

## **complaint**

Miss B has complained about short-term loans granted to her by Active Securities Limited trading as 247 Moneybox.com ("Moneybox" or "the lender").

## **background**

I attach my provisional decision of 29 November 2018, which forms part of this final decision and should be read in conjunction with it. In my provisional decision I explained why I intended to partially uphold Miss B's complaint. I gave both parties a month to provide any further comments they may have had before I reached a final decision.

Miss B agreed with my provisional decision. Moneybox has not responded to it.

## **my findings**

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. As neither party has asked me to consider further information or arguments, I see no reason to depart from the conclusions set out in my provisional decision. It follows that I partially uphold Miss B's complaint.

## **what Moneybox should do to put things right**

I've concluded that Moneybox was irresponsible to lend to Miss B between April 2015 and October 2017. In order to put Miss B back in the position she would have been in, had it not agreed to this number of loans over this length of time, Moneybox should:

- refund all interest and charges that Miss B has paid for the loans agreed in this period;
- pay interest on these refunds at 8% simple\* per year from the dates of payment to the dates of settlement;
- remove any adverse information about loans 6 and 7 from Miss B's credit file (granted in April and May 2015 respectively).
- and remove all information about loans 8 to 25 from Miss B's credit file (from June 2015 onwards)\*\*.

\*HM Revenue & Customs requires Moneybox to take off tax from this interest. Moneybox must give Miss B a certificate showing how much tax it's taken off if she asks for one.

\*\*Putting Miss B back into the position she would have been in had she not been impacted by repeat lending requires the record of these loans to be completely removed from her credit file.

I understand that in early 2018 there was still an outstanding balance on Miss B's final loan. If this is still unpaid, Moneybox should first remove any outstanding interest owing from this and if there is a capital balance outstanding when this is done, it can use the above refund to offset this capital balance.

**my final decision**

For the reasons set out in my provisional decision, I partially uphold Miss B's complaint and require Active Securities Limited (trading as 247 Moneybox.com) to put things right as I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss B to accept or reject my decision before 16 February 2019.

Michelle Boundy  
**ombudsman**

## **COPY OF PROVISIONAL DECISION**

### **complaint**

Miss B has complained about short-term loans granted to her by Active Securities Limited trading as 247 Moneybox.com ("Moneybox" or "the lender").

### **background**

Moneybox agreed 25 loans for Miss B from September 2014 to October 2017. The lending was generally continuous with a few gaps in their lending relationship, the longest of which was about two months. The amounts agreed ranged from £80 to £500, with an average of about £230. Each loan was to be repaid in one payment. I've included a table in an appendix to this decision ([Appendix 1](#)) which sets out some of the loan information Moneybox has provided.

Miss B says that it was irresponsible of Moneybox to lend to her because she couldn't afford the loans and the lender ought to have known this. She says that her credit reports would have shown her other debt repayments and the problems she had managing these.

Moneybox disagrees that it lent irresponsibly. It said it *"took and continue to take much care when making affordability assessments."* The lender offered to remove Miss B's outstanding balance (as of January 2018) as a gesture of goodwill and offered to remove any negative information about her final loan from her credit file. Miss B declined this offer and brought her complaint to this service.

Our adjudicator partially upheld Miss B's complaint and asked Moneybox to refund the interest and charges on her final eight loans, namely loans 18 to 25. Moneybox did not respond to our adjudicator's recommendation and so the case has come to me, an ombudsman, for a final decision.

I am sending out a provisional decision to explain why I agree with our adjudicator's recommendation and why I think it needed to go further. This will allow both parties to comment on this matter before I make my final decision.

### **my provisional findings**

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. I have also taken into account the law, any relevant regulatory rules and good industry practice at the time.

Moneybox agreed all of Miss B's loans in the period after the 31<sup>st</sup> of March 2014. It was and is regulated by the Financial Conduct Authority (FCA) to carry out consumer credit activities. Prior to this, firms were regulated by the Office of Fair Trading (OFT). The rules and guidance issued by the FCA were in close alignment with those of the OFT, and specifically noted and referred back to sections of the earlier guidance.

As I've said above, I have thought about everything to come to a view about what is fair and reasonable in this case. I have set out part of the relevant legal and regulatory framework that Moneybox was subject to over the period it lent to Miss B in [Appendix 2](#) at the end of this decision. This includes some of the provisions of the Consumer Credit Act including later amendments, guidance and rules provided by the OFT and the FCA, and industry codes of best practice.

