Complaint

Miss J complained to Oakam Ltd that it shouldn't have provided her with loans as she believed they were unaffordable for her.

Background

The background to this complaint was set out in my provisional decision dated 20 July 2020. An extract from this is attached (including the regulations and guidance enforce at the time) and forms part of this final decision, so I will not repeat that information here.

In my provisional decision I set out why I was minded to partly uphold the complaint. I invited both parties to let me have any further comments and evidence. Oakam didn't respond to the provisional decision, so I don't know what it thinks about the outcome that was recached. Miss J's representative told us it accepted the provisional decision and it didn't have anything further to add.

My findings

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

Miss J's representative accepted the provisional decision and as Oakam didn't respond I don't know what it thinks about the outcome. As no new information or evidence has been provided, I see no reason to depart from the findings I reached in the provisional decision.

So, I still think Oakam was wrong to have provided Miss J with loans 4-9.

Putting things right – what Oakam needs to do

- Oakam should refund all interest, fees and charges Miss J paid on loans 4 to 9, including payments made to a third party where applicable, but not including anything it has already refunded.

- Add 8% simple interest*, calculated from the date Miss J originally made the payments, to the date the complaint is settled.

- Oakam should remove any adverse information it has recorded on Miss J's credit file in relation to loans 4 and 5. The overall pattern of Miss J's borrowing for loans 6 to 9 means any information recorded about them is adverse, so Oakam should remove these loans entirely from Miss J's credit file.

*HM Revenue & Customs requires Oakam to deduct tax from this interest. Oakam should give Miss J a certificate showing how much tax it has deducted, if she asks for one.

My final decision

For the reasons given above and in my provisional decision, I partly uphold Miss J's complaint.

Oakam Ltd should put things right by doing what I've said above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss J to accept or reject my decision before 4 October 2020.

Robert Walker
Ombudsman

EXTRACT FROM PROVISIONAL DECISION

Complaint

Miss J complained to Oakam Ltd that it shouldn't have provided her with loans as she believed they were unaffordable for her.

Background

Oakam investigated Miss J's complaint and issued its final response dated 3 December 2018. A table based on the information given to us by Oakham can be found below.

Loan	Date Taken	Date Repaid	Amount Borrowed	Number of Weekly Instalments	Highest Monthly Repayment*
1	18/01/2012	28/06/2012	£240.00	26	£75.00
2	28/06/2012	13/10/2012	£352.92	17	£150.00
3	13/10/2012	17/12/2012	£516.21	26	£155.00
4	17/12/2012	26/03/2013	£639.03	26	£180.00
5	26/03/2013	25/06/2013	£731.16	52	£125.00
6	25/06/2013	07/11/2013	£986.98	52	£168.00
7	07/11/2013	08/02/2014	£1,000.29	52	£174.00
8	08/02/2014	29/05/2014	£1,115.04	52	£192.00
9	29/05/2014	29/05/2015	£1,246.42	52	£216.00

*Highest repayment includes where five payments would be made during a monthly period over term of the loan.

As part of its response, Oakam stated that it didn't look at Miss J's first two loans because they were given more than six years before she complained. It also explained it didn't think it had done anything wrong in giving Miss J loans 3 to 6. However, Oakam upheld loans 7 to 9 and made an offer. It offered to refund all the interest and charges Miss J had paid on loans 7 to 9, plus 8% simple interest.

Miss J's representative responded explaining Miss J wasn't happy to accept this offer but would consider any other offers Oakam were willing to make. Oakam replied stating it wouldn't make any other offers.

Miss J's complaint was referred to this Service on 19 December 2018.

In March 2019, Miss J's representative emailed Oakam stating she would like to accept the offer that had been made. Since then both Oakam and Miss J's representative have confirmed that, while an acceptance of the offer was sent to Oakam, the offer wasn't processed and still hasn't been paid to date.

Miss J's representative has said that as the offer hadn't been actioned, due to Oakam going into administration, Miss J wanted us to look at the whole complaint as she believed the complaint hadn't been resolved. However, Oakam is now no longer in administration.

