DRN-4707816

The complaint

Miss B and Mr M have complained about a secured loan (second charge mortgage) they took out with Evolution Lending Limited in 2018. They've said the loan was unaffordable and has put their home at risk.

What happened

Mr M was introduced to Evolution by a third-party intermediary. He spoke to an adviser with Evolution Money Limited (which is Evolution Lending's customer facing arm) on 26 February 2018.

The first call ran to about 1 hour and 45 minutes, and Mr M wanted to apply for a loan in his sole name, the purpose of which was to consolidate some unsecured debts.

Mr M said the property (which Evolution estimated was worth £66,000) was held in his sole name and he had an existing mortgage (also in his sole name) of around £41,000.

Mr M said he wanted to borrow as much as possible, and when pressed said he'd like to borrow £20,000 over a four-year term or less. He said a payment of around £1,000 a month to the loan would be affordable.

When asked about his debts he said they were manageable at that time, but rates were going up so in a few months they were likely to spiral out of control. He said they'd had a baby and his wife Miss B had been on maternity leave, which meant he'd been juggling money and everything had piled up.

The adviser asked Mr M about his income, and he said his basic income was £20,000 per year and his average earnings were around £1,500 to £1,600 a month including commission and a more recent higher amount was an anomaly. He said:

> *"After tax with commission £1,500, £1,600. This month I had quite a good month I came out with about £1,900. But on average I'd say about £1,500."*

Mr M went through his credit file information with the adviser, and when asked about why he'd taken so many cash advances on his credit cards, Mr M said *"I've been juggling money really, paying this off, paying that off"*. He later said – in relation to some recent cash advances he'd taken on credit cards – that his sister had got married in December and it was an expensive time as he is the oldest brother.

After running the checks the adviser said the loan wasn't affordable for Mr M, saying the affordability check came up as minus £314 (meaning that Mr M's monthly expenditure including any new loan exceeded his income by that amount), and that was taking just half the household bills into account.

The adviser asked Mr M if there was any other income he could use, and said if he had his payslips they might show a higher year to date figure so that could be used. Mr M said he would need to go to work to get copies of his payslips as he didn't have copies (or any way to access them) at home, so that option wasn't taken any further.

As Mr M couldn't prove a higher income, the adviser asked if Miss B worked, and when told that she did the adviser said a joint application could be attempted. The adviser spoke to Miss B to obtain her personal information, with Miss B saying her income was £22,000 and she took home £1,650 a month. Miss B said the only other income she received was child benefit, and that went directly into their child's savings account.

The phone was passed back to Mr M and around an hour and a half into the call the adviser said they'd passed affordability on a joint basis, and their disposable income would be £197 a month after this loan and other expenditure.

The adviser suggested Mr M and Miss B include one of Miss B's loans in the consolidation, saying if they did that then Miss B wouldn't need to go and see a solicitor to get independent legal advice. The adviser said that the amended consolidation would leave Mr M and Miss B with a disposable monthly income figure of £266, and that this loan would save them around £900 a month.

The adviser went through the documents that were needed and said she would email over the loan illustration. She said she would give Mr M and Miss B a call back at 3pm to allow them time to read through the paperwork. Mr M and Miss B said they were going out before 3pm, and Mr M asked if they could just continue on that call as he'd read through it all. The adviser said there needed to be a break in the call, so she would end the call and ring Mr M and Miss B back in a few minutes.

The adviser called Mr M back. This call lasted around 15 minutes, with Mr M – on a number of occasions - audibly inhaling a substance from a balloon and giggling.

The adviser continued with the call asking Mr M when he and Miss B would get all the documents submitted to Evolution. Mr M said it would be that day, or at the latest the day after.

The loan pack was emailed to Mr M and Miss B. Mr M e-signed it on 27 February and Miss B on 28 February.

It appears the mortgage offer was issued electronically on 28 February and the contact notes indicate that Mr M was going out to get the legal charge printed so they could get a neighbour to witness their signatures and they were intending to drop the document off with Evolution later that day. The loan was drawn down that same day – two days after the initial advice.

The mortgage offer shows Mr M and Miss B were borrowing £20,000 (plus £2,699 fees) over a ten-year term on a repayment basis. The interest rate was 19.56% (variable) which gave a monthly payment of £409.01 (variable).

Having looked at the transaction history up until November 2022 I can see the direct debit was returned as unpaid in November 2018, March 2019, May 2019 and June 2019. Each time the missing instalment was paid by card within a week. In July 2019 they only paid £200, with the shortfall made up by way of additional payments between September and December 2019.

A further direct debit was returned as unpaid in August 2021, with the instalment made up around two weeks later. In September 2021 Mr M and Miss B underpaid by £20 which was made up in December 2021, and in October 2021 they underpaid by £109.01 which was made up in January 2022. The direct debit was returned as unpaid in April 2022, with the missed instalment paid by card a few days later.

Mr M and Miss B raised a complaint with Evolution in May 2022, saying the loan was unaffordable and shouldn't have been lent to them. Evolution didn't uphold the complaint, saying everything was discussed with Mr M and Miss B and their bank statements didn't evidence any returned direct debit payments. It said they had a disposable income of £54.62 after the payment to Evolution, the loan was affordable and sustainable, and it reduced their outgoings by around £490 a month.

