £100 is more than the average of the six payments. But, even if Lending Stream did use the figure of £100 when working out Mr O's affordability for loan 1, this would still lead me to conclude that this loan shouldn't be upheld as the information Mr O provided showed the loan was affordable.

This is because the proportionate checks that Lending Stream carried out showed it that Mr O had £1,057 of disposable income to meet his largest contractual repayment of £132, as outlined in the credit agreement.

And Mr O has made similar points about loan 2. The FRL says that for loan 2 the repayment is £250.03 whereas the credit agreement says the largest repayment is £358.40. Again, I haven't seen an explanation as to why these figures differ – but I don't need to find out in order to reach a fair outcome.

For the same reasons as I've outlined above in the provisional decision, I think the checks were proportionate (whether Lending Stream used a payment of £250.03 or £358.40) and so I don't think Lending Stream was wrong to have provided this loan either.

I say this because Lending Stream carried out, in my view a proportionate check. It asked for details of Mr O's income and expenditure, and it discovered, from this information that Mr O had monthly disposable income of £1,756. This may not have been accurate reflection of Mr O's disposable income but as this was early on in the lending relationship, and as I've not seen anything that contradicted Mr O's declared income and expenditure it was reasonable for Lending Stream to have relied on what it was told.

This would've likely led Lending Stream to believe that Mr O would be in a position to afford the contractual repayments he was due to make.

Lending Stream also carried out a credit check at this time, I've considered those results, and there isn't anything in those results that in my view, would've prompted Lending Stream to either decline the application or to have prompted it to make further enquiries into Mr O's financial position.

Given it was early on in the lending relationship, the checks it carried out showed Mr O would be in a position to afford the loan and there were no other signs of financial difficulties I consider the checks for both loan one and two to have been proportionate, and this there leads me to the conclusions that the complaint, about these loans shouldn't be upheld. I'm satisfied this is a fair and reasonable outcome for the complaint.

Lending Stream hasn't explained to this Service, either in the final response letter, or its later file submission, exactly how the figures were arrived at. And, further investigation to establish where the figures came from, in my view isn't warranted, because it wouldn't change the outcome regarding loans one and two because based on the information contained with the credit agreements I'm satisfied I can reach a fair and reasonable outcome.

It is of course possible, that Lending Stream initially carried out an assessment of affordability (using loan 1 as an example) for a loan of £250 because this is the amount Mr O requested on the application form data I have been provided. Before, providing the loan the for the amount that was advanced for £300. That may explain the difference in the affordability values in the final response compared to the largest value that is detailed in the credit agreement.

When considering the two sets of figures, from the final response or the credit agreement, whichever one is used doesn't lead me to change my mind about the lending for loans one or two. Both figures would have been affordable.

Or, if I agreed with the numbers used by Lending Stream in the final response letter are correct, and should be the ones considered for the affordability assessment, wouldn't in my mind lead to a different outcome – because the loan would've still looked affordable.

Using the credit agreement figures these loans looked affordable, based on the checks carried out by Lending Stream and the same is true if I use the figures that Lending Stream put into the final response letter.

But using the figures in the credit agreement this is giving the benefit of the doubt to Mr O, because these amounts are larger and therefore, if Mr O could afford the repayments as outlined in the credit agreement he could've afforded the repayments outlined in the final response.

Which is what I did in the provisional decision and using the scheduled figures from the credit agreement (the largest repayment amount due) Mr O would've been able to afford the repayments he was committed to making, based on the information he declared to Lending Stream.

But that doesn't explain the difference in the FRL for loan 2 because Mr O applied for a loan of £800, and that was the amount that was granted. But again, I don't think I need to explore this further in order to reach a fair and reasonable outcome.

Overall, and I know Mr O will disagree with this, but I think, regardless of the figures that Lending Stream used, the information Mr O provided it as part of the application process showed that he could afford the repayment amounts needed taking into account either figures from the FRL or the credit agreement.