Under this framework, in order to hold a consumer credit licence Moneybox was obliged to lend responsibly. As set out by the FCA in its Consumer Credit Sourcebook (CONC), this meant that it needed to make a reasonable assessment as to whether or not a borrower could afford to meet its loan repayments in a sustainable manner. The FCA rules said that in assessing affordability a lender needs to consider what's appropriate in the circumstances for example *"the type and amount of credit being sought and the potential risks to the consumer."* Neither the law nor the FCA specified how the

assessment was to be carried out but, whatever the method, it needed to be enough to assess the sustainability of the arrangement for the consumer.

It's important to note that this means the assessment needed to be consumer-focussed. It was not an assessment of the risk to the lender, but of the risk to the consumer. And it needed to be proportionate to both the circumstances of the lending and the circumstances of the consumer. Therefore, a lender's assessment of creditworthiness would need to be flexible – what was sufficient for one consumer might not be for another, or indeed what might be sufficient for a consumer in one circumstance might not be for the same consumer in other circumstances.

CONC 6.7.21G states

*A firm should not refinance high-cost short-term credit where to do so is unsustainable or otherwise harmful. [Note: paragraph 6.25 of ILG]*

As mentioned, the OFT was the regulator before the FCA took over in 2014. It defined the purpose of short-term credit, such as payday loans, as short-term solutions which were unsuitable for supporting sustained borrowing. Its 'Irresponsible Lending Guidance' points to repeated refinancing of such loans as an example of irresponsible lending.

Paragraph 6.25 of the ILG states that an example of deceptive and/or unfair practice would be

*...repeatedly refinancing (or 'rolling over') a borrower's existing credit commitment for a short-term credit product in a way that is unsustainable or otherwise harmful.*

Highlighting these behaviours specifically in the regulatory guidance suggests that a lender needed to consider the risk to the consumer of such lending behaviour. And it seems logical to me that the more instances of repeated lending, the greater the potential risk to the consumer of the credit being unsustainable.

*what should have happened when Miss B applied for credit and did Moneybox get this right?*

Bearing the above in mind, I would expect an assessment of creditworthiness to vary with circumstance. In general, I'd expect a lender to require more assurance, the greater the potential risk to the consumer. So, for example, I'd expect a lender to seek more assurance by carrying out more detailed checks

- the higher the loan amount,
- the lower the consumer's income; or
- the longer the lending relationship.

In coming to a decision on Miss B's case, I have considered the following questions:

- did Moneybox complete reasonable and proportionate checks when assessing each of Miss B's loan applications to satisfy itself that she would be able to repay the loan in a sustainable way?
  - if not, would those checks have shown that Miss B would have been able to do so?
- taking into account the short-term purpose of the loans provided, did the overall pattern of lending increase Miss B's indebtedness in a way that was unsustainable or otherwise harmful?
- did Moneybox act unfairly or unreasonably in some other way?

Having done so, I've provisionally concluded that Moneybox was irresponsible to lend to Miss B from her sixth loan onwards. I plan to uphold her complaint from here and ask the lender to refund the

interest and charges she paid for this and all her subsequent loans. I appreciate that this will be disappointing for Moneybox and I'll explain in some detail why I've reached this conclusion.

*did Moneybox carry out reasonable and proportionate checks when assessing Miss B's loan applications to satisfy itself that she would be able to repay the loan in a sustainable way?*

#### the information Moneybox obtained

The lender says that it asked Miss B for her income and expenditure each time she applied for credit. Its records show that Miss B said her monthly income ranged from £2,236 to £2,530 and her monthly expenses from £1,150 to £1,700. This means her stated minimum disposable income was on average about £850 and was generally above £500.

Moneybox says that it routinely *"built in a buffer of 55% for a margin of error. This means that the consumer was lent a maximum of 45% of their free cash flow figure."* I note that loans 19, 21 and 24 appear to be above this maximum limit, and loans 18 and 20 within £20 of it. (As I mentioned earlier, our adjudicator upheld Miss B's complaint about the loans granted from loan 18 onwards.)

Moneybox also says that it checked Miss B's credit file when she applied for her first and second loan and that her credit score was above its minimum threshold for approval.

The income and expenditure records provided run from the time of Miss B's seventh loan in May 2015, eight months after her first. I can accept that the lender asked Miss B for this information from the beginning in this instance – it has also provided two credit file reports from the time of her first and second loan applications. So I think it's likely that Moneybox asked for the income and expenditure information also and that it was similar to the information Miss B provided for her seventh loan – a monthly income of £2,236 and expenses of £1,350.