Oakam says that this Service shouldn't look into Miss J's complaint at all because it believes the complaint to have been resolved. Oakam believes Miss J's acceptance of the offer was in full and final settlement of her complaint and that this means there wasn't any ongoing dispute.

One of our adjudicators looked into the complaint and she thought that we could consider the sales of all the loans. The adjudicator made a number of points but overall she said that as the offer in respect of loans 7-9 hadn't actually been actioned in a reasonable amount of time, there was still an ongoing dispute to be considered. She also noted that Oakam's objection to us considering the complaint had

been raised after we'd issued an assessment of the merits into Miss J complaint – which had been partially upheld on 13 January 2020.

Oakam responded disagreeing, repeating that it believes the complaint isn't one we should consider, due to Miss J's acceptance of the offer made in the final response.

The adjudicator also found that loans 1 and 2 were taken out more than 6 years before Miss J's complaint was raised, and so could've been out of time. However, the adjudicator thought that Miss J complained within three years of being aware she had cause to. As a result, the adjudicator considered the merits of all nine of Miss J's loans and found that Oakam shouldn't have given Miss J loans 4 to 9.

Oakam has provided a response disagreeing with the outcome of Miss J's complaint. Oakam has said that it believes the checks carried out were proportionate and that it wasn't wrong to have given Miss J loans 4 to 6. It has also said that it believes our approach to considering complaints appears to have changed over time. It made no response about whether the case was in jurisdiction or not.

The merits of Miss J's complaint were reconsidered more recently, on 30 April 2020, and the adjudicator sent their findings to both Oakam and Miss J's representative. Here the adjudicator explained why they believed Oakam shouldn't have given Miss J loans 3 – 9.

They said that Oakam should've been aware of concerning information from Miss J's credit check results and her bank statements at the time of applying for loan 3. The adjudicator also said that this, combined with Miss J's borrowing history, should've made Oakam aware that it was likely Miss J had underlying financial difficulties and wouldn't have been able to sustainably repay loan 3, without having to borrow again.

Oakam hasn't provided a response to this most recent view but it has stated it still believes we can't consider the complaint due to the offer having been accepted by Miss J.

As no agreement could be reached the case has now been passed to me.

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. We've set out our general approach to complaints about short-term lending - including all of the relevant rules, guidance and good industry practice - on our website. And having done so, I'm intending to conclude that Miss J's complaint is a case that this service can consider and then, when consider what actually happened I'm minded to conclude that Oakham made an error by providing some of the loans to Miss J.

Consideration of Miss J's complaint

Firstly, I will address whether we can consider all of the loans involved in Miss J's complaint. I want to make it clear that this part of the decision is not about whether Oakam did something wrong when it provided the loans to Miss J. It concerns whether or not this Service should consider the merits of her complaint.

Oakam has said that Miss J's complaint about loans 3-9 is one we should choose not to consider because she has accepted the offer it made in the final response letter. This means Oakam believes the rules that govern what this service can consider doesn't extend to looking at Miss J's complaint.

Jurisdiction

Firstly, I don't think this complaint is outside of this service's jurisdiction. And this is the first thing this service needs to consider. Because if we think the case is outside of our jurisdiction then we have no power to take this case forward. However, looking at the various arguments made by Oakham I don't

think this case is outside of our jurisdiction – and therefore is a complaint we could take forward. I've explained why below.

I agree with the adjudicator's findings that while loans 1 and 2 were taken out more than 6 years before Miss J's complaint was raised, there isn't anything to suggest she knew or she ought to have reasonably been aware more than three before she'd complained that she had reason to.

I can also see the complaint was referred to our Service around two weeks after the final response was issued, so within the required six-month time limit. In light of this, I can't see there is a timeliness concern either that would suggest we don't have the right to consider Miss J's complaint about all nine of her loans.