I also don't think, it would've been proportionate for Lending Stream's checks to go further for these two loans, even taking account of the issue of what affordability figure was used. The lending decisions made for loans 1 and 2 were still early on in the lending relationship and Mr O declared he had sufficient disposable income to be able to afford the lending.

Redress for the final response

I appreciate Mr O says that he should be paid compensation because of possible errors in the FRL as it breaches DISP 1.4.1 For ease of reference I've included DISP 1.4.1 below;

Once a complaint has been received by a respondent, it must:

(1) investigate the complaint competently, diligently and impartially, obtaining additional information as necessary;

(2) assess fairly, consistently and promptly:

(a) the subject matter of the complaint;

(b) whether the complaint should be upheld;

(c) what remedial action or redress (or both) may be appropriate;

(d) if appropriate, whether it has reasonable grounds to be satisfied that another respondent may be solely or jointly responsible for the matter alleged in the complaint;

taking into account all relevant factors;

(3) offer redress or remedial action when it decides this is appropriate;

(4) explain to the complainant promptly and, in a way that is fair, clear and not misleading, its assessment of the complaint, its decision on it, and any offer of remedial action or redress; and

(5) comply promptly with any offer of remedial action or redress accepted by the complainant.

But I'm not persuaded, that even if I thought Lending Stream was in breach of the DISP rules that I would award compensation for that. Mr O received the FRL, considered what was said and disagreed with it. Therefore, in line with his rights he referred the complaint to the Financial Ombudsman. He hasn't lost out, as a result of any possible error in the final response letter.

It also, isn't this Service's role to punish a firm and / or award compensation to a consumer (in this case Mr O) purely because a business may have been in breach of the DISP rules.

In this case, Mr O has received a final response that does appear to contain contradictory information about the affordability assessment for loans one and two. But whether the final response complies with the above DISP rule is, ultimately, a regulatory matter for the Financial Conduct Authority.

Rather than a matter for me to decide whether or not the final response letter issued in this case complies with DISP. As I explained at the start of this decision, my remit is to consider and come to a fair and reasonable outcome.

I can't rule out that Mr O may have been caused some inconvenience due to the information that Lending Stream provided in the final response letter. But, ultimately, he was able to refer his complaint to this Service within the relevant time limits.

My review has resulted in an outcome in Mr O's favour. After all I think a fair and reasonable outcome is different to the outcome Lending Stream reached following its investigation. Despite the mistakes contained within the final response letter I do not consider that additional compensation is warranted. I have noted the mistakes, I have reviewed all of the evidence, attributed the appropriate weight and reached an outcome that is fair and reasonable in all of the circumstances.

But what I can't do, nor do I think it is fair, is award compensation solely because the final response in this case may breach the DISP rules. I've considered the impact on the letter and the actions of Mr O since he received it, and even if the information contained within the final response letter mirrored the information that I have used when coming to the outcome that I have, I still think it's likely Mr O would've referred his complaint to us and I have considered an overall award to reflect fair compensation in this case. That is set out below.

I, therefore, can't say that Mr O's actions have been prejudiced by the final response letter, and I'm not persuaded that Mr O has been caused material distress and inconvenience by the contents of the final response letter. After all, the issue with the affordability assessment has only become apparent following investigation by the Financial Ombudsman and the approach I have taken when considering whether proportionate checks have been carried out.

So, while the approach Lending Stream took in its FRL may not reflect DISP in its entirety I don't think that means the early loans should be upheld, there is no causal connection between the two, nor that compensation should be paid because the figures it used in the final response are incorrect.

Irresponsible lending redress

I appreciate Mr O accepts the Financial Ombudsman Service can't rule on the lawfulness of the lending, because only a court can do that. But Mr O says that as I made no finding on

the lawfulness of the loans in the provisional decision, I haven't taken regard to the legal position.

As I've explained earlier, with relevant to DISP 3.6. My role and remit is to come to a fair and reasonable outcome. As part of my assessment I do have to take into account relevant loan and guidance (such as DISP or CONC) into account. But the Financial Ombudsman is not a court and I am not able to make a finding on the legality of these loans. I appreciate Mr O will be disappointed by this, but there is nothing more I can say about it.