The lender says that when Miss B asked for her third loan it gathered more information from her, it asked her *"Is there any further information that you might wish to bring to our attention at this time that you think may cause us to conclude it is inappropriate to enter into an agreement with you (for example, as a result of any health issues you may have, bankruptcy, levels of indebtedness including any other payday loans, entering an IVA?)"*.

Moneybox says that this didn't prompt Miss B to provide any further information.

#### the information Moneybox should have sought

I've started by looking at the lending history between Moneybox and Miss B. The regulations required lenders to assess the risk to consumers in a way that was appropriate to the circumstances. On investigation, it seems Moneybox didn't vary its checks greatly for Miss B over the three years she borrowed from it. Logically, with that approach, Moneybox checks might be proportionate some of the time but it's unlikely that these checks would be proportionate each and every time Miss B applied for credit.

Moneybox agreed Miss B's first three loans in September, November and December of 2014, each of which amounted to £80. Based on the information the lender says Miss B provided, she would have had a disposable income of £886, which would seem sufficient for Miss B to be able to comfortably meet her loan repayments.

However, I've reviewed the credit file reports provided. On the first check (dated 07/09/2014) I can see that Miss B had an active County Court judgement for about £600 which was just over a year old at the time she applied for her first loan. These results also showed a default older than 12 months and that one of Miss B's credit accounts was delinquent within the last 12 months. All of this appears on her second file, dated 08/11/2014. And both files show a history of short-term loans, some of which seem to be outstanding.

I think this information should have prompted Moneybox to inquire further into Miss B's finances before agreeing to lend to her. Moneybox says it asked Miss B about other short-term loans when she asked for her third loan, and that she didn't provide any further information. It is debateable for me whether or not this was enough to probe into Miss B's use of short-term lending, given her credit file information. However, as this was early on in their lending relationship I am giving Moneybox the benefit of doubt here and putting a greater onus on Miss B to have explained the extent of her financial affairs when she first came to ask Moneybox for credit. So I can accept that Moneybox's checks were reasonable for Miss B's first three loans.

That said, I don't think it was fair of Moneybox to continue to rely solely on Miss B's information about her affairs over such a long period of time without asking for some independent supporting evidence, given that it knew she was borrowing from other lenders and knew that she had an active County Court judgement. Miss B asked for her fourth loan within a week of repaying her third. This was for £150, almost double the amount of her earlier loans. Bearing in mind that Moneybox's loans were intended for short term purposes – and weren't suitable for sustained borrowing over longer periods – I think the lender ought to have taken steps to assure itself that a pattern of dependency had not emerged (and was not emerging).

If Miss B was using Moneybox's loans as a way to meet her usual expenses because of ongoing shortfalls in her income then repaying its loans out of that same level of income was not going to be sustainable for her. In other words it's likely she would have difficulty meeting this repayment without having to borrow further or go without. So I think Moneybox should have done more, for example by independently verifying information about Miss B's circumstances to satisfy itself that her income was at the level she'd declared and that she had a sustainable level of disposable income to meet this loan repayment when it was due. It could have done this in a number of ways. It could have brought these concerns to Miss B and asked further questions of her, or asked to see her bank statements, payslips, rent or bill records etc. And so I don't think it did enough here to reasonably assess the risk to Miss B.

Miss B asked for her fifth loan within a week of repaying her fourth. And she went on to borrow more or less continuously from Moneybox for a further two and a half years. So I don't think the lender could reasonably assume her need for its loans diminished at any point and it ought to have continued to look into her finances in more detail throughout their lending relationship. Altogether, I can't conclude that Moneybox carried out reasonable and proportionate checks when assessing Miss B's loan applications for her fourth loan onwards and so I've gone on to consider what it would likely have found out, had it done so.

*as Moneybox's checks weren't reasonable and proportionate, what would reasonable and proportionate checks more likely than not have shown?*

Miss B has provided her bank statements and I can see from these that what she told Moneybox about her income was broadly correct. I don't have a breakdown of her expense information until December 2015 (around the time of her 12<sup>th</sup> loan) so I don't know what she might have said to Moneybox about how she spent her money before this point.

It seems from Miss B's statements that she was managing her finances by borrowing from several short-term lenders throughout the time she borrowed from Moneybox. Her statements show that she didn't have an overdraft and she sometimes used short-term lenders to avoid paying unarranged overdraft fees. What Miss B owed to short-term lenders at any one time varied so sometimes she wasn't left with enough to pay her Moneybox loans without borrowing from elsewhere. And I think Moneybox would have understood this, had it carried out proportionate checks.

