

complaint

Mr W has complained about a loan that Everyday Lending Limited (trading as “Everyday Loans”) provided to him in June 2018. He says that the loan was unaffordable.

background

Mr W was provided with a loan for £2,000.00 in June 2018. The loan had an APR of 249.5% and required 24 monthly repayments of £249.24. The cost of the credit was £3,981.76, which meant that total amount to be repaid was £5,981.76.

When it investigated Mr W’s complaint, Everyday Loans didn’t think it’d done anything wrong when lending to Mr W. Mr W was dissatisfied with this and referred his complaint to our service. One of our investigators then looked at Mr W’s complaint. She thought that Everyday Loans had unfairly provided Mr W with his loan and upheld the complaint.

Everyday Loans didn’t accept our investigator’s assessment. As Everyday Loans disagreed with our investigator the case was passed to an ombudsman.

the regulatory and legal framework

Everyday Loans was authorised and regulated by the Financial Conduct Authority (“FCA”) when it lent to Mr W. The relevant rules and regulations FCA regulated firms are required to follow are set out in the FCA’s Handbook of rules and guidance.

- *the FCA Principles for Business (“PRIN”)*

The FCA’s Principles for Business set out the overarching requirements 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 Consumer Credit sourcebook (“CONC”)*

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

It’s clear there is a high degree of alignment between the Office of Fair Trading’s (“OFT”) Irresponsible Lending Guidance (“ILG”) first published in March 2010 and the rules set out in CONC 5 and CONC 6. As is evident from the following extracts, the FCA’s CONC rules specifically note and refer back to sections of the OFT’s *Irresponsible Lending Guidance* on many occasions.

Section 5.2.1R(2) of CONC sets out what a lender needs to do before agreeing to give a consumer a loan of this type. It says a firm must consider:

- (a) the potential for the commitments under the regulated credit agreement to adversely impact the customer's financial situation, taking into account the information of which the firm is aware at the time the regulated credit agreement is to be made; and*

[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) says:

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

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

CONC 5.3 contains further guidance on what a lender should bear in mind when thinking about affordability.

CONC 5.3.1G(1) says:

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

[Note: paragraph 4.2 of ILG]

CONC 5.3.1G(2) then says:

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

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

CONC 5.3.1G(6) goes on to say:

For the purposes of CONC "sustainable" means the repayments under the regulated credit agreement can be made by the customer:

- (a) without undue difficulties, in particular:*

- (i) the customer should be able to make repayments on time, while meeting other reasonable commitments; and*
- (ii) without having to borrow to meet the repayments;*

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

(c) out of income and savings without having to realise security or assets; and

“unsustainable” has the opposite meaning.

[Note: paragraph 4.3 and 4.4 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 states:

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

And CONC 5.3.7R says that:

A firm must not accept an application for credit under a regulated credit agreement where the firm knows or ought reasonably to suspect that the customer has not been truthful in completing the application in relation to information supplied by the customer relevant to the creditworthiness assessment or the assessment required by CONC 5.2.2R (1).

[Note: paragraph 4.31 of ILG]

Section 140 of the Consumer Credit Act 1974

Mr W's loan was provided after Section 140 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

- (1) 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.*

I've also taken account of the Consumer Credit Act (including the provisions I haven't set out above), and other relevant legislation, including the law relating to negligence, misrepresentation and contract; as well as the law relating to causation and remoteness.

other relevant publications and good industry practice

CONC set out the regulatory framework that authorised consumer credit providers have to adhere to. But they represent a minimum standard for firms. And as I've explained, I'm 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.

the FCA's Portfolio Strategy Letter to firms providing high cost lending products

On 6 March 2019, The FCA wrote a 'Dear CEO' letter to the Chief Executive Officer of all firms allocated to the 'High Cost Lenders' portfolio. The letter set out the FCA's view of the key risks that High Cost Lenders pose to consumers and the markets they operate in. On page two of this letter, the FCA sets out its view of the key causes of harm. It says:

"To assess how firms in the High Cost Lenders portfolio could cause harm, we analysed their strategies and business models. We considered a wide range of information and data, including firms' regulatory histories, the number and nature of complaints, and findings from the HCCR. We also carried out diagnostic work on guarantor lenders, which involved issuing a data request to firms in October 2018.

Following our analysis, we see two key ways that consumers may be harmed across the High Cost Lenders portfolio:

- *a high volume of relending, which may be symptomatic of unsustainable lending patterns*
- *firms' affordability checks may be insufficient, leading to loans that customers may not be able to afford".*

On page three of the letter, in the section entitled '**Complaints**' it says:

"We expect firms to fulfil all relevant obligations, including analysing the root causes of complaints and taking into account the Financial Ombudsman Service's relevant decisions. We gave further detail about what we expect from firms' complaint-handling procedures in the Dear CEO letter we issued to HCSTC firms in October 2018. This is equally relevant to all firms in the portfolio".

the FCA's Dear CEO letter on affordability of High-Cost Short-Term Credit ("HCSTC") loans

On 15 October 2018, the FCA wrote a 'Dear CEO' letter to the Chief Executive Officer of all HCSTC providers. The letter was about the issues surrounding the increase in complaints about unaffordable lending.

