

## **complaint**

Mr W has complained about short-term loans granted to him by Gain Credit LLC trading as Lending Stream.

Mr W says that Lending Stream didn't carry out proper affordability checks and so lent to him when he couldn't afford to repay. He says that his credit reports would have shown other debt repayments and the problems he had managing these.

## **background**

I attach my provisional decision of 9 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 Mr W's complaint. I invited both parties to provide any further comments they may have had by 9 December 2018 before I reached a final decision.

Mr W agreed with my provisional decision. Lending Stream also agrees with it and I understand has agreed to refund Mr W in line with the redress I proposed.

## **my findings**

I've reconsidered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. As neither party has provided any further comments for consideration, I see no reason to depart from the conclusions I reached in my provisional decision. It follows that I partially uphold Mr W's complaint.

## **what Lending Stream should do to put things right**

I've concluded that Lending Stream was irresponsible to lend to Mr W between March 2014 and May 2016. In order to put Mr W back in the position he would have been in, had it not agreed to this number of loans over this length of time, Lending Stream should:

- refund all interest and charges for Mr W's 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;
- and remove all information about these loans (12 to 28) from Mr W's credit file\*\*.

\*HM Revenue & Customs requires Lending Stream to take off tax from this interest. Lending Stream must give Mr W a certificate showing how much tax it's taken off if he asks for one.

\*\*Putting Mr W back into the position he would have been in had he not been impacted by repeat lending requires the record of these loans to be completely removed from his credit file.

**my final decision**

For the reasons set out above and in my provisional decision, I'm partially upholding Mr W's complaint. Gain Credit LLC (trading as Lending Stream) should put things right as I've 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 January 2019.

Michelle Boundy  
**ombudsman**

## **COPY OF PROVISIONAL DECISION**

### **complaint**

Mr W has complained about short-term loans granted to him by Gain Credit LLC trading as Lending Stream ("Lending Stream" or "the lender").

### **background**

Lending Stream agreed 28 loans for Mr W from August 2011 to May 2016, a period of almost five years. The lending was generally continuous with a few gaps, the longest of which was about seven months. The amounts agreed ranged from £50 to £580, with an average of £206. Each loan was to be repaid over six months and some of the loan terms overlapped. I've included a table in an appendix to this decision ([Appendix 1](#)) which sets out some of the loan information Lending Stream has provided.

Mr W says that Lending Stream didn't carry out proper affordability checks and so lent to him when he couldn't afford to repay. He says that his credit reports would have shown other debt repayments and the problems he had managing these.

Lending Stream disagrees that it was irresponsible to lend to Mr W. It says its loans were affordable for him based on the information he provided, and so he was accountable if his underlying financial situation proved otherwise. Nevertheless, Lending Stream offered to refund the interest and charges Mr W paid for three of his loans citing a procedural error in approving them. It offered to refund the same for a further three loans *which "might have made the customer's circumstances difficult"*. Mr W declined this offer.

Our adjudicator partially upheld Mr W's complaint and asked Lending Stream to refund the interest and charges on 11 of Mr W's loans. Lending Stream didn't agree with this recommendation and so the case has come to 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 also allow both parties to comment further 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.

Lending Stream agreed 13 of Mr W's loans in the period before the 31<sup>st</sup> of March 2014. During this time it needed a standard licence from the Office of Fair Trading ("OFT"), in order to carry out consumer credit activities. The remaining 15 loans were granted when the Financial Conduct Authority (FCA) had taken over the regulation of consumer credit.

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 Lending Stream was subject to over the period it lent to Mr W 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 regulators, and industry codes of best practice.

Under this framework, in order to hold a consumer credit licence Lending Stream was obliged to lend responsibly. As clarified by the OFT, this meant that Lending Stream needed to make a reasonable assessment as to whether or not a borrower could afford to meet its loan repayments in a sustainable manner. Neither the law nor the OFT 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.