Loans 4 and 5 were to be repaid in January and February of 2015. Looking at Miss B's bank statements it seems she would have had enough to meet her repayments on these. This seems to be because she'd set up several standing orders for credit repayments from January 2015, two of which were to debt management companies and so the amount she repaid on existing credit was reduced.

And her loan repayments from one of her regular short-term lenders also reduced as the loans were to be repaid over more than one month.

However, Miss B's repayments to this lender increased again – to over £600 in April 2015 and £300 in each of June and July of that year. And this combined with the increasing amount she needed to repay to Moneybox in these months (£224, £238 and £338) means that she wasn't likely to meet these repayments in a sustainable way. And so I think Moneybox was wrong to agree to loans 6, 7, and 8.

I could continue to look into the affordability of Miss B's remaining 17 loans but, as I will go on to explain, I don't think Moneybox should have continued to lend to her beyond this point.

*taking into account the short term purpose of the loans provided, did the overall pattern of lending increase Miss B's indebtedness in a way that was unsustainable or otherwise harmful?*

Although I have explained that there were indicators of risks and dependency at an earlier stage, I think the point at which Moneybox should have concluded that it was irresponsible to keep lending to Miss B came when she asked for her eight loan in June 2015. This loan was for £300, the highest amount she'd borrowed to date. At this point she'd been borrowing from Moneybox for over nine months. Whilst I've concluded that proportionate checks would likely have shown this loan to be unaffordable, Moneybox should also have been concerned that Miss B's need for credit was continuing beyond what could reasonably be interpreted as short-term.

As mentioned earlier, the guidance from the regulator at the time states that short-term credit is not appropriate for supporting sustained borrowing over longer periods, for which other products are more likely to be suitable.

Indeed Moneybox's own website states that:

*"Our loans provide a solution for your occasional short-term needs. They are not suitable for supporting sustained borrowing over longer periods, nor if you are in financial difficulties. The cost of our payday loans can be higher than other types of loans, such as those requiring you to provide a guarantor, which are typically payable over a longer period, so if you do require a longer-term solution there are other more suitable forms of finance available elsewhere."*

Miss B says that Moneybox's loans *"trapped me in a debt spiral, with the repayment taking so much of my wages that I had to borrow again to cover my next month's expenses."* She said that when she repaid them she had to borrow again to get through the next month. She says *"I took out other loans to be able to pay you back and ended up trapped in a spiral that is majorly affecting me today."*

The average amount of credit that Moneybox offered to Miss B between September 2014 and October 2017 was £230. For access to this average amount Miss B paid almost £1,200 in interest<sup>1</sup> in total.

I think agreeing this number of loans over this length of time had the effect of unfairly increasing Miss B's indebtedness to Moneybox by allowing her to take expensive credit – which the rules and guidance and Moneybox's own website make clear was only intended for short-term use – over an extended period of time.

In addition, I think the number and frequency of these loans may have had and will, potentially, continue to have implications for Miss B's ability to access mainstream credit because the presence of these short-term loans on her credit file is likely to be viewed negatively by other lenders.

## **in summary**

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<sup>1</sup> Based on Moneybox's account statements for Miss B.

To sum up, I don't think Moneybox gathered enough information to reasonably assess Miss B's ability to make her loan repayments in a sustainable way from her fourth loan. And it's likely to have discovered that she was unable to do so when she applied for loans 6, 7, and 8, had it carried out proportionate checks. And when Miss B applied for her eighth loan in June 2015 Moneybox ought to have concluded that it was irresponsible to keep lending to her. It should have seen at that point that she appeared to be dependent on its loans for purposes other than to meet unexpected expenses and was probably in need of a longer-term solution.

As a responsible lender, Moneybox wouldn't have agreed to any further credit for Miss B, given that this would increase her indebtedness and potentially impact negatively on her creditworthiness. Therefore, I think Moneybox was irresponsible to have agreed any further loans for her.

### **what Moneybox should do to put things right**

As I've provisionally concluded, Moneybox was irresponsible to lend to Miss B between April 2015 and October 2017. In order to put Miss B back in the position she would have been in, had it not agreed to this number of loans over this length of time, Moneybox should:

- refund all interest and charges that Miss B has paid for the loans agreed in this period;
- pay interest on these refunds at 8% simple\* per year from the dates of payment to the dates of settlement;
- remove any adverse information about loans 6 and 7 from Miss B's credit file.
- and remove all information about loans 8 to 25 from Miss B's credit file\*\*.

I understand that in early 2018 there was still an outstanding balance on Miss B's final loan. If this is still unpaid, Moneybox should first remove any outstanding interest owing from this and if there is a capital balance outstanding when this is done, it can use the above refund to offset this capital balance.