It was looked at by one of our Investigators who didn't uphold the complaint, which Mr M and Miss B didn't agree with. As an agreement couldn't be reached it was passed to me to decide

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 issued a provisional decision in February 2024, the contents of which said:

> "As part of my considerations I asked our Investigator to obtain some further information from both sides, and now that's been received I issue this provisional decision to set out my current thoughts on the complaint.
>
> Whilst all contact was with Evolution Money, I know Evolution Lending's business model is that it delegates the lending assessment to Evolution Money. So in this case Evolution Money wasn't just acting as a mortgage broker, it was also acting as Evolution Lending's agent in underwriting the loan. On that basis I think it is reasonable to say that information that was in Evolution Money's possession could also be deemed to be in Evolution Lending's possession, and that in underwriting the loan and agreeing to lend Evolution Money was acting as Evolution Lending's agent.
>
> <u>The calls</u>
>
> I've listened to all the calls very carefully and I have some serious concerns about the contents of them.
>
> The original application was made in Mr M's sole name. That tied in with both the ownership of the property and the first charge mortgage, as both of those were held in Mr M's sole name. Whilst Miss B lived with Mr M she wasn't registered as a co-owner of the property.
>
> The first call was about an hour and 45 minutes long. About an hour and 10 minutes into the call the adviser stated the loan wasn't affordable in Mr M's sole name and suggested Miss B was added. The adviser didn't explain to Miss B in any detail the implications and risks of her being included on the loan. In fact the adviser went even further and recommended one of Miss B's debts was included in the consolidation so Miss B wouldn't need to obtain independent legal advice about the implications to her of taking on this secured loan:
>
> Adviser: "*Now, the other option that I have here, and I don't know how you guys feel about this, but I would probably recommend doing this OK. There's a* [unsecured loan] *that's on your wife's account, I would recommend clearing it off."*

Mr M: *“OK that’s fine”*

Adviser: *“The reason being is at the moment we’re just clearing all of your debts. And if we just clear all of your debts, it means that your wife is going to have to go and see a solicitor and get independent legal advice. It’ll save you from doing that”*

In adding Miss B to the loan, she would become liable for Mr M’s debts and liable for a loan secured over a property she didn’t own. It seems the only reason this was done was to make the loan Mr M wanted affordable so it could be sold to him. There was no consideration of whether this was in Miss B’s best interests.

The adviser went through the expenditure information with Mr M as well as details of his debts. Having listened to these parts of the call very carefully I have concerns about the fact it seems the adviser is leading Mr M as to how to answer the questions, rather than getting the true and full answers.

For example, when Mr M was asked about a payday loan he’d just taken out:

Adviser: *“So that was taken out in January. So what was the reason behind taking out the payday loan?”*

Mr M: *“erm… just needed…just needed…”* [interrupted by the adviser]

Adviser: *“So this was down to you being over committed on the other debts?”*

Mr M: *“yes”*

And some examples, relating to Mr M and Miss B’s expenditure:

Adviser: *“I know your wife is paying for the food. I need to allocate a minimum of £169, it’s a government guideline OK. But would that include cleaning products and toiletries?”*

And;

Adviser: *“Clothing I need to do a minimum of £62 would you spend anything more than that?”*

And;

Adviser: *“I only need to know if it’s in your name and if it’s coming out of your bank account. So TV packages, will that show on your bank account?”*

Mr M: *“no”*

Adviser: *“landline and broadband?”*

Mr M: *“no, it won’t show on mine”*

And when speaking to Miss B in relation to a credit card with lender B that had a balance of around £6,970 the adviser saw that the most recent payment was £178 and Miss B said that was about right, but the adviser went on to mention a lower monthly payment and used that instead:

Adviser*: “Do you pay them around £170?”*

Miss B: *"Yeah, £180, £170"*

Adviser: *"Just a quick question on this, there's been the last payment £178 but the normal payment on it seems to be around £105 / £117, does that seem about right to you?"*

Miss B: *yeah"*

The credit file information would have shown that the payment of £178 was right as the balance was significantly higher than it had been when Miss B had been paying around £105 to £117 towards it.

When it came to the interest rates on the various credit cards the adviser didn't push Mr M for the actual interest rates applicable, and instead suggested likely interest rates to him.

The first call ended with the adviser saying she would email the paperwork to Mr M and Miss B for them to read, and they would need to do that before a second call could take place. At first the adviser said she would call back at 3pm, but Mr M and Miss B said they were going out so it was agreed the call would end and the adviser would call back in a couple of minutes, as there needed to be a break in the call. I understand this means that Evolution wanted to be able to demonstrate that Mr M and Miss B had time for reflection between the advice and committing to taking the loan. But in fact they weren't given that reflection time – the two calls were consecutive with no opportunity for reflection. So the separation into two calls gave the appearance of a period of reflection without actually providing it.

When the adviser called back a couple of minutes later the call didn't start well, with Mr M seemingly having forgotten what he was due to have read in the short break:

Adviser: "*So have you had enough time to review and consider that mortgage illustration?"*

Mr M: *"Yes"*

Adviser*: "Are you happy with everything on there?"*

Mr M: *"What do you mean by mortgage illustration, I didn't get that part?"*

When the adviser explained it was the document she'd just sent to Mr M, he said that was fine.

The call then deteriorated with Mr M's behaviour becoming increasingly erratic. He, on a number of occasions, inhaled a substance from a balloon, giggled and spoke with a high-pitched voice. Mr M was speaking over the adviser when she was explaining things, and on other occasions, whilst not speaking, Mr M wasn't listening either as the balloon can be heard rustling and Mr M had to ask the adviser to repeat what she'd said.

At one point in this second call Mr M asked *"It's not a second mortgage is it? Or did it class as a second mortgage?"* which, so far into the sales process, is a concern that Mr M was unaware of the product that was being discussed.

I have serious concerns about whether Mr M was in a fit state, especially in the second call, to continue discussing such as serious matter as securing a loan against his property. Mr M was inhaling a substance on the call and, at times, sounds intoxicated. Despite having to repeat herself on a number of occasions, the adviser continued with the call, encouraged the paperwork to be returned quickly, and told Mr M and Miss B they didn't need to wait for the reflection period to end as they could call Evolution as soon as they received the formal mortgage offer. I think this was wholly inappropriate. It's clear to me from listening to the call that Mr M was intoxicated, not following the conversation and not in a fit state to make a serious and important financial decision. That should have been clear to the adviser. The call should have been ended – but instead the adviser ignored what should have been obvious and pressed ahead with selling the loan.