In section 3.13 of its *Irresponsible Lending Guidance*, the OFT said that short-term loan products are “*unsuitable for supporting sustained borrowing over longer periods, and would be expensive as a means of longer term borrowing*”. It also points to repeated refinancing of such loans as an example of irresponsible lending. This 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 of short-term loans (and the longer the consumer's indebtedness continues – including by the provision of a number of consecutive loans), the greater the potential risk to the consumer of the credit being unsustainable.

The FCA's rules, set out in its Consumer Credit Source Book (CONC), echo and refer back to sections of the OFT's *Irresponsible Lending Guidance*. The rules say 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*.” It also clearly states that lenders should not refinance short-term loans where it would be unsustainable for the consumer or otherwise harmful for them.

*what should have happened when Mr W applied for credit and did Lending Stream 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 Mr W's case, I have considered the following questions:

- did Lending Stream complete reasonable and proportionate checks when assessing each of Mr W's loan applications to satisfy itself that he would be able to repay the loan in a sustainable way?
  - if not, would those checks have shown that Mr W 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 Mr W's indebtedness in a way that was unsustainable or otherwise harmful?
- did Lending Stream act unfairly or unreasonably in some other way?

Having done so, I've concluded that Lending Stream was irresponsible to lend to Mr W from his twelfth loan onwards. I plan to uphold his complaint and ask Lending Stream to refund the interest and charges he paid for this and all his subsequent loans. I appreciate that this will be disappointing for Lending Stream and I'll explain in some detail why I've reached this conclusion.

*did Lending Stream carry out reasonable and proportionate checks when assessing Mr W's loan applications to satisfy itself that he would be able to repay the loan in a sustainable way?*

the information Lending Stream obtained

Mr W first applied for credit with Lending Stream in August 2011. Lending Stream asked him for his income and expenditure, and recorded this for each of his loan applications. The lender said it also considered a minimum level of spend across a number of variables as part of its underwriting process and checked Mr W's credit rating with a third-party Credit Reference Agency (CRA) each time he applied for a loan. It says it agreed to lend to Mr W because, based on his high level of disposable income and high credit score, he met its affordability criteria.

Lending Stream recorded a credit score for Mr W on each occasion, so I am satisfied it carried out this type of check, though the score itself in isolation doesn't tell me anything about Mr W's finances which gave rise to the scoring or how the scoring was to be used. The lender hasn't provided any of the results of these third-party checks. So I don't know what it would have seen of Mr W's financial arrangements. Mr W has provided a recent copy of his credit file which shows some of his financial commitments over the time in question. It doesn't show any adverse information, for example defaults or County Court judgements, which I think might have concerned Lending Stream over the years, though I appreciate that Mr W's current credit report will probably not show everything which might have appeared at an earlier point.

Lending Stream said

*"When our customers fill in the loan application form, we specifically ask them to check the box confirming that they have written down all their expenses including the payments towards other loans while filling the information. Mr. [W] accepted by signing the agreement electronically confirming that the information provided by him was true and to the best of his knowledge, we considered the information provided in the application and relied on that."*

*As specified by Mr. [W] in his decision, both the OFT and FCA clearly state that a lender is able to rely on the information that an applicant provides about his circumstances when applying for a loan."*

Lending Stream also said that where *"customers provide falsified information to obtain credit, we feel [they] should be held accountable for deliberate misrepresentation of facts."* And that it never asks for customer's bank statements because of data protection reasons *"as it contains the sensitive information which a customer might not want to reveal to any lender. Customers prefer to borrow from payday lenders like us, as we provide instant money to them."*

On this point of applicant truthfulness – the OFT guidance Section 1.30 states that

*...where creditors' assessments of affordability rely, in part, on information provided by borrowers, it is important that such information is accurate and up to date and the borrower should advise the creditor in a timely manner of any relevant change of circumstances that is likely to significantly impact on any such assessment. Creditors would not be considered culpable by the OFT for placing reliance on information provided by borrowers, at least in part to inform such assessments, which was subsequently found to have been substantively inaccurate or untrue at the time that it was provided, **where the creditor had no reason to suspect that this was the case.** (my emphasis)*