\*HM Revenue & Customs requires Moneybox to take off tax from this interest. Moneybox must give Miss B a certificate showing how much tax it's taken off if she asks for one.

\*\*Putting Miss B back into the position she would have been in had she not been impacted by repeat lending requires the record of these loans to be completely removed from her credit file.

### **my provisional decision**

I intend to uphold Miss B's complaint for the reasons given above and require Active Securities Limited trading as 247 Moneybox.com to put things right as I've set out.

I'll wait a month to see if either party has anything further to add – before considering my decision on this complaint once more.

Michelle Boundy  
**ombudsman**



**Appendix 1 Miss B's borrowing history**

Loan number	Date from	Date repaid	Principal (£)	Total actual repayment (£)
1	08/09/2014	26/09/2014	80	100
2	08/11/2014	28/11/2014	80	102
3	05/12/2014	24/12/2014	80	120
4	29/12/2014	28/01/2015	150	232
5	31/01/2015	13/02/2015	100	111
6	01/04/2015	15/04/2015	200	224
7	02/05/2015	15/06/2015	175	238
8	30/06/2015	15/07/2015	300	338
9	30/07/2015	14/08/2015	300	338
10	29/08/2015	15/09/2015	300	343
11	01/10/2015	15/10/2015	300	336
12	12/12/2015	14/12/2015	300	307
13	01/02/2016	15/03/2016	200	270
14	08/04/2016	13/05/2016	100	129
15	01/06/2016	15/07/2016	200	272
16	05/08/2016	15/09/2016	80	107
17	20/10/2016	15/11/2016	200	243
18	15/11/2016	29/12/2016	385	524
19	03/01/2017	28/01/2017	453	547
20	17/02/2017	30/03/2017	400	534
21	04/04/2017	06/04/2017	500	512
22	26/06/2017	28/07/2017	80	102
23	16/08/2017	29/09/2017	150	204
24	09/10/2017	30/10/2017	400	470
25	30/10/2017	-	300	-

## **Appendix 2 Some information on the legal and regulatory background to the lending**

### **the Consumer Credit Act 1974**

Section 25(2) of the Consumer Credit Act 1974 set out the factors that regulators had to have regard to when deciding whether or not to grant a consumer credit licence to a lender. It said:

- (1) *In determining whether an applicant for a licence is a fit person for the purposes of this section the OFT shall have regard to any matters appearing to it to be relevant including (amongst other things)—*
- (a) the applicant's skills, knowledge and experience in relation to consumer credit businesses, consumer hire businesses or ancillary credit businesses;*
  - (b) such skills, knowledge and experience of other persons who the applicant proposes will participate in any business that would be carried on by him under the licence;*
  - (c) practices and procedures that the applicant proposes to implement in connection with any such business;*
  - (d) evidence of the kind mentioned in subsection (2A)*
- (2A) *That evidence is evidence tending to show that the applicant, or any of the applicant's employees, agents or associates (whether past or present) or, where the applicant is a body corporate, any person appearing to the OFT to be a controller of the body corporate or an associate of any such person, has—*
- (a) committed any offence involving fraud or other dishonesty or violence;*
  - (b) contravened any provision made by or under—*
    - (i) this Act;*
    - (ii) Part 16 of the Financial Services and Markets Act 2000 so far as it relates to the consumer credit jurisdiction under that Part;*
    - (iii) any other enactment regulating the provision of credit to individuals or other transactions with individuals;*
  - (c) contravened any provision in force in an EEA State which corresponds to a provision of the kind mentioned in paragraph (b);*
  - (d) practised discrimination on grounds of sex, colour, race or ethnic or national origins in, or in connection with, the carrying on of any business; or*
  - (e) engaged in business practices appearing to the OFT to be deceitful or oppressive or otherwise unfair or improper (whether unlawful or not)*

Section 25(2B) set out an example of the type of practice referred to in Section 25(2A(e)) and said:

*For the purposes of subsection (2A)(e), the business practices which the OFT may consider to be deceitful or oppressive or otherwise unfair or improper include practices in the carrying on of a consumer credit business that appear to the OFT to involve irresponsible lending.*