The lending decision

In considering whether to lend, a lender must take into account whether the loan will be affordable and sustainable over the whole term of the loan. The rules of mortgage regulation – found in the MCOB section of the Financial Conduct Authority Handbook – set out the minimum requirements for the affordability assessment.

The rules say in carrying out an affordability assessment, a lender must take full account of:

- Income, net of tax and national insurance
- Committed expenditure (that is, expenditure on credit and other commitments)
- Basic essential expenditure (that is, basic household expenses such as food and housekeeping, utilities, council tax, buildings insurance, essential travel, and so on)
- Basic quality of living costs (defined as expenditure which is hard to reduce and gives a basic quality of life beyond the essentials – such as clothing, household goods, repairs, personal items and toiletries, recreation, and childcare)

Lenders must obtain evidence of income and information about expenditure. A lender is entitled to rely on the information it is given unless there are common sense reasons to doubt it.

The loan taken out by Mr M and Miss B in February 2018 was for £20,000 over a term of ten years. Added to this was a product fee of £2,000 and a lending fee of £699. The loan was on a variable rate of 19.56% at the time the loan was taken (APRC 23.96%). The monthly payment was £409.01 with the total amount repayable being £49,080.20.

Mr M's property was valued at £66,000. The outstanding amount of the first charge mortgage on the property was £40,904 so along with the money borrowed for the loan (including fees) with Evolution, this meant a loan to value ratio of 96%.

The affordability assessment completed by Evolution gives Mr M and Miss B's incomes as £1,569.65 and £1,655.51 respectively. It also includes £89.94 child benefit.

Whilst Evolution had obtained Miss B's payslips, it didn't obtain copies of Mr M's. It isn't clear why this was the case as in the second call Mr M said he'd managed to get into his account where his payslips were, and it was agreed that he would email them to the adviser. Instead Evolution took the last three income receipts that showed on Mr M's bank statements and averaged those out to give a mean monthly income.

However, Mr M had been very clear on the calls that he had received an unusually high amount in December 2017, making reference to that point more than once. When he'd been asked by the adviser what his net monthly income was he said *"… on average I'd say about £1,500."* On this basis I don't think it was reasonable for Evolution to take the higher pay into account when only considering three months income as, based on what Mr M had said, that wasn't fairly representative of his true monthly income.

As part of our investigation Mr M and Miss B submitted copies of Mr M's payslips for

January and February 2018. These showed that in January 2018 Mr M:

- had a basic gross monthly salary of £1,666.67,
- was deducted £230.77 for *"sick/late"*,
- received gross commission of £58.86, and
- was paid a net amount of £1,278.30.

And in February 2018 Mr M:

- had a basic gross monthly salary of £1,666.67,
- was deducted £500 for *"sick/late"*,
- received gross commission of £948.72, and
- was paid a net amount of £1,702.61.

Based on what Mr M said about his average monthly income being £1,500 and the fact his January 2018 income receipt showed as so much lower on his bank statement (which Evolution used to assess his income) I don't think Evolution acted appropriately in using an income figure of £1,569.65 for Mr M when assessing the affordability of this loan.

And had Evolution obtained copies of Mr M's payslips, which he said were available in the second call, then it would have seen that the only amount Mr M was guaranteed to receive each month (before any *"sick/late deduction"*) was £1,666.67 gross, which would have given a net monthly income of around £1,410.

Mr M and Miss B's expenditure was entered as being £2,851.47, comprising £1,191.53 bills (including the mortgage), £386.32 for car expenses, £1,217.80 for unsecured credit and £55.82 for the mortgage stress test. This left £463.63 for the Evolution loan and any other unexpected expenditure. After the Evolution repayment of £409.01 was included, this left Mr M and Miss B £54.62 a month.

Our Investigator asked Evolution about the stress test and it said the £55.82 was made up of two elements; £33.12 for the first charge mortgage and £23.70 for the Evolution loan. It said "*In both cases, the rate has been stressed by adding 1.66% (based on the then forecast rates over the first 5 years of the loan)."*

As this loan was taken out after 31 March 2016, it was a regulated mortgage contract, to which the MCOB section of the Financial Conduct Authority Handbook applies. Section 11.6 covers the responsible lending rules and guidance.

MCOB 11.6.18 says:

(1) Under MCOB 11.6.5R (4), in taking account of likely future interest rate increases for the purposes of its assessment of whether the customer will be able to pay the sums due, a mortgage lender must consider the likely future interest rates over a minimum period of five years from the expected start of the term of the regulated mortgage contract (or variation), unless the interest rate under the regulated mortgage contract is fixed for a period of five years or more from that time, or for the duration of the regulated mortgage contract (or variation), if less than five years.

(2) In coming to a view as to likely future interest rates, a mortgage lender must have regard to:

   (a) market expectations; and

   (b) any prevailing Financial Policy Committee recommendation on appropriate interest-rate stress tests;

and must be able to justify the basis it uses by reference to (a) and (b).

(3) For the purposes of this rule, even if the basis used by the mortgage lender in (2) indicates that interest rates are likely to fall, or to rise by less than 1%, during the first five years of the regulated mortgage contract (or variation), a mortgage lender must assume that interest rates will rise by a minimum of 1% over that period.

MCOB 11.6.18A says:

(1) Under MCOB 11.6.5R (4), in taking account of likely future interest rate increases for the purposes of its assessment of whether the customer will be able to pay the sums due, a second charge lender must also consider the likely future interest rates of any regulated mortgage contract in existence at the time of the assessment and remaining in existence after the relevant second charge regulated mortgage contract has been entered into.