I'd also refer Mr O back to the previous section in this decision where I discussed the role and my remit, and I repeat here that it isn't within my remit to make a finding on the lawful position of the loans, as I'm required to decide what is fair and reasonable in all of the circumstances of the case.

Overall, taking into account the relevant laws and regulation and what I consider to be fair and reasonable in this case, the redress that I proposed in the provisional decision, and what can be found at the end of this final decision in relation to loans 3 - 8 is fair and reasonable in the circumstances of this case.

The redress in relation to the refund of the interest, fees and charges is in my view fair. Mr O has paid interest on the upheld loans that he shouldn't have done because they ought to not have been granted. So for loans where Mr O has taken out a loan and fully repaid it, the interest should be refunded this is the fair thing to do in order to put Mr O back into the position he would've been in had the loan not been granted.

In all situation, I think it's fair, that although may have been advanced that shouldn't have been, Mr O would still need to pay back, at the very least what he was advanced, but no more than that. Which is why the interest, fees and charges are refunded and this is the fair and right thing to do.

Where loans haven't been fully repaid, say because of financial difficulties, it's reasonable to allow the lender, in this case Lending Stream to offset any outstanding balance from the refund that is due. This is to ensure that any capital which was advanced is fully repaid.

It's also fair that to this sum, 8% simple interest is added. This is recognition of the fact that Mr O has been deprived of the use of the funds (the interest element of the refund). This 8% award is in line with what a court may award for deprivation of funds.

I'm also not making an award for compensation in relation to any distress that may have been associated with the lending decisions Lending Stream made. The compensation that is proposed and for what lending Stream has already agreed to, is in my view, fair to compensate Mr O for the loans that he was provided with.

No further compensation is being recommended in relation to any distress and inconvenience that may have been caused because of the loans being advanced. While some of the loans ought to not have been advanced, the distress and inconvenience that Mr O may have incurred is more likely than not a result of the context of his wider financial situation at the time.

I say this because, based on the bank statements Mr O previously provided, these show he was borrowing from other high cost short-term creditors before he was advanced loan one. So, I think any distress or inconvenience that may have been caused was more likely as a result of his financial position at the time rather than specifically as a result of being granted these loans.

In this case, I've not seen anything else in relation to the unaffordable lending part of the complaint which would make me think that I need to depart from the well-established approach that is used when putting a consumer back into the position they would've been in had an error not been made. In this case, I'm satisfied this approach leads to a fair and reasonable outcome.

DSAR request

I've reviewed the paperwork that Mr O has sent in, and I do agree with him that the ICO has issued its findings into its investigation into how Lending Stream, dealt with his DSAR.

The ICO says, in its findings dated 28 April 2021;

"I have considered the information available in relation to this complaint and I am of the view that Gain Credit LLC has not complied with their data protection obligations. This is because you have not received an appropriate response to your subject access request within the statutory timeframe".

The letter goes on to say, correctly, that should Mr O be worried that the information is being withheld from him, then Mr O would *"...have the right to take the matter to court. The court has the power to make an order requiring Gain Credit LLC to provide information if it is found to have been unreasonably withheld"*.

Mr O rightly points out that compensation was awarded for the delays in Lending Stream dealing with his request for information, and I still think this amount is fair. The question now, is should a further award be paid, given the result of the ICO's findings.

Mr O provided a letter to this Service, outlining why he says the award for Lending Stream's failure should lead to a compensation payment at the *"upper limit of the severe range"*.

I've thought carefully about this. But I don't think a further award should be paid. Mr O did spend a considerable amount of time dealing with Lending Stream and had to escalate his request to the ICO in order to try and receive the information he was entitled to receive. This also, wasn't helped by the fact Lending Stream told this Service it had complied with Mr O's request.