Dismissal

However, although there is nothing within the rules to prevent us from taking the complaint forward, that doesn't always mean that is appropriate for this service to do so. An objection to us considering the complaint based on Miss J having accepted an offer in full and final settlement, could valid grounds for dismissing the complaint about loans 3-9 without considering the merits.

In accordance with DISP Rule 3.3.1, the decision about whether it's appropriate for us to investigate a case is one for us. We may dismiss a case without considering its merits in a number of different situations, for example where a complaint is made about a business but the consumer making the complaint can be shown to have accepted an offer on the understanding that such an acceptance was in full and final settlement of their complaint – and the settlement has been actioned.

As neither Oakam or Miss J appear to dispute an acceptance of the offer was sent to Oakam in March 2019, I don't think there is a need for me to consider this aspect any further. But I have considered what has happened since the acceptance was sent to Oakam.

Miss J's complaint was referred to this Service on 19 December 2018, and at that point there was an ongoing dispute that we could consider. Based on what I've seen, Miss J's representative didn't contact Oakam about accepting an offer until after this, on 12 March 2019.

On 15 March 2019, Miss J's representative contacted us to let us know they had accepted Oakam's offer, but still wanted us to consider the loans that hadn't been included in it. Based on Miss J's representative's acceptance email to Oakam, I can't see they made Oakam aware of this. Therefore, I think it was fair at that point for Oakam to reasonably believe Miss J hadn't accepted the offer in settlement of her whole complaint. However, this doesn't automatically mean the complaint should be dismissed.

Generally, where an objection to us considering a complaint is raised by a lender, on the basis that an offer has been accepted to settle the complaint, that business is also usually able to evidence the accepted settlement has been actioned in a reasonable period of time. What a reasonable amount of time may be will depend on the individual circumstances of the complaint.

In some instances we may consider being provided with such information is enough to have demonstrated that both parties to the complaint have fulfilled their part of the agreed settlement and that both parties have reasonably agreed the settlement has resolved the complaint. However, in other instances we may not think that this is enough, by itself, to say that it wouldn't be appropriate for us to consider the matter further.

I acknowledge that Oakam has said that Miss J's offer acceptance wasn't processed once it went into administration. I also note that once Oakam confirmed it was no longer in administration the offer still wasn't actioned. Both Oakam and Miss J's representative agree the offer accepted hasn't been actioned to date.

Miss J had a reasonable expectation that once she'd accepted Oakam's offer that this would be fulfilled in a timely manner. In November 2019, Miss J's representative told us that as the offer hadn't been honoured Miss J believed the complaint to be unresolved and asked us to continue to consider the complaint – which we did. And it was reasonable for us to do so.

This was around eight months after Miss J's acceptance had been communicated to Oakam. Given the amount of time that had passed since Miss J's acceptance had been sent to Oakam, and that the accepted offer hadn't been fulfilled in a reasonable amount of time, I think it was fair for Miss J to think at this point that the offer acceptance hadn't resolved her complaint and that there was still an ongoing dispute between her and Oakam. I think we are able to consider Miss J's complaint.

I'd also note that there was at least two separate occasions where Oakam would've had the opportunity to raise an objection to us considering Miss J's complaint before the adjudicator's assessment in January 2020. However, there isn't anything from what I've seen to suggest Oakam did this. Therefore at the time we issued our view, I don't think it was unreasonable for us to consider Miss J's offer acceptance had not resolved her complaint as she'd agreed.

Once Oakam had raised its objection to us considering Miss J's complaint it still hadn't fulfilled the offer that had been accepted in March 2018. Therefore, Oakam hadn't upheld its part of the settlement offer.

Taking everything into consideration, I'm satisfied that in this instance there was an ongoing dispute between Miss J and Oakam that we could and should've investigated when we did. As there is still an ongoing dispute, and I don't think that this case should be dismissed, I will now address the merits of Miss J's unaffordable lending complaint.