The third paragraph of this letter said:

"We note that the Ombudsman has recently published four examples of determinations of individual complaints about payday loans to illustrate its approach to the issues raised in those complaints (see: <https://www.financial-ombudsman.org.uk/publications/technical.htm>). If relevant, firms should take these examples of determinations into account as part of establishing their own effective procedures for complaints handling (see DISP 1.3.1R)".

Paragraph eight of the letter went on to say:

“We would highlight in particular the risks in relation to repeat borrowing. These were flagged in our price cap proposals in CP14/10, in July 2014, in which we said that we were concerned that repeat borrowing could indicate a pattern of dependency on HCSTC that is harmful to the borrower. We noted that rigorous affordability assessments were key to avoiding harm in this area, and firms should ensure they are making responsible assessments of the sustainability of borrowing”.

my findings

I have read and considered all the evidence and arguments available to me from the outset, in order to provisionally decide what is, in my opinion, fair and reasonable in all the circumstances of the case.

Taking into account the relevant rules, guidance and good industry practice, I think the overarching questions I need to consider in deciding what’s fair and reasonable in the circumstances of this complaint are:

- Did Everyday Loans, each time it lent, complete reasonable and proportionate checks to satisfy itself that Mr W would be able to repay in a sustainable way?
 - If not, would those checks have shown that Mr W would’ve been able to do so?
- Did Everyday Loans act unfairly or unreasonably in some other way?

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

Did Everyday Loans, each time it lent complete reasonable and proportionate checks to satisfy itself that Mr W would be able to repay in a sustainable way?

Regulations in place at the time Everyday Loans was lending to Mr W required it to carry out a reasonable assessment of whether Mr W could afford to repay his loans in a sustainable manner. This is sometimes referred to as an “affordability assessment” or “affordability check”.

The affordability checks should’ve been “borrower-focused” – so Everyday Loans had to think about whether repaying the loan sustainably would cause difficulties or adverse consequences *for Mr W*. In other words, it wasn’t enough for Everyday Loans to think only about the likelihood that it would get its money back without considering the impact of repayment on Mr W himself.

Checks also had to be “proportionate” to the specific circumstances of the loan application. In general, what constitutes a proportionate affordability check will be dependent upon a number of factors including – but not limited to – the particular circumstances of the borrower (e.g. their financial history, current situation and outlook, and any indications of vulnerability or financial difficulty) and the amount / type / cost of credit they are seeking. Even for the same customer, a proportionate check will more likely than not look different for different loan applications.

In light of this, I think that a reasonable and proportionate check ought generally to have been *more* thorough:

- the *lower* a customer's income (reflecting that it could be more difficult to make any loan repayments to a given loan amount from a lower level of income);
- the *higher* the amount due to be repaid (reflecting that it could be more difficult to meet a higher repayment from a particular level of income);
- the *longer* the term of the loan (reflecting the fact that the total cost of the credit is likely to be greater and the customer is required to make payments for an extended period); and
- the *greater* the number and frequency of loans, and the longer the period of time during which a customer has been given loans (reflecting the risk that repeated refinancing may signal that the borrowing had become, or was becoming, unsustainable).

There may also be other factors which could influence how detailed a proportionate check should be for a given loan application – including (but not limited to) any indications of borrower vulnerability, any foreseeable changes in future circumstances, or any substantial time gaps between loans. I've thought about all the relevant factors in this case.

It's my understanding that Mr W was asked to provide details of his monthly income and monthly expenditure. I've also seen that Everyday Loans carried out a credit check. The information provided also indicates that Everyday Loans was told Mr W was paying £475 a month in rent. And it assumed that Mr W would use 35% of his income to pay for living expenses. The income and expenditure assessment provided suggested Mr W would have a remaining monthly disposable income of £9.89 after the payments for this loan were made.

I've carefully thought about the checks Everyday Loans says it carried out.

Bearing in mind its response to our investigator, I think that it'd be helpful for me to start by explaining that Everyday Loans was required to establish whether Mr W could sustainably make his loan repayments – not just whether the loan payments were affordable on a strict pounds and pence calculation. Of course the loan payments being affordable on this basis might be an indication that a consumer could sustainably make the repayments. But it doesn't automatically follow that this is the case.