Section 3.32 states

*We do not consider that the creditor could be held culpable under circumstances in which it made a reasonable request for information from the borrower, in order to inform its assessment of affordability, and the information provided by the borrower was substantively incorrect/untrue **and the creditor (acting reasonably) was not aware of this.** (my emphasis)*

And the guidance gives the following examples of specific irresponsible lending practices:

*(4.29) Failing 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.*

*(4.31) Accepting 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.*

The FCA's regulations set out in CONC state that

*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 - 5.3.1G (4(b));*

And 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... [Note: paragraph 4.31 of ILG] - 5.3.7R."*

This examination of the relevant regulation shows that it is not enough to rely solely on information supplied by an applicant where a lender ought reasonably to have suspected that the information was not correct. As I will go onto explain, there comes a point in the long lending relationship between Lending Stream and Mr W where, in my view, Mr W's repeated requests for additional short-term loans ought reasonably to have caused Lending Stream to have questioned the information it received from Mr W. I don't think it was fair to have continued to approve Mr W's repeated loan applications without further assessment.

the information Lending Stream should have sought

I've started by looking at the lending history between Lending Stream and Mr W. As set out above, the regulations require lenders to assess the risk to consumers in a way that is appropriate to the circumstances. On investigation, it seems Lending Stream didn't vary its checks for Mr W over the five years he borrowed from it. Logically, with that approach, Lending Stream's checks might be proportionate some of the time but it's unlikely that these checks would be proportionate each and every time Mr W applied for credit.

The first three times Mr W borrowed from Lending Stream he declared his monthly income as £2,000 with a maximum of £650 in expenses each month. Given the amount he needed to pay back each month compared with his apparent disposable income I think the checks Lending Stream carried out for these loans (asking for income, expenditure and checking Mr W's credit file) were proportionate.

Mr W hadn't at this point built up a pattern of borrowing from Lending Stream and potentially his need for its loans could stem from one-off or emergency shortfalls in his disposable income. I think it was reasonable here for Lending Stream to rely on what Mr W told it about his finances as it didn't have anything else to contradict this information or to lead it to suspect that it might not have the complete picture of his circumstances.

When Mr W paid off these loans, he didn't apply for another loan until September 2012, over seven months later. When he repaid his fourth loan, there was another gap of about five months before he applied for credit again. The lending relationship between Lending Stream and Mr W was still in its early stages here, so I think it was reasonable for the lender to have seen these gaps as an indication that Mr W's finances had moved on from whatever situation had required his previous loans. And so I think the checks it carried out for Mr W's fourth and fifth loans were proportionate.

Mr W's sixth loan was almost double the amount of his fifth, and he borrowed this while his fifth was outstanding. Lending Stream says it "*believes lending multiple loans should not be considered as irresponsible lending or unaffordable if [a] customer's income is substantially higher than [a] customer's expenditure.*" I agree with Lending Stream in that granting overlapping loans with combined repayments is not necessarily irresponsible. But, apart from being arguably more difficult to manage for the consumer, the fact that someone would ask for further credit having just taken out a loan should raise the question as to the intended purpose of the loans. And, depending on how long the lending relationship was at that point, this may be of concern to a responsible lender.

It is debateable for me whether or not Lending Stream ought to have done more here to check that Mr W could afford his repayments on both loans in a sustainable manner. But taking into account the gaps in lending so far, I have come to the conclusion that, overall, its checks were proportionate and therefore it wasn't irresponsible of it to lend in this instance.

Mr W's seventh loan was for £415 – the largest amount he'd asked to borrow so far. And when Lending Stream agreed this loan it was aware that he now had two other loans outstanding with it. I think the lender should have been concerned about Mr W's ability to repay this sustainably. It would therefore have been reasonable to have asked him not only about his regular expenditure but whether or not he needed to pay anything else out of the money he would have available to meet all his loan repayments, such as other short-term loans. I can't see that it looked for this information and so I don't think the checks Lending Stream did here were enough in the circumstances, despite the information Mr W provided about his level of disposable income.

