DRN-3556197

The complaint

Mr N says Gain Credit LLC (trading as Drafty) gave him a line of credit he couldn't afford to repay. Mr N further says this facility put him into financial difficulties and he had to borrow money in order to repay it.

What happened

Mr N approached Drafty for a running credit facility in July 2018. Mr N was given a facility with a £1,570 credit limit. In February 2019 Mr N's credit limit was increased to £1,770. Drafty has confirmed the facility was fully repaid by Mr N in January 2020.

Mr N was given a running credit account where he could either request funds up to his agreed credit limit in one go or could take multiple drawdowns up to his limit. He was also able to borrow further, up to his credit limit, as and when he repaid what he owed. To be clear, Mr N was *not* given a payday loan.

In Drafty's first final response letter (in April 2021) it explained the information it gathered from Mr N before it approved the facility. It concluded given the estimated monthly repayment of around £180, Mr N was likely to be able to afford his credit facility.

Drafty also provided details of the times it asked Mr N to check his income and expenditure with it. And even when Mr N's disposable income had decreased there was still a sufficient amount to be able to afford the facility. Drafty didn't think it was wrong to have approved the credit facility.

It then seems Drafty issued a second final response letter in November 2021. In this second final response letter Drafty partly upheld Mr N's complaint. It said that allowing Mr N to use the facility after 2 November 2019 was in the long run not sustainable for him.

It agreed to pay compensation to Mr N on any drawdowns taken from 2 November 2019 and remove any negative information from Mr N's credit file from this date. However, there were no new drawdowns after this date and so Drafty said the refund due to Mr N would be £0.00.

One of our adjudicators looked at Mr N's complaint. She thought the checks Drafty carried out before initially granting this facility were proportionate and showed Drafty Mr N was likely to be able to afford the payment amount on the hypothetical payment schedule outlined on Mr N's credit agreement. This was calculated on the full amount of credit available being drawn down and then repaid. So, she didn't think it was wrong to have initially approved the facility.

However, the adjudicator, pointed out that in addition to taking reasonable steps to ensure the facility was affordable at the outset, Drafty also had an obligation to monitor the facility. Having reviewed, the way Mr N borrowed and repaid the facility, like Drafty she thought by 2 November 2019 the facility had become unsustainable for him. Knowing this, in the adjudicator's view Drafty should've stepped in and Drafty should've frozen the interest on the facility.

The adjudicator recommended different redress to what Drafty offered. The adjudicator felt that *any* interest, fees and charges added to the account after 2 November 2019 should be refunded, not just interest on any potential new drawdowns.

Mr N didn't disagree with the adjudicator's assessment.

Drafty didn't agree with the adjudicator's assessment. In response it sent a number of emails to the adjudicator as well as our operational contact team. Overall, it made a number of points, in summary it has said:

- It agreed with the point that the adjudicator was upholding the complaint from – 2 November 2019.
- However, it didn't agree with the proposed redress.
- It says that as the complaint was upheld from 2 November 2019 everything before that date (such as drawdowns) have been deemed affordable whereas from the uphold everything is unaffordable.
- Therefore, it is well within its rights to collect the principle as well as the interest on any drawdowns before 2 November 2019. Had there been any drawdowns after 2 November 2019 the interest on those amounts would've been waived.
- It doesn't consider the redress instruction is appropriate given the circumstances and it considers its original proposal to put things right (as outlined in the second final response letter) to be fair and reasonable here.
- It has pointed out, that the change in how it wants to calculate redress on cases that involve irresponsible lending was changed following an internal review and it considers this change to be reasonable.

In short, Drafty's response is best summed up by what it says below;

> *"So, to restate, the decision implies that any draws granted after 2nd Nov'19 were inappropriate, so we should refund the interest paid towards them. However, it also implicated that draws requested prior to 2nd Nov'19 WERE reasonable for us to have granted, so we aren't liable to refund any interest paid towards them despite that we collected it after 2nd Nov'19."*

As no agreement has been reached, the case has been passed to me for a final decision.

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.

I've also taken into account the law, any relevant regulatory rules and good industry practice at the relevant times.

For completeness, I've thought about all aspects of the complaint including whether it was reasonable for the facility to have been granted in the first place, how the facility was monitored and then finally I'll address Drafty's concerns around the adjudicator's proposed redress.

The relevant regulations in place at the time Mr N was initially given his running account credit facility.

I think it would be helpful for me to start by explaining that Drafty gave Mr N this facility when it was regulated by the Financial Conduct Authority ("FCA"). And the relevant

regulatory rules in place at the time were set out in the Consumer Credit Sourcebook ("CONC") section of the FCA Handbook of rules and guidance. The affordability requirements set out in Section 5.2 of CONC were subsequently replaced by the new CONC 5.2A in November 2018. But I've referred to the rules that were in place at the time Drafty provided this facility to Mr N.