This is because CONC defines sustainable as being without undue difficulties and in particular the customer should be able to make repayments on time, while meeting other reasonable commitments; as well as without having to borrow to meet the repayments. And it follows that if a lender realises, or it ought fairly and reasonably to realise, that a borrower won't be able to make their repayments sustainably if they're unlikely to be able to make their repayments without borrowing further.

And I don't think that Everyday Loans could fairly and reasonably have concluded that Mr W would be able to sustainably make the repayments to this loan, when its own assessment concluded that he'd have less than £10 left over once the payments to this loan were factored in.

I say this because Everyday Loans' expenditure assessment was not thorough enough to have captured all of his committed expenditure. Indeed Everyday Loans only assumed a percentage off Mr W's income was going towards his existing living expenses. Given that Everyday Loans' contact notes suggest that it had copies of Mr W's bank statements, I'm unsure as to why it needed to estimate Mr W's living expenses when it had clear information on this. I also find it unreasonable for Everyday Loans to have proceeded on this basis when the purpose of this loan was recorded as a deposit for a house purchase. And, in my view, Everyday Loans simply asking whether Mr W's mortgage payments would be cheaper than his self-declared rent didn't go far enough.

So to sum up, I'm concerned that Everyday Loans' decision to lend to Mr W was based on a conclusion that Mr W would, at best, just about be able to make the repayment to this loan on a pounds and pence basis. And even then this was based on an estimate of his living expenses, which was unlikely to have captured all of Mr W's living costs and any reasonable assessment of the information to hand ought to have alerted it to the fact that it was overoptimistic. I think that Everyday Loans' decision to proceed with Mr W's application on this basis meant that it didn't complete reasonable or proportionate checks for Mr W's loan.

Would proportionate checks on these loans have indicated to Everyday Loans that Mr W would have been unable to repay his loans in a sustainable manner?

As proportionate checks weren't carried out for these loans, I can't say for sure what they would've shown. So I need to decide whether it is more likely than not that a proportionate check would have told Everyday Loans that it was unfair to give these loans to Mr W, given his financial circumstances at the time. Mr W has provided us with evidence of his financial circumstances at the time he applied for these loans.

Of course, I accept different checks might show different things. And just because something shows up in the information Mr W has provided, it doesn't mean it would've shown up in any checks Everyday Loans might've carried out. But in the absence of anything else from Everyday Loans showing what steps it took to verify the information provided (and how it interpreted it), I think it's fair and reasonable to place considerable weight on it as an indication of what Mr W's financial circumstances were likely to have been at the time.

I've carefully looked through everything Mr W's provided and I've also thought about everything both parties have said. Having done so, I don't think Mr W had the capacity to take on these loans.

The information I've seen indicates that Mr W had significant debts with a number of existing creditors. He had a payday loan that he was in an arrangement to pay for. Indeed as our investigator pointed out Mr W's arrangement would have seen him take a further three years to repay a loan that was supposed to be repaid in a month. Mr W was also in arrears on his water, electricity and council tax bills. So even from a creditworthiness point of view, I struggle to see how Everyday Loans would have considered that there was a reasonable prospect of it receiving its loan repayments when Mr W was already unable to make payments to priority creditors.

Having carefully considered everything, I think there was no reasonable prospect of Mr W being able to make his payments without undue difficulty or borrowing further. And as I think that proportionate and reasonable checks would have shown Everyday Loans all of this, it follows that I think proportionate and reasonable checks would've alerted it to the fact that Mr W wouldn't have been able to sustainably make the repayments to these loans.

Did Everyday Loans act unfairly or unreasonably in some other way?

I've carefully thought about everything provided. Having done so, I've not seen anything here that leads me to conclude that Everyday Loans acted unfairly or unreasonably towards Mr W in some other way.

So I find that Everyday Loans didn't act unfairly or unreasonably towards Mr W in some other way.

Overall and having carefully thought about the two overarching questions, set out on page six of this decision, I think that Everyday Loans unfairly and unreasonably provided Mr W with this loan. As Mr W is being expected to pay interest and charges on a loan he shouldn't have been given, I think that he lost out because of what Everyday Loans did wrong.

So I think that Everyday Loans now needs to put things right.

fair compensation – what Everyday Loans needs to do to put things right for Mr W.

Having carefully considered everything, I think it would be fair and reasonable in all the circumstances of Mr W's complaint for Everyday Loans to remove all the interest and charges added to Mr W's loan from the outset. In other words, Everyday Loans needs to make sure that Mr W pays back no more than the £2000 he was provided with. I'd also remind Everyday Loans of its obligations to treat Mr W positively and sympathetically should he be experiencing financial difficulty.

my final decision

For the reasons given above, I'm upholding Mr W's complaint. Everyday Lending Limited (trading as "Everyday Loans") should put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 17 October 2019.

Jeshen Narayanan
ombudsman