Miss J's complaint

I have included some of the regulations that were in place at the time Oakham started to lend to Miss J (when regulation lay with the Office of Fair Trading) and then the regulations from April 2014 – when Oakham feel under the remit of the Financial Conduct Authority (FCA) – at the end of this provisional decision. As Oakham will see, the regulations that were in place from the OFT and the FCA are similar. Indeed, the FCA's regulations in part reference the OFT regulations.

So, thinking about the regulations that were applicable at the time, Oakam needed to take reasonable steps to ensure that it didn't lend irresponsibly. In practice this means that it should have carried out proportionate checks in order to reasonably conclude Miss J could repay the loans in a sustainable manner.

These checks could take into account a number of different things, such as how much was being lent, the repayment amounts and the consumer's income and expenditure. With this in mind, in the early stages of a lending relationship, I think less thorough checks might be reasonable and proportionate.

But certain factors might point to the fact that Oakam should fairly and reasonably have done more to establish that any lending was sustainable for the consumer. These factors include:

- 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 *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 even come a point where the lending history and pattern of lending itself clearly demonstrates that the lending was unsustainable.

Oakam was required to establish whether Miss J could sustainably repay her loans – not just whether the loan payments were affordable on a strict pounds and pence calculation. The loan payments being affordable on this basis *might* be an indication Miss J could sustainably make her repayments. But it doesn't automatically follow that this is the case.

I've carefully considered all of the arguments, evidence and information provided in this context and what this all means for Miss J's complaint.

As neither Oakam nor Miss J appear to dispute the adjudicator's findings that there isn't enough to suggest it was unfair for Oakam to have given her loans 1 and 2, I don't think there is a need for me to consider these loans any further. However, I have kept them in mind when thinking about the overall lending relationship between Miss J and Oakam. Instead this decision will focus on loans 3 to 9.

Oakam has told this Service it carried out detailed and extensive checks before agreeing to lend to Miss J. It says it asked Miss J about her income and monthly expenses. It also said it carried out a check of her credit file and that Miss J's income was validated against bank statements as part of the application process.

For loan 3, I do think that the credit check results Oakam has provided raise some real concerns for me about Miss J's indebtedness at the time. I say this as, while Oakam has stated the two active County Court Judgements (CCJs) Miss J had were issued several years earlier, in 2006 and 2007, the balance of these totalled £27,064.

This was in addition to the £8,843 balance Miss J had in loan or instalment credit and revolving and budget credit. I think this reasonably suggested Miss J was likely already over indebted by the time she applied for loan 3. I think this information ought to have reasonably prompted Oakam to carry out a full review of Miss J's financial circumstances before agreeing to lend further. There isn't anything to suggest Oakam did this.

Oakam has shown it recorded Miss J's declared monthly income for loan 3 as £1,838 and her monthly expenditure as £1,157. I can also see for the majority of Miss J's loans Oakam did obtain some partial bank statements as part of the application process. However, Oakam doesn't appear to have provided us with copies of such information for loan 3.

Miss J hasn't provided copies of her bank statements covering this period either. So, in the absence of anything else, I haven't seen enough to fairly say Oakam was wrong to have provided Miss J with loan 3, despite my concerns about the extent of the checks it undertook. However, if Miss J is able to provide copies of her bank statements for the period of September and October 2012, I will review my findings for loan 3.

By loan 4, Miss J had had an ongoing borrowing relationship with Oakam for nearly a year without a single day of not being in debt. With the exception of loan 1, at the point of each new loan application Miss J still had outstanding debt on the previous loan which she 'rolled over' into the new loan. This started with around £56 from loan 1 into loan 2, and by loan 4 this was around £409 from loan 3. This was Miss J's largest outstanding balance to date to be refinanced into a new loan, making loan 4 her largest loan to date.

Additionally, I note the time period between Miss J's requests for further borrowing decreased with each new loan. Loan 2 was applied for just over five months after loan 1 but by loan 4 this had reduced to just over two months since taking out loan 3. Therefore, I think Oakam should've reasonably been aware that Miss J was, in my view, showing signs of having difficulties repaying previous loans since applying for loan 2 and that, by loan 4, this had become an emerging pattern of behaviour which only continued with loan 5. So, I think Oakam were wrong to have given Miss J loans 4 and 5.