Section 5.2.1(2) of CONC set out what a lender needed to do before agreeing to give a consumer credit this type. And it says a firm had to consider:

> *"the potential for the commitments under the regulated credit agreement to adversely impact the customer's financial situation"* as well as *"the ability of the customer to make repayments as they fall due over the life of the regulated credit agreement, or for such an agreement which is an open-end agreement* (like Mr N's facility)*, to make payments within a reasonable period."*

CONC 5.2 also includes some guidance on the sorts of things a lender needs to bear in mind when considering its obligations under CONC 5.2.1. Section 5.2.4(2) says;

> *"a firm should consider what is appropriate in any particular circumstances dependent on, for example, the type and amount of credit being sought and the potential risks to the customer. The risk of credit not being sustainable directly relates to the amount of credit granted and the total charge for credit relative to the customer's financial situation."*

CONC 5.3 contains further guidance on what a lender should bear in mind when thinking about affordability. CONC 5.3.1(1) says

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

CONC 5.3.1(2) then says

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

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

Although the guidance didn't set out compulsory checks it did list a number of things a lender could take into account before agreeing to lend. The key thing was that it required a lender's checks to be proportionate.

Any checks had to take into account a number of different things, such as how much was being lent and when what was being borrowed was due to be repaid. I've kept all of this in mind when thinking about whether Drafty did what it needed to before agreeing to Mr N's Drafty facility.

As explained, Mr N was given an open-ended credit facility. So, overall I think that this means the checks Drafty carried out had to provide enough for it to be able to understand whether Mr N would be able to both service and then repay his facility within a reasonable period of time. Draft also needed to monitor Mr N's repayment record for any sign that he may have been experiencing financial difficulties.

What happened when Drafty approved the facility

Having carefully thought about everything provided, I do think Drafty's checks before providing this facility to Mr N were proportionate taking all of the circumstances into account.

As explained, Mr N wasn't given a payday loan where he had to repay all of what he borrowed plus the interest due when he next got paid. He was given a facility where there was an expectation that he'd repay what he borrowed plus the interest due within a reasonable period of time. CONC doesn't set out what a reasonable period (CONC 5.3.1(8)) of time is. And it's important to note that a reasonable period of time will always be dependent on the circumstances of the individual case.

Mr N was granted a facility with Drafty with a £1,3570 limit. In the credit agreement, a hypothetical situation is laid out to show the potential cost of the facility to Mr N. This hypothetical situation assumed that Mr N did the following:

1. drew down his maximum credit limit on the first day of the facility being provided,
2. he kept to the terms of the agreement and
3. Mr N repaid what he owed in 12 monthly installments.

Had Mr N done that, she'd have repaid Drafty a total of £2,156.22 meaning a total monthly repayment of around £179.68.

So, in these circumstances, I think Drafty needed to carry out reasonable and proportionate checks to understand whether Mr N could make monthly repayments of around £180 at an absolute minimum.

Drafty says it agreed to Mr N's application after he'd provided details of his monthly income and expenditure and it looked at his credit score. It says the information it gathered showed that Mr N would be able to comfortably make payments of around £180 a month. In these circumstances it thought it was reasonable to lend.

The information provided does suggest that Mr N was asked to provide details of his declared income of £1,850 and declared expenditure of £375. This left Mr N with disposable income of just over £1,475 per month to service and repay the facility.

Drafty also carried out a credit check before the facility was granted, and it has provided the Financial Ombudsman with a summary of the results. Based on this, it was aware that Mr N had one default recorded on his credit file, but this had been reported almost six years before the facility was granted. In my view that wouldn't have been a concern for Drafty and not enough to have prompted it to have carried out further checks before granting the facility.

Bearing in mind the amount of the monthly repayment, the questions Drafty asked Mr N, this was Mr N's first facility and the other information – such as the information in Mr N's credit report, I don't think it was unreasonable for Drafty to rely on the information Mr N provided.

I accept Mr N's actual financial position may not have been reflected either in the information provided, or the information Drafty obtained. But Drafty could only make its

decision based on the information it had available at the time.

At this stage of the lending relationship between the parties, I don't think proportionate checks would've extended into Drafty asking Mr N to evidence about what he was declaring, or it asking him for his bank statements. So overall I don't think that Drafty treated Mr N unfairly or unreasonably when it initially provided his with an open-ended credit facility in July 2018.

After the facility was approved Mr N initially appears to have managed the repayments well, making payments larger than the minimum expected and not drawing down any new funds after August 2018.

