Financial Ombudsman Service

complaint

Mr T has complained about five personal loans he took out with Everyday Lending Limited (trading as “Everyday Loans”). He says that Everyday Loans irresponsibly provided the loans to him.

background

This complaint is about five loans Mr T was provided with between August 2014 and January 2017. His borrowing history is as follows:

Loan	Date taken	Amount	Received	Consolidation	Term	Repayment
1	August 2014	£2270	£2000*	None	24 months	£207.93
2	February 2015	£3627.74	£1000*	Loan 1 (£2357.74)	24 months	£309.82
3	August 2015	£6000	£2191.61	Loan 2 (£3808.39)	24 months	£430.76
4	April 2016	£8696.14	£3500	Loan 3 (£5196.14)	36 months	£471.70
5	January 2017	£2778.24	£2778.24	None	24 months	£115.76

*an amount of £270 went towards paying for ancillary accident insurance

When it investigated Mr T’s complaint, Everyday Loans didn’t think it had done anything wrong or had acted unfairly when providing Mr T with any of his loans. Mr T was dissatisfied with this and referred his complaint to our service.

One of our adjudicators then looked at Mr T’s complaint. He thought that Everyday Loans unfairly provided loans two to five to Mr T. So he partially upheld Mr T’s complaint.

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

the regulatory and legal framework

Everyday Loans was authorised and regulated by the Financial Conduct Authority (“FCA”) throughout the period it lent to Mr T. 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]*

CONC 5A.3 contains the rules regarding the total amount of charges a firm is permitted to impose on a HCSTC agreement.

CONC5A.3.2R says:

Cost caps: imposition of charges etc.: Total cost cap

A firm must not:

(1) impose one or more charges, on a borrower under an agreement for high-cost short-term credit, that, alone or in combination with any other charge under the agreement or a connected agreement, exceed or are capable of exceeding the amount of credit provided under the agreement;
(2) arrange for or instruct another person to take the step described in (1).

<u>*Section 140 of the Consumer Credit Act 1974*</u>

All of Mr T's loans were 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".

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

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: <u>https://www.financial-ombudsman.org.uk/publications/technical.htm</u>). 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 T would be able to repay in a sustainable way?
    - If not, would those checks have shown that Mr T 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 T 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 T would be able to repay in a sustainable way?

Regulations in place at the time Everyday Loans was lending to Mr T required it to carry out a reasonable assessment of whether Mr T 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 T*. 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 T 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.

- loan one

It's my understanding that for loan one Mr T 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 T was living with his parents.

The income and expenditure information provided suggested Mr T had a monthly disposable income of £700. Everyday Loans says that its credit checks didn't show any payday loans. But it has also said that its system notes indicate that a discussion took place about Mr T's recent reliance on payday loans.

Everyday Loans also says that it requested copies of Mr T's bank statements – although it hasn't provided this in its file. Equally, I'm also unsure as to why it needed to use an estimate of Mr T's living expenses if it had his bank statements. So it's unclear what evidence Everyday Loans asked for and received and what weight it placed on the information gathered when considering Mr T's application.

I do think that there is an argument for querying why Mr T needed to borrow £2000 – to clear payday loans due to two short-term lenders - and repay it over two years if he genuinely had £700 in disposable income available to him. This is especially as this disposable income would've been enough to clear one of the outstanding loans in full. But, on balance, I don't have enough to say that the information Everyday Loans gathered was unreasonable - especially as Mr T confirmed that he was living with his parents.

With this in mind, although I have concerns about its interrogation of the information it received, I think Everyday Loans just did just about complete reasonable and proportionate assessments before providing loan one to Mr T. And this means that I think the checks Everyday Loans carried out for loan one were reasonable and proportionate. So I don't think that Everyday Loans did anything wrong when it provided this loan to Mr T.

- loan two onwards

Mr T was provided with a further £1000 within six months of taking loan one. And this meant that he had to borrow £3627.74 in total as £2357.74 to settle loan one (a further accident insurance policy for £270 was also taken).

I have to start by saying that I don't see how the figures Everyday Loans has provided quite add up. Unless he missed payments, which I've not been made aware of, Mr T would've made six payments of £207.93 between him being provided with loan one and applying for loan two. Yet the amount Everyday Lending says went towards settling loan one was higher than what he'd borrowed in the first place. This was even though the payments made would've totalled more than half the sum advanced.