## **section 140A of the Consumer Credit Act 1974**

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

### **140A Unfair relationships between creditors and debtors**

- (1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following—*
  - (a) any of the terms of the agreement or of any related agreement;*
  - (b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;*
  - (c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).*
- (2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor).*
- (3) For the purposes of this section the court shall (except to the extent that it is not appropriate to do so) treat anything done (or not done) by, or on behalf of, or in relation to, an associate or a former associate of the creditor as if done (or not done) by, or on behalf of, or in relation to, the creditor.*
- (4) A determination may be made under this section in relation to a relationship notwithstanding that the relationship may have ended.*
- (5) An order under section 140B shall not be made in connection with a credit agreement which is an exempt agreement [for the purposes of Chapter 14A of Part 2 of the Regulated Activities Order by virtue of article 60C(2) of that Order (regulated mortgage contracts and regulated home purchase plans)]*

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

### **140B Powers of court in relation to unfair relationships**

- (2) An order under this section in connection with a credit agreement may do one or more of the following—*
  - (a) require the creditor, or any associate or former associate of his, to repay (in whole or in part) any sum paid by the debtor or by a surety by virtue of the agreement or any related agreement (whether paid to the creditor, the associate or the former associate or to any other person);]*
  - (b) require the creditor, or any associate or former associate of his, to do or not to do (or to cease doing) anything specified in the order in connection with the agreement or any related agreement;*
  - (c) reduce or discharge any sum payable by the debtor or by a surety by virtue of the agreement or any related agreement;*

- (d) direct the return to a surety of any property provided by him for the purposes of a security;*
- (e) otherwise set aside (in whole or in part) any duty imposed on the debtor or on a surety by virtue of the agreement or any related agreement;*
- (f) alter the terms of the agreement or of any related agreement;*
- (g) direct accounts to be taken, or (in Scotland) an accounting to be made, between any persons.*

### **section 55B of the Consumer Credit Act 1974**

On 1 February 2011 the majority of the legislation implementing the provisions of the Consumer Credit Directive 2008 came into force. This included an additional requirement on a lender to carry out an "Assessment of creditworthiness" which was set out in section 55B of the Consumer Credit Act.

Section 55B said:

Assessment of creditworthiness

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

### **regulation by the Office of Fair Trading**

In March 2010 (updated February 2011), the OFT issued its guidance on the test for irresponsible lending for the purposes of section 25(2B) of the Consumer Credit Act 1974. The foreword to its 'Irresponsible Lending Guidance' (ILG) set out its purpose saying:

*The primary purpose in producing this guidance is to provide greater clarity for businesses and consumer representatives as to the business practices that the Office of Fair Trading (OFT) considers may constitute irresponsible lending practices for the purposes of section 25(2B) of the Consumer*

*Credit Act 1974. It indicates types of deceitful or oppressive or otherwise unfair or improper business practices which, if engaged in by a consumer credit business, could call into consideration its fitness to hold a consumer credit licence.*

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

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

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

Section 2.2 of the guidance says:

*In general terms, creditors should:*

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

Section 2.3 lists other expectations of lenders. Amongst other things, it says:

*In addition to the above there should be:*

- *fair treatment of borrowers. Borrowers should not be targeted with credit products that are clearly unsuitable for them, subjected to high pressure selling, aggressive or oppressive behaviour or inappropriate coercion, or conduct which is deceitful, oppressive, unfair or improper, whether unlawful or not*

*Borrowers who may be particularly vulnerable by virtue of their current indebtedness, poor credit history, or by reason of age or health, or disability, or for any other reason, should, in particular, not be targeted or exploited.*

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

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

*'Assessing affordability', in the context of this guidance, is a 'borrower-focussed test' which involves a creditor assessing a borrower's ability to undertake a specific credit commitment, or specific additional credit commitment, in a sustainable manner, without the borrower incurring (further) financial difficulties and/or experiencing adverse consequences.*

Section 4.2 of the OFT guidance says:

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

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

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

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

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

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

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

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

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

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

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

- *evidence of income*
- *evidence of expenditure*

- *records of previous dealings with the borrower*
- *a credit score*
- *a credit report from a credit reference agency*
- *information obtained from the borrower, whether on an application form or separately*

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

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

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

*Failing to undertake a reasonable assessment of affordability in an individual case or cases*

Section 4.21 gives another example:

*Failing to consider sufficient information to be able to reasonably assess affordability, prior to granting credit, significantly increasing the total amount of credit provided, or significantly increasing the credit limit (in the case of a running account credit agreement)*

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

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

Sections 4.29 and 4.31 deal with a lender's treatment of information disclosed by the customer. 4.29 says it would be an unsatisfactory business practice where a lender fails:

*to take adequate steps, so far as is reasonable and practicable, to ensure that information on a credit application relevant to an assessment of affordability is complete and correct.*

And section 4.31 says it would be unsatisfactory for a lender to accept:

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

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

*Failing to monitor a borrower's repayment record*

Section 6.2 goes on to say:

*The OFT considers that creditors should take appropriate action...when/if there are signs of apparent / possible repayment difficulties.*

Section 6.25 focuses specifically on short-term credit products and says that it would be a “deceptive and/or unfair practice” where a lender is:

*Repeatedly refinancing (or 'rolling over') a borrower's existing credit commitment for a short-term credit product in a way that is unsustainable or otherwise harmful.*

Section 6.25 then goes on to say:

*The OFT considers that this would include a creditor allowing a borrower to sequentially enter into a number of separate agreements for short-term loan products, one after another, where the overall effect is to increase the borrower's indebtedness in an unsustainable manner.*

*The general purpose of short-term loans, such as 'payday loans', is to provide borrowers with a cash advance until their next pay day and they are usually about 30 days, or just over, in duration. However, in certain circumstances, the borrower can elect to 'renew' the loan for a fee and delay payment for a further agreed period of time.*

*The purpose of payday loans is to act as a short-term solution to temporary cash flow problems experienced by consumers. They are not appropriate for supporting sustained borrowing over longer periods, for which other products are likely to be more suitable.*

#### **regulation by the Financial Conduct Authority (“FCA”) (from 1 April 2014)**

All of Miss G's loans were agreed when the FCA was the regulator for consumer credit. The FCA's Principles for Business (“PRIN”) set out the high level standards which all authorised firms are required to comply with.

PRIN 1.1.1G, says

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

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

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

The FCA's Consumer Credit sourcebook (CONC) is the specialist sourcebook for credit-related regulated activities. The purpose of CONC is to set out the detailed obligations that are specific to credit-related regulated activities and activities connected to those activities carried on by firms. These build on and add to the high-level obligations, for example, in PRIN and the requirements in or under the Consumer Credit Act.

This handbook sets out the rules which apply to providers of consumer credit like Moneybox. CONC Section 5 sets out a firm's obligations in relation to responsible lending. And CONC Section 6 sets out a firm's obligations after a consumer has entered into a regulated agreement.

There is a high degree of alignment between the OFT's Irresponsible Lending Guidance and the rules set out in CONC 5 and CONC 6. As is evident from the following extracts, the FCA's CONC rules (in place at the time) specifically note and refer back to sections of the OFT's *Irresponsible Lending Guidance* on many occasions.

Section 5.2.1R(2) of CONC set out what a lender needed to do before agreeing to give a consumer a loan of this type. It said 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*

**[Note: paragraph 4.1 of ILG]**

- (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.*

**[Note: paragraph 4.3 of ILG]**

CONC also includes guidance about 'proportionality of assessments'. CONC 5.2.4G(2) said:

*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.*

**[Note: paragraph 4.11 and part of 4.16 of ILG]**

CONC 5.3 contained further guidance on what a lender should bear in mind when thinking about affordability. And CONC 5.3.1G(1) said:

*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.*

**[Note: paragraph 4.2 of ILG]**

CONC 5.3.1G(2) then said:

*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.*

**[Note: paragraph 4.1 (box) and 4.2 of ILG]**

In respect of the need to double-check information disclosed by applicants, CONC 5.3.1G(4) has a reference to paragraphs 4.13, 4.14, and 4.15 of ILG and stated:

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

And CONC 5.3.7R said 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).*

**[Note: paragraph 4.31 of ILG]**

CONC 6.7 sets out a firm's obligations in relation to its post contract business practices. CONC 6.7.21G to 6.7.23R contains specific obligations for high-cost short-term credit providers.

CONC 6.7.21G says:

*A firm should not refinance high-cost short-term credit where to do so is unsustainable or otherwise harmful.*

*[Note: paragraph 6.25 of ILG]*

CONC 6.7.22G says:

*A firm should not allow a customer to enter into consecutive agreements with the firm for high-cost short-term credit if the cumulative effect of the agreements would be that the total amount payable by the customer is unsustainable.*

*[Note: paragraph 6.25 (box) of ILG]*

CONC 6.7.23R says:

*A firm must not refinance high-cost short-term credit (other than by exercising forbearance) on more than two occasions.*

CONC 6.7.17R defines refinancing and says:

- (1) In CONC 6.7.18 R to CONC 6.7.23 R “refinance” means to extend, or purport to extend, the period over which one or more repayment is to be made by a customer whether by:
  - (a) agreeing with the customer to replace, vary or supplement an existing regulated credit agreement;*
  - (b) exercising a contractual power contained in an existing regulated credit agreement; or*
  - (c) other means, for example, granting an indulgence or waiver to the customer.**
- (2) “Exercise forbearance” means to refinance a regulated credit agreement where the result is that no interest accrues at any time in relation to that agreement or any which replaces, varies or supplements it from the date of the refinancing and either:
  - (a) there is no charge in connection with the refinancing; or*
  - (b) the only additional charge is a reasonable estimate of the actual and necessary cost of the additional administration required in connection with the refinancing.**
- (3) The term “refinance” within paragraph (1) does not include where under a regulated credit agreement repayable in instalments a customer requests a change in the regular payment date and as a result there is no charge or additional interest in connection with the change.*

#### **other relevant publications and good industry practice**

The ILG (and following that the FCA's Consumer Credit Handbook (“CONC”)) set out the regulatory framework that regulated/authorised consumer credit providers have to adhere to. But in making my decision, I am also required to take into account any other guidance, standards, relevant codes of practice, and, where appropriate, what I consider to have been good industry practice at the time of the events in dispute.

the OFT's Payday Lending Compliance Review Final Report

The OFT published its "Payday Lending Compliance Review Final Report" in March 2013. The purpose of the review was "...to establish the extent to which payday lenders [were] complying with the Consumer Credit Act, other legislation and [were] meeting the standards set out in the ILG."

The review sought to highlight examples of what the OFT considered poor practice and evidence of non-compliance with the relevant law and failure to meet the minimum standards expected. The analysis was also put together to help the FCA's work on payday lending ahead of it assuming responsibility for regulating the sector from April 2014.

The report began with an overview section setting out the OFT's concerns. Page two of the report says that the OFT:

*...is particularly concerned by the evidence of irresponsible lending; too many people are given loans they cannot afford, and when they can't repay are encouraged to extend them, exacerbating their financial difficulties This is causing real misery and hardship for a significant number of payday users*

Page three of the report says:

*Our evidence paints a concerning picture of the payday lending market. It appears that irresponsible lending is not a problem confined to a few rogue traders, but it has its roots in the way competition works in this market. The evidence suggests that many consumers are in a weak bargaining position, and that firms compete on speed of approval rather than price*

It then goes on to say:

*Additionally, firms describe and market their product to consumers as one-off short term loans (costing on average £25 per £100 borrowed for 30 days), but in practice around half the revenue comes from loans which last longer and cost a lot more because they are rolled over or refinanced. Lenders do not need to compete hard for this source of revenue because by this time they have a captive market. This, and the misuse of continuous payment authorities to reclaim monies owed, may distort incentives for lenders, encouraging them to make loans to people who cannot afford to repay them first time.*

the Consumer Finance Association Lending Code for Small Cash Advances

The principal trade association representing the interests of short-term lending businesses operating in the United Kingdom is the Consumer Finance Association ("CFA"). The CFA published a good practice charter entitled 'Lending Code for Small Cash Advances' in July 2012. I understand that Moneybox is a member of the CFA and revised and updated its own lending code<sup>2</sup> with regard to the CFA's Good Practice Customer Charter.

Section 1 of the code sets out its purpose. Section 1b says:

*Members of the Consumer Finance Association offer small cash loans predominantly from high street outlets or online*

Section 1c says:

*This type of loan allows customers to borrow a relatively small amount of money, (usually between £50 and £1000) which they repay over a short period (typically one or two months). The loan is not designed for longer term borrowing, but to improve short term personal cash flow*

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<sup>2</sup> <https://www.247moneybox.com/news/30012013-247moneybox.com-launches-responsible-lending-video.html>

And Section 1d says:

*The purpose of this Code is to ensure compliance by members with the minimum standards set by the Association, as specified in the Code, and accordingly protects and benefit consumers*

Section 3 sets out the general obligations expected of lenders. Amongst other things Section 3 says members shall:

*b) trade honestly, responsibly and treat customers with respect.*

*l) ensure fairness in all dealings with customers including, but not limited to, their dealings with customers both before and after the making of the agreement and the manner in which those agreements are enforced.*

Section 4 of the code sets out a lender's specific lending obligations. Part (a) of this section is concerned with advertising and marketing and amongst other things, it says:

*iii) members shall ensure all advertising is truthful and not misleading and raise awareness to the short term nature of the loan.*

Part (d) of section 4 is concerned with pre-contractual information. And it, amongst other things, says:

*v) members shall provide explanations to the customer, to enable them to assess whether the proposed credit agreement is appropriate to their circumstances by explaining...:*

- *that small cash loans are intended to improve short term cash flow, and therefore not suitable for longer term borrowing.*