In February 2019 there was an increase to the credit limit – by about £200 but given the way the facility had been used I don't think Drafty needed to do any further checks at this point in time and there was no indication the facility was unsustainable for Mr N.

In May 2019 Mr N appears to have made multiple payments repaying the facility before drawing down more in credit. This may have been concerning to Drafty – given the large repayment and drawdowns. But as Mr N had only had the facility for around a year at this point, I don't think there was anything in the way the facility was being used that would've given Drafty concern to either carry out further checks or to have stopped Mr N using the facility.

However, after May 2019 Mr N's behaviour changed. He would tend to pay Drafty around the minimum repayment amount each month and then return to borrow the available credit. This is something that Drafty needed to be aware of and consider whether allowing Mr N to continue to use the facility was sustainable. But, I don't yet think it had reached the point where Drafty ought to have realised the facility wasn't sustainable for Mr N.

Why I think Drafty shouldn't have provided further funds after 2 November 2019

Although I don't think Drafty was wrong to have initially provided the facility, that wasn't the end of its obligations to Mr N. As I've said above When the facility was approved, Drafty was regulated by the FCA and it issued guidance on this type of lending and what it says should be expected from lenders when granting these types of loans.

Within the Consumer Credit Sourcebook (CONC) section 6.7.2R says:

> *"(1) A firm must monitor a customer's repayment record and take appropriate action where there are signs of actual or possible repayment difficulties*

But, it's also worth saying at this point that CONC 1.3 provides a non-exhaustive list of some indicators, which when present in a consumer's circumstances, could be suggestive of potential financial difficulties.

In practice, CONC 6.7.2(1)R meant Drafty needed to be mindful of Mr N's repayment record and how he used the facility and step in if and when he showed signs of possible repayment difficulties.

Our adjudicator thought Drafty should've stepped in and taken action in by 2 November 2019. By this point, our adjudicator thought that Mr N's borrowing history showed he was potentially reliant on the facility and so it had become unsustainable for him. It's worth saying here that this the same point that Drafty thought the complaint should be upheld.

This is also the same point, that Drafty concluded in the second final response letter that the facility may *"have been sustainable in the long term".*

So there doesn't appear to be any dispute as to when the facility likely became unsustainable for Mr N. Buy for the avoidance of doubt, I agree with both the adjudicator and Drafty that at this point it was likely the facility was no longer sustainable for Mr N.

Looking at the way Mr N had used the facility he would frequently make around the minimum repayment and then return for further funds taking his facility balance back up towards the credit limit. The fact that he had, by this point had the facility for around 18 months and still owed almost his entire balance shows to me that he wasn't making any significant headway in repaying the facility within a reasonable period of time.

Therefore, I've set out below what I think Drafty needs to do in order to put things right for Mr N while explaining why all the interest charged after the 2 November 2019 needs to be refunded.

Compensation for Mr N

In summary, the dispute here is about how Drafty needs to put things right and what, if any compensation may be due to Mr N. Drafty says following a review, it feels it should only have to refund any interest, fees and charges connected with any new drawdowns from 2 November 2019. In this case, as no new drawdowns were taken after the uphold point there is no refund due to Mr N.

Whereas the adjudicator thought the fairest outcome was for all interest, fees and charges to have been stopped on 2 November 2019.

It is worth saying, that in the second final response letter in 2021, Drafty did say the following:

> *However, we can see there is a possibility that allowing the continued use of the line beyond November 02, 2019 may not have been sustainable in the long term.*

To me, this is quite clear, it has made the finding that Mr N continuing to use the line of credit after 2 November 2011 may not have bene sustainable in the long term. Drafty has, made the finding that the whole of the facility was no longer – not just the new drawdowns.

Therefore, given the conclusions that Drafty has made in the final response letter, that the whole facility was unsustainable, it therefore follows that it isn't just the redress due on any new drawdowns that Mr N may have made, but in fact the whole facility including what was already owed – so also including a refund on any balance that existed on the facility before this date.

Thinking about this, and the fact the reasons why Drafty has upheld the complaint are clear, I've outlined below what Drafty needs to do in order to put things right for Mr N.

Putting things right

In order to put things right Drafty should do the following:

- Refund all interest, fees and charges that Mr N paid from 2 November 2019;
- Then refund any interest fees and charges from the above date and then add 8% simple interest a year from the date of the payment to the date of settlement*;

- remove any negative information about the facility from Mr N's credit file from 2 November 2019.

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

My final decision

For the reasons given above I partly uphold Mr N's complaint.

Gain Credit LLC should put things right for Mr N as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N to accept or reject my decision before 2 September 2022.

Robert Walker
Ombudsman