In any event, I'm mindful that CONC 5.2.4G(2) provides some guidance on the proportionality of assessments. And it makes it clear that 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. Everyday Loans says it was aware of Mr T's *"recent reliance"* on payday loans before he took loan one and it also says it was aware of Mr T's guarantor loan.

And if it had looked at Mr T's bank statements, which it says it obtained, it would also have seen that Mr T had continued borrowing from one of the payday lenders the funds from loan one was supposed to free his reliance on. So Everyday Loans ought to have been aware that Mr T's financial situation suggested that he'd developed a reliance on expensive credit and this ought to have played a part in determining whether any further borrowing was sustainable.

Yet I can't see that Everyday Loans did do this. Indeed it seemed to proceed on with the application that Mr T had total monthly living expenses of £1390, despite the emerging pattern of Mr T wanting or needing to borrow again. Indeed it argues that as Mr T made the payments to loan one this suggested loan two was affordable. I don't agree that this is the case. And, in any event, Everyday Loans was required to assess whether Mr T could sustainably repay his loans.

I can't see how a consumer making payments to an earlier loan automatically means that a later one will be sustainable, as without checks on how the consumer obtained the funds and what impact this had on their finances the lender can't know if they suffered undue difficulty when repaying. My own experience of cases has shown me that high-cost credit borrowers are more likely to do whatever it takes to make a loan payment irrespective of the impact that has on their finances. So I think that Everyday Loans needed to take steps to ensure that further credit wouldn't adversely impact Mr T's financial position before providing loan two.

The circumstances weren't much different at the time Mr T applied for loan three. This time Mr T was 'given' £6000 of which £3,808.39 went towards repaying loan two. Once again I have to query how the amount that went towards loan two can have been calculated when it was more than the amount borrowed and Mr T had made five payments of £309.82.

If Everyday Loans' calculations are correct in the period between loan one and loan three having been provided Mr T would've made six payments of £207.93 and five payments of £309.82 yet he wouldn't have made any inroads at all into the capital. In my view, this in itself bears the hallmarks of unsustainable lending.

Yet it doesn't appear as though Everyday Loans was applying any further scrutiny to Mr T's applications. It proceeded with this application on the basis that Mr T's total monthly living costs were the same as they'd been for loans one and two. And for loans four and five it actually proceeded with these applications on the basis that these costs had reduced. This was despite the fact that Everyday Loans became aware that Mr T would be using some of what he was borrowing for loan four to settle further payday loans.

Everyday Loans says it can't have been expected to know that Mr T was reliant on payday loans and that Mr T said that he was making repairs to his mother's stairs. But I don't find this argument in the least bit persuasive. The payday loans Mr T was going to repay were for the same lenders the funds from loan one were supposed to repay and free his dependency from. As Mr T still owed those lenders money some twenty months after he took loan one, I think it needed to properly scrutinise Mr T's finances to ascertain why he still owed these payday lenders money rather than simply accept whatever verbal explanation was provided.

What concerns me more than anything else I've seen is that Everyday Loans provided Mr T with a sixth loan (which is not part of this complaint as it Everyday Loans hadn't looked at it) after this complaint was made. Mr T being provided with a sixth loan in these circumstances leads me to believe that Everyday Loans' checks don't evolve with a consumer's borrowing history and circumstances. Instead it appears to me that Everyday Loans refuses to review and consider what is unfolding in front of its eyes in favour of simply doing the same thing over and over again and choosing to rely on its process.

So to sum up, I'm concerned that Everyday Loans' checks for Mr T on his second loan didn't take into account it was a second loan taken shortly after the first. And I can't see any signs that Everyday Loans' checks got more thorough for the remaining loans either even though it was relending before any of the original terms had ended.

Overall and having carefully considered everything, I don't think that Everyday Loans complete reasonable or proportionate checks for any of Mr T's loans other than for loan one. And this means that I think that Everyday Loans' checks before providing Mr T with loans two to five were neither reasonable nor proportionate.

Would proportionate checks on loans two to five have indicated to Everyday Loans that Mr T 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 T, given his financial circumstances at the time. Mr T 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 T 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 T's financial circumstances were likely to have been at the time.