(2) The second charge lender must, at a minimum, base its assessment under (1) on the balance outstanding of any regulated mortgage contract relevant under (1).

MCOB 11.6.19 says:

In relation to MCOB 11.6.18R (2):

(1) an example of market expectations is the forward sterling rate published on the Bank of England website. A mortgage lender should not use its own forecast; and

(2) a mortgage lender should not link its determination to market expectations without considering the likely effect of rate changes in accordance with the market expectations on the specific regulated mortgage contract in question.

At the time this loan was taken out the Financial Policy Committee recommendation on appropriate interest-rate stress tests was to use an interest rate 3 percentage points higher than the reversion rate.

It isn't clear how Evolution reached a decision that an uplift of 1.66 percentage points was reasonable for the stress test, rather than the 3 percentage points that was the standard recommendation at the time. MCOB 11.6.18 doesn't give the option of market expectations '*or'* any prevailing Financial Policy Committee recommendation, it says '*and*.' I can't see any reasonable basis here for Evolution to decide to use a 1.66% stress test, rather than the recommended 3%. Whilst Evolution isn't bound by that recommendation, it would be viewed as good industry practice and for a lender to deviate from it I'd expect to see a detailed and robust reason for that decision.

Had the stress test been carried out using the recommended 3 percentage point increase then I believe the result would have been about £50 higher, in effect removing the entire disposable income it had been stated Mr M and Miss B would have.

On top of that I have concerns about other information contained within the income and expenditure form. I've already explained why I think a lower income figure should have been used for Mr M, and now I'll look at the expenditure part.

Our Investigator, at my request, clarified some information that was recorded on the income and expenditure form. In response to that question Evolution said:

"On review of the Income and Expenditure documents sent to you, there was a clerical error. The £85.00 actually related to clothing, with the £358.00 Housekeeping incorporating food for the family and other expenses for the 1 year old. Whilst we can evidence less than this amount, ONS figures were used."

I’ve added up the general spending on the bank statements (outside of the areas that are separately listed on the income and expenditure, such as fuel etc) and that shows expenditure of around £980 in December, £770 in January and £410 in February, compared to the £443 allocated in total for housekeeping and clothing. These bank statements were available to Evolution at the time and used to evidence Mr M’s income, and his and Miss B’s outgoings.

Whilst it is difficult to say from the bank statements what is “housekeeping” and what is non-essential expenditure, I note that the only other category the non-essential spending could come under on the income and expenditure form is “other” and for that a monthly amount of £75.95 was given. If that is added to the £358 allocated for housekeeping and £85 for clothing then that gives £518.95 a month, compared to the £980 and £770 I’ve mentioned above that were spent in December and January. If an average of the three months is taken, then that gives a mean monthly general spending figure of around £720 against that £518.95 used in the income and expenditure assessment. Some of this might have been one-off expenditure or discretionary expenditure (related, for example, to Christmas or Mr M’s sister’s wedding). But equally it might not have been. The key point is that Evolution had in its possession information that showed the expenditure it took into account for the affordability assessment might have been an under-estimate, but made no attempt to check that or confirm what it had been told.

In addition, in those months Mr M and Miss B made substantial cash withdrawals from their bank accounts which also weren’t included in the income and expenditure assessment. Those totalled around £4,700 in December, £4,580 in January and £4,630 in February. Again, these might have been for discretionary or one-off items, or they might not have been. But again Evolution didn’t consider information in its possession which ought to have led it to question the expenditure information it did take into account.

On top of this Mr M’s credit file showed he had taken £10,583 in cash advances from his credit cards in the last 12 months (so not just at the time of his sister’s wedding), and the bank account information showed Miss B was receiving £1,000 a month from a family member with the description *“help with bills”*. I think this ought to have led Evolution to question whether Mr M and Miss B were living beyond their means, and – especially if the family help came to an end – whether their situation was sustainable. And it ought to have considered whether, in those circumstances, securing some of their debt to the property was the responsible thing to do.

Evolution says that the loan was used to consolidate a number of credit commitments and therefore benefitted Mr M and Miss B by reducing their monthly expenses. It has also said that the funds from the secured loan consolidated all the active short-term loans.

I’ve reviewed information from Mr M and Miss B’s credit files, their bank transactions and the calls with Evolution, and from that I’ve put together a table of Mr M and Miss B’s debts. I’ve taken the monthly payment firstly from the credit file and bank account information, and if that isn’t clear I’ve instead used the information given in the calls.

Who	**Type**	**Lender**	**Date taken**	**Outstanding balance**	**Monthly payment**	**To be repaid with this loan**
Mr M	Payday loan	F	January 2018	£140	£67	
Mr M	Loan	H	January 2015	£11,730	£277.22	
Mr M	Loan	S	June 2016	£926	£185.33	Will be repaid

						in five months
Mr M	Payday loan	ML	February 2018	£500	£147.33	Yes
Mr M	Credit card	V	February 2017	£4,266 (credit limit £4,200)	£110.22	Yes
Mr M	Payday loan	W	January 2018	£217	£85	Yes
Mr M	Current account	H		£2,109 (£2,200 overdraft limit)		
Mr M	Credit card	S	April 2017	£3,687 (credit limit £3,800)	£107.23	Yes
Mr M	Payday loan	MJ	January 2018	£317	£93	
Mr M	Credit card	B	July 2013	£9,682 (credit limit £9,500)	£227.38	Yes
Mr M	Credit card	M	August 2017	£1,934 (credit limit £2,000)	£60.41	
Miss B	Loan	1	December 2017	£1,177	£69.28	Yes
Miss B	Loan	A	January 2018	£8,000	£316.20	
Miss B	Loan	T	September 2017	£9,494	£206.40	
Miss B	Credit card	B	July 2012	£6,970 (credit limit £7,200)	£186.67	
Miss B	Credit card	T	November 2016	£2,710 (credit limit £2,800)	£31	
Miss B	Credit card	T	February 2017	£1,323 (credit limit £1,400)	£25	
Miss B	Current account			£98 (£650 overdraft limit)		
Miss B	Payday loan	L	February 2018	£400	Unknown	Yes
Miss B	Payday loan	2	February 2018	£60	Unknown	
Miss B	Payday loan	2	February 2018	£60	unknown	

Adding up the monthly payments that would remain after consolidation (not including the loan with only five months to run and the unknowns) then that totals around £1,260, rather than the £1,208 used by Evolution in its affordability assessment.