It seems Mr W repaid his eighth loan on the same day as he took it out so I won't look further into this. He applied again later that same month. This was now the fifth time in less than four months that Mr W had asked for credit. Bearing in mind that Lending Stream'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 Mr W was using Lending Stream's loans as a way to meet his usual expenses because of ongoing shortfalls in his income then repaying its loans out of that same pot of money was not going to be sustainable for him. In other words it's likely he would have difficulty meeting this repayment without having to borrow further or go without. So I think Lending Stream should have done more, for example by independently verifying information about Mr W's circumstances to satisfy itself that Mr W's income was at the level he'd declared and that he 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, not just by asking for bank statements (as noted earlier, Lending Stream said it was reluctant to ask for this information specifically). It could have brought these concerns to Mr W and asked further questions of him. Or asked to see payslips, rent and bill records etc. And, as before, I don't think it did enough here to reasonably assess the risk to Mr W.

Lending Stream continued to agree loans for Mr W throughout 2013 to 2016, some of which were overlapping. It didn't do any more when assessing the risk to Mr W in agreeing these loans than it had done when he'd applied for the preceding ones. Given the, generally, frequent and continuous pattern of the lending, I think Lending Stream should have continued to look further than it did into Mr W's circumstances when he continued to apply for loans.

I note that there were other gaps in lending, for example a period of about five months in late 2013 (between loans 10 and 11) and a gap of about three months in late 2015 (between loans 24 and 25). Unlike the earlier gaps I mentioned, I don't think it would have been reasonable for Lending Stream to have interpreted these gaps as indicative of a sustained change for the best in Mr W's financial circumstances. In these instances there was an established pattern of borrowing which I think, in this case, means the gaps were not long enough to establish a sustainable independence from the credit. In my view, the lender ought to have been concerned about that, irrespective of this length of pause in Mr W's loan applications.

In summary, I don't think the checks Lending Stream carried out were proportionate to the circumstances of the lending from loan 7 onwards. So I've gone on to consider the consequences of this for Mr W.

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

Mr W provided this Service with his bank statements. I can see that what he told Lending Stream about his income was broadly correct, but his expenses were higher and he was borrowing from another short-term lender. I think Lending Stream would have learnt this had it carried out further checks from loan 7. However, because the loans Lending Stream agreed for Mr W were to be repaid over six month terms, they would have appeared affordable for him throughout 2013 and into early 2014. And so while Lending Stream ought to have done more to assess Mr W's situation, I can't say it was irresponsible it to have agreed to loans 5 to 11. In saying this, I also note that loans 8, 9, and 10 were for decreasing amounts (£165, £100, and £50 respectively), all of which were considerably less than loan 7.

Mr W took out car finance in late 2013 with monthly repayments of over £300. And he continued to borrow from other short-term lenders. This left him with less money to meet his Lending Stream repayments, particularly when he took out a Lending Stream loan when he had other payday loans outstanding. Had Lending Stream looked further into Mr W's circumstances in March 2014 when he applied for his twelfth loan, I think it would have understood that he would struggle to meet his repayments for any further credit. And, as a responsible lender, I don't think it would have agreed to lend to him.

I could continue to look into the affordability of Mr W's remaining 16 loans but, as I will go on to explain, I don't think Lending Stream should have continued to lend to him beyond this point.

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

In considering this question, I first looked at the offer that Lending Stream made to Mr W. It offered to refund the interest and charges he paid for loans 16, 21 and 28 because it said these *"might have made the customer's circumstances difficult"*. Lending Stream hasn't explained why it is at these points, with hindsight, that its loans potentially caused problems for Mr W. I agree that Lending Stream is correct to offer a refund to Mr W in respect of these loans. But I think that it should have been concerned about the impact of its credit much earlier in its lending relationship with Mr W.