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

As I've previously explained, I think Everyday Loans needed to find out just why it was Mr T needed to borrow increasing amounts despite what he was saying about his income and expenditure. I think that if Everyday Loans had done this here, it would more likely than not have seen that Mr T was continuing to borrow from payday lenders. And it would also have seen that there were significant amounts of cash withdrawals from Mr T's account - some 50% of his monthly income.

Mr T says that these withdrawals went towards gambling. And that any reasonable investigation into his circumstances would have shown up that he was gambling significant amounts of money. I don't think that I have enough to make that finding here.

Be that as it may, even though I don't have enough here to say it's more likely than not that Everyday Loans ought to have realised that Mr T was gambling significant amounts of money, I still think that it ought to have noticed the cash withdrawals. And I don't think that it would've been reasonable to reach the conclusion that Mr T could sustainably repay loans two to five without him providing a plausible and persuasive reason for the large cash withdrawals.

In any event, given Everyday Loans' response to our adjudicator's assessment where it said he didn't consider the checks showed the loan payments were affordable, I think that it'd be helpful for me to explain that Everyday Loans was required to establish whether Mr T 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.

I think this is important because irrespective of what the cash withdrawals were being used for, I, in any event, don't think that Mr T was in a financial position to sustainably repay loan five.

To explain, Everyday Loans was increasing Mr T's overall indebtedness at a rapid rate. Having looked at Everyday Loans' own records, at the time of Mr T's first loan he owed £1650 to other creditors. But when Mr T was provided with loan four, some twenty months later, he now owed Everyday Loans £16,981.20. That's over ten times what he owed before he started borrowing from Everyday Loans.

I've already explained that by the time of loan three, Mr T had made approaching £3,000 in payments. But he hadn't made any inroads into the capital he owed. Indeed on Everyday Loans' figures it looks like the amount that went to settling loans one and two was more than what he was advanced despite all of these payments. And by the time Mr T was provided with loan four, he'd made approaching £6500 in payments in his 20 months of owing Everyday Loans money. Yet the amount that went to settling loan three was only just over £800 less than what he'd originally been advanced.

I accept that Mr T did receive around £8500 in funds over the period concerned. But I find it incredible that he paid approaching £6500 in this 20 month period but now owed nearly £17,000 – even allowing for the additional funds he received. And bearing in mind what Everyday Loans ought to have been aware of in terms of Mr T's financial circumstances, I can't see how it could've reasonably thought Mr T could make the payments to these loans on these terms without it adversely affecting his financial position.

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 M wouldn't have been able to sustainably make the repayments to loans two to five.

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

Whilst my conclusion on loans two to five being unsustainable for Mr T is, on its own, enough for me to uphold the complaint, Everyday Loans made a number of arguments in response to our adjudicator's view. As this is the case, I think it is worth me reflecting on Everyday Loans' arguments so as to give a proper sense of my thinking in relation to them and to explain why I would've, in any event, upheld the complaint about loan four, even if I hadn't made the findings I had in the section above.

Everyday Loans' response to our adjudicator's assessment primarily centred on its belief that he erroneously focused on the fact that loans two, three and four exceeded the total cost-cap for High-Cost Short-Term Credit ("HCSTC") when these loans weren't HCSTC.

I want to start by saying that our adjudicator didn't make the finding that these loans were HCSTC. And I accept that the terms of the loans bring them outside the scope of the FCA definition of HCSTC. This means that I agree that the daily and total cost caps applying to HCSTC products don't apply to these loans. But I want to be clear that the reason I draw this conclusion is because these loans weren't *short-term* even though they were clearly high-cost.

And so, while the cap doesn't apply, I think that the consumer protection principles that underpin it are worth exploring bearing in mind I'm deciding what's fair and reasonable in all the circumstances of this case. I'm mindful that the FCA brought in CONC 5A because it was given a statutory duty[1] to protect borrowers from excessive charges. I'd find it somewhat strange for it to be the case that Parliament felt the need to legislate to protect consumers from excessive charges on credit taken over a short-term, while also believing that such high charges were reasonable for credit taken over a longer period. Especially in circumstances, such as here for loan four, where the lender is transitioning the borrower from a product where the interest, fees and charges are capped to one where they aren't.

Indeed there is an argument for saying that transitioning Mr T from a loan where the total amount he could repay was capped to one which wasn't, in itself, likely to be unfair. But for reasons I'll go on to explain, it's possible that existing legislation provides similar protection for such borrowers.