But the awards the Financial Ombudsman make are for fair compensation considering a number of different factors (DISP 3.7.2 – which is covered further below). Awards can cover several different aspects, from financial loss, pain and suffering or distress and inconvenience.

And I've addressed the compensation award below in more detail with reference to the relevant DISP rule.

Total compensation recommended

Mr O says that the total compensation award that I recommended of £200 wasn't sufficient (as detailed above) enough and that I have unreasonably and unlawfully narrowed the scope of the award.

Firstly, I have considered whether Mr O suffered a financial loss, and if there has been any what needs to be done as far as possible, in order to unwind what has happened. In this case, I'm satisfied the compensation in relation to the irresponsible lending does this – as far

as possible and is fair and reasonable.

It is also why, this Service asks Lending Stream to make adjustments to the credit file, to reflect the fact that there should either be no adverse information on his credit file for loans 3 to 5, and for loans 6 to 8 they should be, entirely removed from Mr O's credit file. Again, I consider this to be fair and reasonable as the amendment to the credit file corrects the position and ensures that the lending has not resulted in adverse information remaining on Mr O's credit file.

I'm satisfied the financial loss compensation is fair and reasonable because it does put him back into the position, he would've been in had those loans not been advanced.

I also, don't think that Mr O should be given compensation purely because he advanced loans he couldn't afford. This is because, the financial loss has been addressed by the adjustments to the credit file and the award regarding loan 3 onwards. This is in my view fair and reasonable.

However, there is of course other types of compensation that can be paid, our website contains example of this and DISP 3.7.2 is also relevant here as well, because it sets out the following;

".., a money award may be such amount as the Ombudsman considers to be fair compensation for one or more of the following:

- (1) financial loss (including consequential or prospective loss); or*
 - (2) pain and suffering; or*
 - (3) damage to reputation; or*
 - (4) distress or inconvenience;*
- whether or not a court would award compensation.*

Mr O is correct, the Financial Ombudsman can award further payments for things such as distress or damage to his reputation and this is reflected in the DISP rules. Although some and / or all of the above factors may or may not be relevant to the consideration of any further award. But what is important, is any award that is made, in line with the above DISP guidance also fits into what I consider to be a fair and reasonable outcome and a reflection of fair compensation in this case.

I also want to be clear, that when coming to the compensation award of £200, I didn't limit the scope of my thinking when coming to the award. I did consider the four points reference above and which can be found in DISP 3.7.2. In this case, I've already dealt with the financial loss that Mr O incurred and then I went on to consider whether further compensation should be award for what happened with his dealings with Lending Stream.

I couldn't find any evidence that Mr O's reputation has been damaged by Lending Stream advancing him unaffordable loans or with his dealings with the ICO. I also, don't think I can conclude that pain and suffering has been caused given what Mr O has told me and from what I've seen in this complaint.

When looking at compensation, I thought about the fact that Mr O was caused distress and inconvenience in his dealing with Lending Stream around the ICO, and my conclusion was that a payment of £200 was fair and reasonable.

Mr O was entitled to ask for the information that he did, and I've seen from his letters that he was clear what he wanted and why. Lending Stream had a duty and obligation to respond to

this and to provide the information that he was seeking. However, it would seem based on the information that this didn't happen.

Mr O then had to spend time dealing with not just Lending Stream as to why the request hadn't been carried out but he then had to seek further support from the ICO and then wait for its investigation to be carried out. Although it is worth adding, that Mr O's complaint wasn't delayed by having to go to the ICO for an investigation.

Based on the documentation that Mr O has provided (the letters from the ICO) and what I've mentioned above the findings are clear, that Lending Stream didn't comply with the request that Mr O to supply the information. This outcome took almost a year to be reached (between June 2020 and April 2021). So given what Mr O was asking for, he was entitled to, and in my view, it took an unreasonable amount of time to get to the point where he was given an answer, that being Lending Stream hadn't complied.

On top of the fact that Lending Stream informed the Financial Ombudsman in February 2021 that the request had been carried out, which does seem to be at odds with the findings made by the ICO.