Although I have explained that there were indicators of risks and dependency at an earlier stage, I think the point at which Lending Stream should have concluded that it was irresponsible to keep lending to Mr W should have come when Mr W asked for his twelfth loan in March 2014.

At this point he'd been borrowing from Lending Stream for almost year, albeit with a gap of a few months, and had an earlier history of borrowing. Whilst I've concluded that proportionate checks would likely have shown this loan to be unaffordable, Lending Stream should also have been concerned that Mr W'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 Lending Stream's own website states that:



*“There are several reasons why applying for repeat pay day loans, or other short-term loans, might not be the right option for you. Taking out regular short term loans is an expensive way to borrow money, and isn’t appropriate if you’re already having financial problems.”*

It also cautions applicants to *“...carefully consider whether a loan is right for your individual financial situation. Borrowing of this type is an expensive form of credit that may be appropriate for short term financial needs but which is not appropriate for longer term borrowing or if you are in financial difficulty.”*

Mr W says that when he borrowed from Lending Stream he had to borrow again to have enough money for living costs. He explained that he had two small children at the time and had to borrow from other payday lenders to repay these loans and meet other costs. He says Lending Stream *“... should have realised from the number of times I rolled loans over to the next month or borrowed again from other lenders that my loans and my debt problems were getting worse and it was not responsible to continue to lend to me.”*

Looking at the credit that Lending Stream offered to Mr W between August 2011 and June 2016, I can see that the amounts lent ranged from £50 to £580, with an average of over £200. For access to this average amount he paid almost £3,500 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 Mr W's indebtedness to Lending Stream by allowing him to take expensive credit – which the rules and guidance and Lending Stream'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 Mr W's ability to access mainstream credit because the presence of these short-term loans on his credit file is likely to be viewed negatively by other lenders.

#### **in summary**

To sum up, I don't think Lending Stream gathered enough information to reasonably assess Mr W's ability to make his loan repayments in a sustainable way from loan 7. Had it done so, it would have discovered that he was unable to do so when he applied for loan 12 in March 2014. And beyond that point, Lending Stream ought to have concluded that it was irresponsible to keep lending to Mr W because it should have seen that Mr W 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, Lending Stream wouldn't have agreed to any further credit for Mr W, given that this would increase his indebtedness and potentially impact negatively on his creditworthiness. Therefore, I think Lending Stream was irresponsible to have agreed loan 12 and all further loans for him.

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<sup>1</sup> Based on Lending Stream's account statements for Mr W.

### **what Lending Stream should do to put things right**

As I've concluded, Lending Stream was irresponsible to lend to Mr W between March 2014 and May 2016. In order to put Mr W back in the position he would have been in, had it not agreed to this number of loans over this length of time, Lending Stream should:

- refund all interest and charges for Mr W's 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;
- and remove all information about loans 12 to 28 from Mr W's credit file\*\*.

\*HM Revenue & Customs requires Lending Stream to take off tax from this interest. Lending Stream must give Mr W a certificate showing how much tax it's taken off if he asks for one.

\*\*Putting Mr W back into the position he would have been in had he not been impacted by repeat lending requires the record of these loans to be completely removed from his credit file.

### **my provisional decision**

I intend to uphold Mr W's complaint for the reasons given above and require Gain Credit LLC (trading as Lending Stream) 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.

**Appendix 1 Mr W's lending history (offers highlighted)**

\* Lending Stream said that it made a procedural error when it agreed these three loans and so offered to refund all interest and charges paid.

## **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 the OFT 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 140 of the Consumer Credit Act 1974**

All of Mr W's loans were given to him 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**

- (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, 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 or 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:

*fail[s] 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 (from 1 April 2014)**

Mr W’s last 16 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 Lending Stream. 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 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. And CONC 5.3.1G(1) says:

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

**[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]**

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:

- (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 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]**

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

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, by which time Lending stream had already lent to Mr W 11 times.

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 Lending Stream is a CFA member.

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*

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.*

-END-