One obvious discrepancy is with one of Miss B's credit cards as I detailed earlier. In the call the adviser says the balance is £6,970 and asked Miss B if she paid around £170 a month. Miss B agreed, saying she paid around £170 to £180 a month. To which the adviser said "*just a quick question on this, there's been the last payment £178 but the normal payment* *on it seems to be around £105 / £117, does that seem about right to you?"* Miss B simply replied *"yeah"*.

But the credit file shows the adviser was wrong to use a lower figure of £117 (as she noted on the credit file). That's because at the point Miss B was paying between £105 and £117 a month the balance was around £4,000, but in December 2017 she'd substantially increased the balance to around £7,100, hence the higher payment of £178 was due in December (and Miss B paid £360 in January). Many lenders use a calculation of 3% of the credit balance to work out the minimum monthly payment due and based on Miss B's balance of around £7,100 that gives a monthly payment of £213.

Although Mr M's loan for which he was paying £185.33 a month only had five months left to run, there was no mention of how Mr M and Miss B would afford to pay that £185.33 a month for those five months bearing in mind Evolution had calculated that Mr M and Miss B would only have a monthly disposable income (without taking those payments into account) of £54.62.

I think Evolution ought also to have been concerned about Mr M and Miss B's credit history. It had a copy of their credit records, which showed a history of taking payday loans and other forms of credit. That included several loans taken out in the year before this application as well as substantial cash advances from credit cards. The adviser didn't really explore this with Mr M and Miss B in any depth, with a few answers given such as juggling money and funding Mr M's sister's wedding.

Mr M, in particular, was withdrawing more in cash from his bank account each month than he was receiving in income. When the cash withdrawals from the credit cards are added to that it forms a concerning picture, and one that can't really be explained by juggling money or paying for a relative's wedding.

In the calls Mr M doesn't sound very engaged with the process, with the adviser often suggesting answers and figures to use and Mr M just agreeing. And that's before I add in the second call where Mr M sounds intoxicated and is inhaling a substance on the call.

Evolution saw from Mr M's bank statements that he was in receipt of Employment and Support Allowance payments, but it seems it didn't explore that with Mr M to see if there was any potential impact on his income and/or employment nor did it question why Mr M had said he wasn't in receipt of any benefits when asked in the calls.

In light of all the above, I don't think the income and expenditure information accurately reflects Mr M's normal income, or his and Miss B's true outgoings at the time. It significantly underestimates their expenditure as shown on their bank statements. But even on the income and outgoings which were included in the form, the loan appears to be potentially unaffordable when stress tested at 3% (rather than 1.66%) as set out above.

Whilst the loan reduced Mr M and Miss B's monthly expenditure by consolidating some – but not all – of their debts, it increased their overall indebtedness by over £3,000. This was due to the additional amount of £491.36 paid to Mr M and Miss B on top of the consolidation, along with the product fee of £2,000 and a lending fee of £699. It also meant that the debt was secured against Mr M's property over ten years which would add a significant amount of interest to the amount he and Miss B initially borrowed and meant that his property could be repossessed if he and Miss B were unable to maintain the repayments. So while the loan might have reduced their outgoings, if that still didn't make their situation sustainable it wouldn't in my view be responsible to exchange unsecured for secured debt.

I have serious concerns about whether Mr M was in a fit state to understand what he was being asked and told in the calls, and that the adviser actively encouraged them to include one of Miss B's debts in the consolidation to deny her the need to take independent legal advice about whether this loan was in her best interests, and the implications of agreeing to it.

For all those reasons, I'm satisfied that this loan was irresponsible and unaffordable, and should never have been lent."

Responses to my provisional decision

Mr M and Miss B accepted my provisional decision. Evolution didn't accept it, saying I quote:

"Whilst I understand the reasons for your conclusion, Evolution still believes our decision to lend was appropriate. I will outline our stance in more detail below, with added context where necessary.

One point made in your provisional decision related to the inclusion of Miss B, and the suggestion that the implications and risks of her being added to the loan was not explained. Whilst there was no lengthy verbal conversation with Miss B specifically regarding the risk of her being added to the loan, Evolution are satisfied Miss B appropriately consented to its terms.

Debts for Miss B were included in the consolidation, so I am satisfied she also benefitted from the loan and did not require independent legal advice. The relevant documents were signed by Miss B, which did detail the consequences of taking the loan.

Regarding the alleged "leading questions" used during the application, whilst I agree the adviser should not have interrupted Mr M with their own commentary on the probable reason for taking out the payday loan, Mr M did not disagree, and had opportunity to do so. Based on Mr M's tone and temperament throughout the application, often interrupting, asking when he was unsure of a salient point, and even asking for the original advisor to be removed from the application, I believe it is reasonable to believe, had Mr M disagreed with this presumption, a correction would have been made. I do not believe however, that the poor phrasing from the Mortgage Adviser on this occasion had any impact on the income and expenditure, and do not believe this point to be integral to the affordability concerns around the complaint.