To explain, Mr T was clearly refinancing and taking further funds from Everyday Loans. And for reasons I've already explained earlier on in this decision, I think that it ought to have been clear to Everyday Loans that Mr T was struggling to manage his finances – hence his need for further funds. And, in these circumstances, I think that it would have been fair, reasonable and proportionate for Everyday Loans to have recognised this and also factor it in to any product offered, when lending to him.

In my view, Everyday Loans didn't do that and instead unfairly took advantage of the situation by providing a series of loans, over an extended period, which resulted in Mr T paying very high rates of interest. Indeed all but two of his loans had an APR akin to those normally reserved for HCSTC products.

To be clear, had it not been the case that I think proportionate checks would've shown loan two to five to be unsustainable, I wouldn't say it was unfair per se for Everyday Loans to refinance Mr T's loans, given his apparent need to re-borrow - after all this might've allowed him to repay what he already owed more gradually and leave his finances with more breathing space. That said even though it might not have been unfair per se for Everyday Loans to refinance an existing loan, this doesn't mean that it was fair or reasonable for Everyday Loans to provide these loans on the terms it did.

[1] s131 Financial Services (Banking Reform) Act 2013

I accept that this loan was provided after the extortionate credit bargaining provisions in the Consumer Credit Act 1974[2] were replaced by the Unfair Relationship provisions (contained in section 140). But the effect of this series of loans was that it created a cumulative interest rate so outrageous[3] that I think a court may well have found it grossly exorbitant and that the agreement grossly contravened ordinary principles of fair dealing.

This is especially the case when bearing in mind the following:

- the prevailing interest rates when the loans were advanced on the respective occasions;
- Mr T's weak bargaining position, considering his need to refinance so often and his reliance on HCSTC, in comparison to Everyday Loans;
- Mr T being advised to transition (for loan four) from products where the total amount he repaid couldn't exceed twice what he originally borrowed to one where the total amount to be repaid wasn't capped;
- the argument here isn't that the majority of these loans weren't high-cost but that they weren't short-term;
- the cumulative effect of Mr T being provided these loans over such an extended period.

And as the Unfair Relationship provisions were brought in to increase consumer protection[4], I also think it's entirely possible that a court may well find that an unfair relationship existed between Everyday Loans and Mr T at the time of, at least, some of these loans – bearing in mind Everyday Loans history of repeat lending to Mr T (which the regulator has confirmed may, in itself, be symptomatic of unsustainable lending) - although I can't say this for certain.

But, in any event, even if this isn't the case, I'm required to decide what I think is fair and reasonable in all of the circumstances of this case. And I find that by the time of loan four Mr T was given a loan which had an interest rate which, on the face of things, wasn't commensurate to the risk Everyday Loans was taking in providing the funds.

As I've previously explained, by the time loan four was provided Everyday Loans had received around £8,500 in funds from Mr T. But he'd already made monthly repayments of almost £6,500 at this stage. So this means that by the time of the fifth payment on loan four Everyday Loans would've received what it had advanced, in total, to Mr T. And it follows that the payments from month six onwards were being made after there was no risk to Everyday Loans of it not getting what it originally lent back.

I think that this agreement (which required 19 out of the 24 payments to be made once Everyday Loans would already have had its money back (in my view, a substantial proportion) would, to any ordinary observer, be seen as unfair given this loan was provided in circumstances where Everyday Loans ought to have been alert to the possibility Mr T was struggling to manage his money and in circumstances where Mr T was being advised to switch from products where the total amount he had to repay was capped.

In my view, this had the effect of unfairly and excessively increasing and prolonging Mr T's overall indebtedness. This is especially as the cumulative effect of these loans meant that

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[2] s137-140 Consumer Credit Act 1974
[3] Goode: *Consumer Credit Law and Practice*, 5.267
[4] *"Fair, Clear and Competitive, The consumer credit market in the 21st century"* Department for Trade and Industry White Paper (2003), p 52-53

Mr T was repaying loans over an extended period at an interest rate that's only really suitable for products intended where the credit is intended to repaid over a short term period. I'm particularly struck by the unfairness of the first two loans that were structured in such a way that, even after several months of repayments, the settlement figure still exceeded the amount Mr T had borrowed in the first place.