I'd like to take this opportunity to explain that I haven't recreated individual, proportionate affordability checks for loans 6 to 9 because I don't think that it is necessary to do so. Instead I've looked at the overall pattern of Oakam's lending history with Miss J, with a view to seeing if there was a point at which Oakam should reasonably have seen that further lending was unsustainable, or otherwise harmful. I think this point was reached by loan 6, so Oakam should have realised that it shouldn't have provided any further loans. I say that because:

- I think that by loan 6 Oakam would've been aware that Miss J had now had an ongoing borrowing relationship with it for almost 18 months and been in debt for the entire time. Such an overall pattern of borrowing suggests Miss J had become persistently reliant on short-term loans.

- There was an emerging pattern between loans 1 to 5 of Miss J taking new loans prior to her having settled the previous loan – 'rolling' the existing outstanding balance into the new loan and requesting further funds on top of this. This was an indication that Miss J was showings signs of having difficulties repaying previous loans.

- By loan 6, there was no sustained, significant reduction in Miss J's borrowing. Her overall borrowing only increased with each new loan and by this point Miss J's loan amount was £986.98. This was her largest loan to date and more than four times that of the original amount Miss J borrowed for loan 1. Based on this, Oakam ought to have realised it was more likely than not Miss J was having to borrow further to cover the hole repaying her previous loans was leaving in her finances.

- Miss J wasn't making any real inroads into what she owed Oakam and her indebtedness was being prolonged for an extended period of time. As mentioned above, loan 6 was provided around 18 months after Miss J's first loan. This period was to be extended for an additional 52 weeks when loan 7 was provided and further still, along with an ever-increasing indebtedness, when loans 8 and 9 were given.

- At the time of applying for loan 9, Miss J had an ongoing borrowing relationship for more than 2 years and 4 months. By this point Oakam should've reasonably been aware that Miss J wasn't using these loans for the purpose they were intended.

I think that Miss J also lost out when Oakam provided loans 4 to 9 because:

- These loans had the effect of unfairly prolonging Miss J's indebtedness by allowing her to take expensive credit intended for short-term use over an extended period of time and

- the extended period of time Miss J owed Oakam money was likely to have had negative implications on her ability to access mainstream credit and so kept her in the market for these high-cost loans.

As part of Oakam's response to the adjudicator's findings, it has raised questions about our approach to considering the merits of irresponsible/unaffordable lending complaints. Oakam has asked if our approach has changed more recently and offered a different complaint outcome as an example of possible inconsistencies in our approach.

This service has always considered the relevant rules and regulations that were in effect at the time of the lending decisions were made. Indeed our approach is based on what the OFT and FCA said at the time each loan was given.

For Miss J's complaint, I have already set out the relevant test that is applied to when thinking about whether Oakam's checks went far enough. In light of this, there is no need for me to comment any further on the 2016 example decision Oakam has provided.

Taking on board all the information that I currently have access to, I think Oakam was wrong to have given Miss J loans 4 to 9.

the legal and regulatory framework regulation by the Office of Fair Trading (up to 31 March 2014)

Up to the end of March 2014 Oakham was subject to the OFT . During this time it needed a standard licence from the Office of Fair Trading ("OFT"), in order to carry out consumer credit activities.

Section 25(2) of the Consumer Credit Act 1974 set out the factors the OFT had to consider when deciding whether 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) [my emphasis].

Section 25(2B) set out a direct 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 [my emphasis].

In March 2010, as required by s.25A, the OFT produced guidance on the test for irresponsible lending for the purposes of section 25(2B) of the Consumer Credit Act 1974 and so it issued its guidance on irresponsible lending ("ILG").