I do believe a closed question was used regarding payments to a credit card, where we initially state the last payment was £178.00 per month, but ultimately, we ask if a payment of £105.00/ £117.00 per month "seems right". Whilst I appreciate this is a closed question, and the last payment at the time was £178, looking at the bank statements this was significantly higher than payments made in the last 12 months. In the last year the amounts ranged from £105.00 to £178.00, but payments were rarely higher than £120.00, and often £105 or £110. An average of the payments made over the 12 months was around £123.00, suggesting the payment of £178.00 isn't realistic. Excluding this significantly higher payment, the average amount paid over that same period was £117.70, which is in line with the amount entered into our affordability assessments. Though I appreciate the balance had grown at the time of the £178.00 payment (December 2017), it may be reasonable for the Mortgage Adviser to have determined this higher amount was an over payment as no payment had been made in October 2017. Ultimately the £117.00 amount was entered with the consent of the customer.

Evolution took a cautious approach to food and clothing, opting to use our own minimum guidelines, rather than a significantly lower amount evidenced on bank statements. Whilst *we decided to use the total amount of £231.00 per month, the evidenced amounts over the prior 3 months were £184.30, £301.00 and £96.83 (averaging £187.40).*

Though I agree more questions could have been asked surrounding cash withdrawals, I do believe the explanation provided around payments for Mr M's sister's wedding was taken as an explanation for this by the Mortgage Adviser. Though I understand your conclusion that, as there were withdrawals throughout the year, these were likely not attributed to the wedding, we cannot say for certain that would be the case, as often times payments for such events can occur both before and after the actual event itself.

I appreciate Evolution did not push for actual interest rates of debts in the customer's name, this was not in an attempt to skew the information and is more due to the fact most customers will not have this information to hand.

Whilst I appreciate the Ombudsman's stance that the customers were not given appropriate time to reflect on the information provided, we did offer to call back at a later time, and it was the customers who suggested an earlier callback time to go over the information. Regardless of this call, both customers demonstrated they knew where to find the fey facts of the loan, and the customers had ample opportunity to review the documents in the 2 days between this initial conversation and the binding offer being generated. Though you state "When the adviser called back a couple of minutes later the call didn't start well, with Mr M seemingly having forgotten what he was due to have read in the short break:" this is speculative, and the customer confirms they have had enough time to review and consider the mortgage illustration. On review, I believe it is the phrase "mortgage illustration" itself that seems to be a point of contention, rather than any suggestion they had forgotten what they were previously discussing on the prior call. As specified previously, after a short explanation that the mortgage illustration was the document that was just sent, the customer said this was fine. It is worth reiterating here that, on occasions when Mr M was unsure, answers were sought on the same call, which would lead me to believe the customers would have spoken up had they not understood any other aspect of the agreement they were entering into.

One of the primary concerns noted in your response was regarding Mr M's ability to retain information and make sound decisions, and suggested Mr M's behaviour to be "erratic" and that he was intoxicated, suggesting the advisor ignored what should have been obvious. In this I must firmly disagree, and whilst I understand the conclusion you have come to, I believe this matter is far from clear cut and is in fact very open to interpretation. As detailed on several occasions, Mr M was quick to challenge anything he did not understand, and this was often done by interrupting the Mortgage Advisor in a tone that may be considered blunt. Mr M was consistent in this, and whilst this may have been considered abrasive to a listener, I do not think it can be considered erratic as the Mr M was consistent in this approach throughout the phone calls. Early into the process, Mr M stated they have a 1 year old child that has kept them up late, the same child who can regularly be heard crying in the background of several calls, and the suggestion was that this led to both customers being tired. Though tired, and preoccupied on several occasions, I believe this to be understandable based on the situation, in line with how many new parents would react, and the risk mitigated by some of the answers being repeated, and the key fact of the loan being presented in writing so the customers could return the documents only when they were satisfied the loan was right for them. On review of the application process, I found no evidence the customers were ever rushed, and in fact Evolution did ask if more time was needed.

The customer specifically asks "It's not a second charge mortgage, is it? Or did it class as a second mortgage", but when this is answered, the subject is not questioned again. Whilst financial professionals regularly deal with the terms second mortgage, and mortgage *illustration etc, these are not terms regularly used by the general public, and it may be hard for those who do not regularly hear these terms to immediately associate them with their loan. But this does not mean they do not understand the general terms they are entering into. Furthermore, as alluded to earlier, the customer has not suggested they did not understand the agreement they were entering into and are instead suggesting the loan was not affordable.*

Regarding the specific substance in question, this too is somewhat speculative. Though you suggest the customer sounds intoxicated, the tone and temperament was the same over all calls, and there was no base level call in which we could establish a sudden change through intoxication of any kind. The suggestion that the customer was intoxicated was not identified by our initial complaint handler, the FOS adjudicator, or myself on my review, and it should be noted that our role is not of a medical professional able to determine such things.

The Balloon was not ignored during the conversation in question. Mr M appeared to inhale from the Balloon for a moment to entertain his child who had been crying, and this was likely an attempt to calm the child further. The Balloon was allegedly still there from Valentines Day, which given the timeframe of the conversation was plausible, and Mr M discussed the fact there was helium remaining. Prior to inhaling, the customer had also been rubbing the balloon, which appeared to also me an attempt to calm the child. Though I understand there may have been more nefarious intentions here, we have acted in good faith when carrying on with the conversation based on a plausible circumstance that is not overly unusual, and with no definitive evidence of diminished. Again, it should be noted the customer has not suggested to us they were intoxicated, and this aspect of the application would have no impact on the affordability of the loan.