So taking all of this into account, I think that it was unfair for Everyday Loans to have provided loans four and five to Mr T, in these particular circumstances, irrespective of whether they were sustainable. And this means that had I not already reached the conclusion proportionate checks would've shown Everyday Loans that loans two to five were unsustainable for Mr T, I would've, in any event, reached the conclusion that Everyday Loans acted unfairly or unreasonably in some other way towards Mr T.

Overall and having carefully thought about the two overarching questions, set out on page seven of this decision, I think that Everyday Loans unfairly and unreasonably provided Mr T with loans two to five. As Mr T ended up paying interest and charges on loans 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 T

I've carefully thought about what amounts to fair compensation in this case.

Where I find that a business has done something wrong, I'd normally expect that business – in so far as is reasonably practicable – to put the consumer in the position they *would be in now* if that wrong hadn't taken place. In essence, in this case, this would mean Everyday Loans putting Mr T in the position he'd now be in if he hadn't been given loans two to five.

But when it comes to complaints about irresponsible lending this isn't straightforward. Mr T *was* given the loans in question and he's used the funds. So, in these circumstances, I can't undo what's already been done. And it's simply not possible to put Mr T back in the position he would be in if he hadn't been given these loans in the first place.

As this is the case, I have to think about some other way of putting things right in a fair and reasonable way bearing in mind all the circumstances of the case. And I'd like to fully explain the reasons why I think that it would be fair and reasonable for Everyday Loans to put things right in the following way.

interest and charges on the loans Mr T shouldn't have been given

As I've explained, Everyday Loans ought to have realised that it was providing Mr T with loans that he'd more likely than not be unable to substantially repay. And in reality it's the interest that Mr T had to pay Everyday Loans on loans two to five that is the problem, as he kept having to find additional funds (usually through borrowing elsewhere) to pay the interest on his Everyday Loans loan.

I'm also mindful Mr T then took out further loans which resulted in him having to borrow more to repay previous loans. So I think that the fairest way to ensure that Mr T is refunded any interest and charges that he may have paid is to add the total amount of money he received as a result of being provided loans two to five together. Everyday Loans should then deduct any payments Mr T made from this amount.

Everyday Loans should treat any payments made after the payments Mr T made reached the total of the money he received, if there were any, as overpayments. And to start with, I think that Everyday Loans should refund any such overpayments as they will represent the interest Mr T unfairly paid as a result of being given his loans.

It's also clear to see that Mr T lost the use of the funds he used to pay the interest (or overpayments), I now think that Everyday Loans needs to refund to him. As Mr T lost the use of these funds, I think that he should be compensated for this.

We normally ask a business to pay 8% simple interest where a consumer hasn't had the use of funds because its actions resulted in something having gone wrong. Bearing in mind my conclusions in the paragraph above, I see no reason to depart from our usual approach here and I think awarding 8% per year simple interest, on the interest and charges that were paid (in other words any overpayments over and above the amount of money Mr T received if there were any), is fair and reasonable in the circumstances of this case.

Mr T's credit file

Generally speaking, I'd expect a lender to remove any adverse information recorded on a consumer's credit file as a result of the interest and charges on the loans they shouldn't have been given. After all it's the interest and charges that the consumer is being refunded and the expectation is they will have repaid, or they should repay what they owe.

As the monetary award I'm making reflects this, I see no reason to depart from our typical approach in this case. So I think that Everyday Loans should remove any adverse information recorded on Mr T's credit file as a result of the interest and charges on loans three and four.

All of this means that I think it would be fair and reasonable in all the circumstances of Mr T's complaint for Everyday Loans to put things right in the following way:

- add up the total amount of money Mr T received as a result of having been given loans two to five. The payments Mr T made (to his loans) should be deducted from this amount. Any payments made, if any, after the total amount repaid exceeds the amount of money Mr T was given should be treated as overpayments;

- refund the premium Mr T paid for the ancillary accident insurance he was sold when Everyday Loans provided loan two;

- add interest at 8% per year simple on any overpayments and the ancillary accident insurance from the date they were paid by Mr T, if they were, to the date of settlement†;

- remove any adverse information recorded on Mr T's credit file as a result of these loans.

† HM Revenue & Customs requires Everyday Loans to take off tax from this interest. Everyday Loans must give Mr T a certificate showing how much tax it's taken off if he asks for one.

my final decision

For the reasons given above, I'm upholding Mr T's complaint. Everyday Lending Limited (trading as "Everyday Loans") should pay Mr T compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 27 April 2019.

Jeshen Narayanan
ombudsman