Having thoughts about what is fair and reasonable, and the types of award I can make as an Ombudsman, I do consider the award of £200 to be fair and reasonable.

I've thought about whether that award is unfair or should be increased and I don't think it should be. I'm satisfied, although I know Mr O will disagree that this is a fair reflection of the fact that he had to go above and beyond and was caused delays in asking for and chasing of the information he was entitled to.

If I were to increase the award for compensation solely because Lending Stream failed to comply with the DSAR, this would effectively be punishing Lending Stream for not complying. And this isn't something I have the power to do as once again, my powers are about being fair and reasonable.

I had to consider the impact on Mr O for having to go, further than ought really be needed in order to obtain information he was entitled to under a DSAR. Having thought about that, I do think the award that I initially recommended is fair and reasonable and I don't intend, in this case, to award more than the £200 compensation.

I appreciate that Mr O feels differently, and I can see that he has put a lot of time and effort into his submissions and provided explanations as to why a further award should be made, but in this case, thinking about what the awards are for, my scope for being fair and reasonable I consider what has been proposed to be fair and reasonable.

I've outlined below what Lending Stream needs to do in order to put things right for Mr O.

Putting things right

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

In deciding what redress Lending Stream should fairly pay in this case I've thought about what might have happened had it stopped lending to Mr O from loan 3, as I'm satisfied it ought to have.

I believe the options available to Mr O would have been:

1. having been declined this lending, Mr O may have simply left matters there, not attempting to obtain the funds from elsewhere – particularly as a relationship existed between him and this particular lender which he may not have had with others;
2. If that wasn't a viable option, he may have looked to borrow the funds from a friend or relative – assuming that was even possible; or
3. he 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 he 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.

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 Mr O 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 Mr O would more likely than not have taken up any one of these options. So, it wouldn't be fair to now reduce Lending Stream's liability in this case for what I'm satisfied it has done wrong and should put right.

Lending Stream shouldn't have given Mr O loans 3 to 8.

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

- A) Lending Stream should refund all repayments made by Mr O towards interest, fees and charges on loans 3 - 5.
- B) Lending Stream should calculate 8% simple interest* on the individual payments made by Mr O which were considered as part of "A", calculated from the date Mr O originally made the payments, to the date the complaint is settled.
- C) Lending Stream should remove all interest, fees and charges from the outstanding balance due for loans 6 – 8, and treat any repayments made by Mr O as though they had been repayments of the principal. If this results in Mr O having made overpayments then Lending Stream should refund these overpayments with 8% simple interest* calculated on the overpayments, from the date the overpayment arose, to the date the complaint is settled. Lending Stream should then refund the amounts calculated in "A" and "B" and move to step "E".
- D) However, 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 this should be paid to Mr O. However, if there is still an outstanding balance then Lending Stream should try to agree an affordable repayment plan with Mr O.
- E) Lending Stream should remove any adverse information recorded on Mr O's credit file in relation to loans 3 – 5. The overall pattern of Mr O's borrowing for loans 6 to 8 means any information recorded about them is adverse, so Lending Stream should remove these loans entirely from Mr O's credit file.
- F) Lending Stream should pay directly to Mr O £200 in compensation for the distress and inconvenience, he's been caused by the delays and poor communication by Lending Stream. Lending Stream can't use this payment to offset any outstanding balance that may be due.

*HM Revenue & Customs requires Lending Stream to deduct tax from this interest. Lending Stream should give Mr O a certificate showing how much tax Lending Stream has deducted, if he asks for one.

My final decision concludes the Financial Ombudsman's consideration of this complaint, which means I'll not be engaging in any further discussion of the merits of it.

My final decision

For the reasons I've explained above and in my provisional decision, I'm upholding Mr O's complaint in part.

Gain Credit LLC should put things right for Mr O as directed above regarding the loans and pay an additional £200 compensation for the distress and inconvenience caused.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr O to accept or reject my decision before 27 April 2022.

Robert Walker
Ombudsman