Regarding the evidence gathered and stress testing conducted during the application, I must establish that Evolution was not required to specifically gain payslips from the customer. Though Mr M was willing to provide payslips, it was explicitly explained that these could not be gained until they had returned to work the next week. Mr M explained he had expected to receive an income of £1,500.00 per month, and following a review of consents online, this figure was evidenced as being broadly accurate based on the averages taken, and a slightly higher amount (as evidenced) was entered as £1569.65. Whilst I appreciate you have since been sent evidence that denotes sick pay, we were not advised of this at the time, and could not have considered it. As you stated, stress testing was also applied to the account, and whilst you state the stress testing recommendation of 3% was not met by Evolution, there was no obligation to meet this 3% figure. In line with MCOB the 1.66% stress was based on market expectations using the HM Treasury of independent forecasts and considering the forecast over the first 5 years of the loan. Whilst I appreciate, since the time of this application in 2018, the economic climate has changed and we are experiencing unprecedented rises in the Bank of England base rate and the overall cost of living, based on the time of the application, Evolution concluded the rate of 1.66% was sufficient. Since increasing our interest rates, the customers payments have increased from £409.01 to £453.90, which remains within the originally stress test threshold applied, with every payment being made in full since January 2022, suggesting the loan is affordable and sustainable even after recent increases.

Mr M had made it clear early into the process that he had looked at refinancing elsewhere but had been unable to gain the necessary funds due to an already high level of credit utilisation, but their main goal was to reduce their outgoings. Our loan did reduce their outgoings and meant they were paying out significantly less per month than they would have had they continued paying their creditors directly. I understand your comments that the customers may have gone down the root of an IVA or Debt Management Plan had they not been given this loan, but I am adamant that this loan met the customers needs as they *explained them, and there was not sufficient reason to doubt the information provided by them. Early into the application Evolution made the scope of our service clear, by explaining we only provided second charge loans, and asking the customer to explain to us their understanding of loans secured against the property (which they appropriately did). The customer was told that free advice is available elsewhere, and offered details for the Money Advice Service that they chose not to take.*

In conclusion, I believe appropriate steps were taken to establish the loan was affordable and sustainable, and there was not sufficient reason to believe this was not the case. There was no suggestion the customers were vulnerable at the time of the application and our records show the customers have suitably maintained their agreement since, further supporting our stance the loan was suitable. Based on this, I would ask your position is reconsidered."

My conclusions

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

Having done so I'm not persuaded that Evolution's response to my provisional decision changes the outcome of this complaint.

I've reviewed what Evolution has said about whether Mr M was intoxicated during the call. I don't agree that it was "not overly unusual" and something that the adviser had no reason to be concerned about. But in any case, regardless of that, it's clear that this loan wasn't affordable and that's what I'll focus on

I don't intend to answer each individual point Evolution has commented on as this shouldn't be viewed as individual issues, instead the lending decision should be looked at as a whole. So whether or not Mr M could have obtained his payslips (albeit, I note in the second call he said he was accessing them) doesn't, in itself, change the outcome of this complaint. Instead the whole picture needs to be looked at, and when that is done I'm satisfied this loan was irresponsible and unaffordable, and should never have been lent.

All I can do with most of Evolution's response, is refer it back to my provisional decision which explains why each of the points it has picked up on was an issue and nothing Evolution has said in response to that has changed my opinion. That said, I will deal with a few parts here.

"I do believe a closed question was used regarding payments to a credit card, where we initially state the last payment was £178.00 per month, but ultimately, we ask if a payment of £105.00/ £117.00 per month "seems right". Whilst I appreciate this is a closed question, and the last payment at the time was £178, looking at the bank statements this was significantly higher than payments made in the last 12 months. In the last year the amounts ranged from £105.00 to £178.00, but payments were rarely higher than £120.00, and often £105 or £110. An average of the payments made over the 12 months was around £123.00, suggesting the payment of £178.00 isn't realistic. Excluding this significantly higher payment, the average amount paid over that same period was £117.70, which is in line with the amount entered into our affordability assessments. Though I appreciate the balance had grown at the time of the £178.00 payment (December 2017), it may be reasonable for the Mortgage Adviser to have determined this higher amount was an over payment as no payment had been made in October 2017. Ultimately the £117.00 amount was entered with the consent of the customer."

It isn't clear why Evolution feels an average payment made towards a credit card over the last 12 months would give an accurate reflection of what the payment on that credit card was (and likely would be going forwards as this debt wasn't included in the consolidation) at the time of the sale. It is entirely irrelevant what Miss B was paying 12 months, 6 months or even 3 months before the sale when all those payments were based on a lower debt balance.

As I set out in my provisional decision, the balance had been around £4,000 when Miss B was paying between £105 and £117 a month, but in December 2017 that balance had increased substantially to around £7,100. That information was in the adviser's possession at the time as it was contained within the credit report, so I don't agree it was reasonable for the adviser to have determined the £178 payment was an overpayment. Just taking a fairly standard industry calculation of 3% of the balance gives an expected monthly payment of £213.

Evolution has said that £117 was entered with the consent of the consumer but I don't agree. The conversation was:

Adviser: *"Do you pay them around £170?"*

Miss B: *"Yeah, £180, £170"*

Adviser: *"Just a quick question on this, there's been the last payment £178 but the normal payment on it seems to be around £105 / £117, does that seem about right to you?"*

Miss B: "*Yeah"*

Miss B agreed that she paid around £170 to £180 a month. Whilst the adviser mentioned the lower figures, in the context of the conversation whilst the adviser used the word 'normal' it could easily be taken to mean the normal payments before the payment went up. The adviser didn't say why she was asking the second question about the payments, nor did she tell Miss B the consequences of her answer. Miss B didn't consent to £117 being used, she just said *"yeah"* to the two questions that were put to her. Miss B didn't expressly agree that this lower figure was what she would be liable to pay once the loan completed.

In any event, as I've said, the information about the higher balance and the fact the previous payments were based on a significantly lower balance was in the adviser's possession and so the adviser shouldn't have just ignored that irrespective of what Miss B said.