So I consider the ILG to be of central importance in reaching a fair and reasonable outcome in Miss J's case. The foreword to the guidance set out its purpose and it said:

The primary purpose in producing this guidance is to provide greater clarity for businesses and consumer representatives as to the business practices that the 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 through a form or a meeting

Section 4.15 concerns the verification of income and expenditure for the purposes of making an appropriate assessment of affordability. It states:

In our view, creditors who do not require documentary evidence of income and/or expenditure as part of their assessment of affordability, but rather accept information provided by the borrower without any supporting evidence or, in the alternative, do not seek any information on income and/or expenditure at all as part of their assessment, should ensure that whatever means and sources of

information they employ are sufficient to make an appropriate assessment. We do not consider that self-certification of income would generally be sufficient in respect of significant long-term credit agreements, particularly those
secured on property.

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)This could (but not necessarily) include for example:

Where applicable, appropriate and proportionate, failing to verify details of current income and/or expenditure by, for example, checking hard copies of payslip/contract of employment
(when a borrower is in employment), accountant's letters (where a borrower is self-employed) or benefit statements (where a borrower is not in employment).

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 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. At this point the ILG was amended to reflect any changes required by the Consumer Credit Directive and an additional requirement on a lender to carry out an "Assessment of creditworthiness" was set out in section 55B of the Consumer Credit Act.

It's important to note that both section 25 and section 55 remained in force until regulation of Consumer Credit providers passed to the FCA in April 2014. 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.".

By the time of loans 8 and 9 (1 April 2014 onwards) this requirement to assess creditworthiness moved from S55B of the Consumer Credit Act, to the rules of the new regulator the Financial Conduct Authority. Regulation by the Financial Conduct Authority (from 1 April 2014) Oakham gave Miss J loans 8 and 9 after regulation of Consumer Credit Licensees had transferred from the OFT to the Financial Conduct Authority ("FCA") on 1 April 2014.

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 CONC also replaced the requirements set out in Section 55B. CONC 5 sets out a firm's obligations in relation to responsible lending. But I've not listed all the requirements under CONC 5.2 here, but they are similar to those that can be found in the ILG.

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 OFT's Irresponsible Lending Guidance and the rules set out in CONC 5 and CONC 6 when they were introduced in April 2014. 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 5.2.1 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.

Section 140A of the Consumer Credit Act 1974

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

140A Unfair relationships between creditors and debtors

(1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following-

(a) any of the terms of the agreement or of any related agreement;
(b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;
(c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).

(2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor).

(3) For the purposes of this section the court shall (except to the extent that it is not appropriate to do so) treat anything done (or not done) by, or on behalf of, or in relation to, an associate or a former associate of the creditor as if done (or not done) by, or on behalf of, or in relation to, the creditor.

(4) A determination may be made under this section in relation to a relationship notwithstanding that the relationship may have ended.

(5) An order under section 140B shall not be made in connection with a credit agreement which is an exempt agreement [for the purposes of Chapter 14A of Part 2 of the Regulated Activities Order by virtue of article 60C(2) of that Order (regulated mortgage contracts and regulated home purchase plans)]

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

140B Powers of court in relation to unfair relationships
(2) An order under this section in connection with a credit agreement may do one or more of the following—

(a) require the creditor, or any associate or former associate of his, to repay (in whole or in part) any sum paid by the debtor or by a surety by virtue of the agreement or any related agreement (whether paid to the creditor, the associate or the former associate or to any other person);]

(b) require the creditor, or any associate or former associate of his, to do or not to do (or to cease doing) anything specified in the order in connection with the agreement or any related agreement;

(c) reduce or discharge any sum payable by the debtor or by a surety by virtue of the agreement or any related agreement;

(d) direct the return to a surety of any property provided by him for the purposes of a security;

(e) otherwise set aside (in whole or in part) any duty imposed on the debtor or on a surety by virtue of the agreement or any related agreement;

(f) alter the terms of the agreement or of any related agreement;

(g) direct accounts to be taken, or (in Scotland) an accounting to be made, between any persons.