> *"As you stated, stress testing was also applied to the account, and whilst you state the stress testing recommendation of 3% was not met by Evolution, there was no obligation to meet this 3% figure. In line with MCOB the 1.66% stress was based on market expectations using the HM Treasury of independent forecasts and considering the forecast over the first 5 years of the loan. Whilst I appreciate, since the time of this application in 2018, the economic climate has changed and we are experiencing unprecedented rises in the Bank of England base rate and the overall cost of living, based on the time of the application, Evolution concluded the rate of 1.66% was sufficient.*

The change in the economic climate and base rate increases, whilst Evolution say these were unprecedented, are some of the reasons why stress testing was used. Evolution has said it used 1.66% in line with MCOB, based on market expectations. But as I explained in my provisional decision, the relevant MCOB rule doesn't say market expectations '*or*' any prevailing Financial Policy Committee recommendation, it says '*and*.' Whilst there was no obligation to meet the 3% figure, it would be viewed as good industry practice to do so and I'd expect to see a detailed and robust reason for deviating from it, which I haven't seen here.

> *"I am adamant that this loan met the customers* [sic] *needs as they explained them, and there was not sufficient reason to doubt the information provided by them."*

This isn't a case where the outcome depends on whether or not Evolution had sufficient reason to doubt the information that was provided by Mr M and Miss B. Instead, this is a case where the information that was in Evolution's possession at the time showed the loan wasn't affordable had that information been correctly scrutinised.

Evolution calculated Mr M and Miss B had £54.62 left after its 1.66% stress test was carried out, and so the issue with Miss B's credit card alone (that £117 was used instead of £178 for the ongoing monthly commitment) would be enough to have made this application fail the affordability check if the correct data had been used.

Or if the full 3% stress test had been used then, again, this would likely have failed the affordability check (or have been very close to it).

Or if Mr M's income had been recorded as £1,500 as he said *"… on average I'd say about £1,500"*, rather than £1,569, this would have failed the affordability check.

Or if Mr M and Miss B's true expenditure as shown on their bank statements - around £980 in December, £770 in January and £410 in February, giving an average of £720 a month – had been used instead of the £518.95 that was allocated for housekeeping, clothing and 'other', this would have failed the affordability check.

Finally, there was no mention of how Mr M and Miss B would maintain the £185.33 a month personal loan payment that had five months left to run. By Evolution's calculations Mr M and Miss B had £110.44 left a month without the stress test (that is £54.62, plus the £55.82 it included for the 1.66% stress test amount), so they were £75 a month short for five months even based on the figures Evolution used. It doesn't seem that consideration was given to this point.

As I said, I've not dealt with each individual point Evolution raised in its response to my provisional decision, although I have taken them all into account. It seems Evolution hasn't looked at this overall lending decision holistically, instead focusing on each individual part in isolation. I'm satisfied, once everything is put together, that this loan was irresponsible and unaffordable, and should never have been lent.

Putting things right

To put matters right, Evolution should bring the loan agreement to an end and remove any adverse entries associated with this loan from Mr M and Miss B's credit files. It should remove the £699 lending fee and £2,000 product fee it charged from the balance, as well as all interest charged on the borrowing to date. If any other fees have been added to the balance over the life of the loan those should also be removed. Evolution should then treat all the payments Mr M and Miss B have made as payments reducing the capital balance.

If this results in a balance outstanding, Evolution should reach a sustainable arrangement with Mr M and Miss B for the repayment of the remaining outstanding capital balance, and can retain the charge over the property in the meantime.

If, however, this means that Mr M and Miss B have already repaid more than the capital they borrowed, the excess should be refunded to them, adding simple annual interest of 8% running from when any payments above the total capital amount were made to the date Evolution refunds them. In this scenario, Evolution may deduct income tax from the 8% interest element of my award, as required by HMRC – but should tell Mr M and Miss B what it has deducted so they can reclaim the tax if they are entitled to do so. In this case, it should also remove the charge from the property.

I don’t think it would be fair to ask Evolution Lending to write off the remaining capital balance, if there is one. Mr M and Miss B received the capital and used it to pay off other debts, so it’s fair and reasonable that they pay back what they borrowed. But it’s not fair and reasonable for Evolution Lending to charge fees and interest for a loan it should not have entered into.

I can see that Mr M and Miss B have experienced difficulty in making repayments to this loan. If Evolution Lending had not lent, Mr M and Miss B would not have experienced these problems – though they may well have had difficulties with the unsecured debt they would have retained had it not been consolidated into this loan.

However, it’s also possible Mr M and Miss B would have come to some arrangement with their unsecured creditors had this loan not existed. So it’s not possible to be sure exactly what capital or interest Mr M and Miss B would have had to pay if the debts had not been consolidated into this loan.

It's likely that removing all interest from this loan results in a saving to Mr M and Miss B compared to the amount they would have had to pay towards the consolidated debts had they not been consolidated. But it’s also possible they would have entered an arrangement such as an IVA or bankruptcy which would have led to them paying less (though with other consequences). It’s likely there is some saving in removing interest from the loan. But nevertheless I think it’s a fair outcome to this complaint because I don’t think it’s fair and reasonable for Evolution Lending to recover fees and interest charged under a loan agreement that ought never to have been entered into.

Although the existence of this loan caused Mr M and Miss B substantial distress and inconvenience, with the added worry that it was secured over their home, I don’t propose to compensate Mr M and Miss B separately for the distress and inconvenience this lending and the associated financial difficulties caused them. I think the saving made in writing off the interest on this loan, compared to what they would likely have had to pay had the debts not been consolidated, represents fair compensation for that.

My final decision

For the reasons I’ve given, I uphold this complaint and direct Evolution Lending Limited to put matters right in the way I’ve set out above. Under the rules of the Financial Ombudsman Service, I’m required to ask Miss B and Mr M to accept or reject my decision before 24 April 2024.

Julia Meadows
Ombudsman