complaint

Miss R has complained about a personal loan provided by Loans 2 Go Limited ("L2G") in December 2017. She's said she's concerned L2G is saying that she owes £3,670.20 when she only borrowed £900. She's also suggested that L2G hasn't treated her positively and sympathetically since she's explained that she's having difficulty repaying her loan.

background

I attach my provisional decision of 28 January 2019, which forms part of this final decision. In my provisional decision, I set out why I was intending to uphold Miss R's complaint and invited both parties to make any final comments ahead of my final decision. Following this, L2G confirmed it had nothing to add and it would await my final decision. Miss R confirmed she accepted my provisional decision. But that L2G had sold her debt onto a third party.

my findings

I have reconsidered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

I set out in some detail why I intended to uphold Miss R's complaint in my provisional decision. And, in the absence of anything further, I see no reason to change my conclusions.

putting things right – what L2G needs to do

I think it would be fair and reasonable, in all the circumstances of this case, for L2G to:

- buy back Miss R's account from the third party debt purchaser and
- reduce the starting balance on Miss R's loan to £1,800.00; and
- reduce the starting balance on Miss R's account by the amount of any payments Miss R made either to it or the third party debt purchaser; and
- arrange an affordable payment plan with Miss R so that she can repay the outstanding balance. I'd like to remind L2G of its obligation to treat Miss R positively and sympathetically when it is arranging this affordable payment plan with her.

my final decision

For the reasons set out above and in my provisional decision of 28 January 2019, I'm upholding Miss R's complaint. Loans 2 Go Limited should put things right in the way set out above.

Under the rules of the Financial Ombudsman Service, I am required to ask Miss R to accept or reject my decision before 28 March 2019.

Jeshen Narayanan
ombudsman

COPY OF PROVISIONAL DECISION

complaint

Miss R has complained about a personal loan provided by Loans 2 Go Limited ("L2G") in December 2017. She's said she's concerned L2G is saying that she owes £3,670.20 when she only borrowed £900. She's also suggested that L2G hasn't treated her positively and sympathetically since she's explained that she's having difficulty repaying her loan.

background

Miss R successfully applied for a loan of £900.00 with L2G in December 2017. The loan had an 18 month term and the monthly payments were £203.90. The information provided by L2G suggests that this was a "top-up" and refinance of an existing loan as Miss R only received £370.05 in cash after signing her loan agreement.

As I understand it, Miss R hasn't been able to make any of the payments due on this loan. She's said that this is because she's experiencing financial difficulties due to changes in her employment. L2G has taken income and expenditure information from Miss R since being notified of her financial difficulties. But it's unclear whether L2G has reached an arrangement with Miss R for her to be able to repay this loan.

One of our investigators initially looked at Miss R's complaint. His conclusion was the amount of interest Miss R had to pay for her loan was clearly disclosed to her. He also thought that he hadn't seen anything to suggest that L2G had treated Miss R unfairly in relation to her payment difficulties either. So he didn't uphold the compliant.

Miss R's complaint was then reviewed by one of our adjudicators. She thought that L2G had provided High-Cost Short-Term credit to Miss R. And the amount of interest it added to Miss R's loan meant that it exceeded the total cost cap set out in the Financial Conduct Authority's ("FCA") Consumer Credit Sourcebook ("CONC").

So our adjudicator upheld Miss R's complaint and said that L2G should remove all the interest from the outstanding balance on Miss R's loan. L2G disagreed with our adjudicator and asked for the complaint to be passed to an investigator or an ombudsman. As the parties have been unable to agree on a resolution the case has been passed to me for review.

my provisional 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. I've also taken into account the law, any relevant regulatory rules and good industry practice at the time the loans were offered.

Having carefully thought about issues, I think that there are two key questions that I need to consider in order to decide what's fair and reasonable in the circumstances of this complaint. They are:

- Was the loan L2G provided Miss R with High-Cost Short-Term credit and so the amount charged was in breach of the FCA cost cap?

- Did L2G act unfairly or unreasonably towards Miss R in some other way?

I've carefully considered these questions.

Was the loan L2G provided Miss R with High-Cost Short-Term credit ("HCSTC")?

I think that it might be helpful for me to start by setting out the definition of HCSTC.

HCSTC is defined in the FCA Handbook of rules and guidance (the handbook"). It is defined as:

a regulated credit agreement:

(a) which is a borrower-lender agreement or a P2P agreement;

(b) in relation to which the APR is equal to or exceeds 100%;

(c) either:

(i) in relation to which a financial promotion indicates (by express words or otherwise) that the credit is to be provided for any period up to a maximum of 12 months or otherwise indicates (by express words or otherwise) that the credit is to be provided for a short term; or

(ii) under which the credit is due to be repaid, or substantially repaid, within a maximum of 12 months of the date on which the credit is advanced;

(d) which is not secured by a mortgage, charge or pledge; and

(e) which is not:

(i) a credit agreement *in relation to which the lender is a* community finance organisation*; or*

(ii) a home credit loan agreement*, a* bill of sale loan agreement *or a* borrower-lender agreement *enabling a* borrower *to overdraw on a current account or arising where the holder of a current account overdraws on the account without a pre-arranged overdraft or exceeds a pre-arranged overdraft limit*

Having looked at Miss R's agreement, I'm satisfied that it is a regulated borrower-lender agreement; with an APR exceeding 100%; which isn't secured by a mortgage, charge or pledge. And Miss R's loan isn't a home-credit loan, a bill of sale agreement or an overdraft. Finally L2G isn't a community finance organisation either.

So I think that Miss R's agreement clearly met sections a, b, d and e of the definition of HCSTC. This means that Miss R's loan is HCSTC if section c of the definition is also met.

Section c(ii)

L2G argues that Miss R's loan doesn't meet section c of the definition of HCSTC because it had a term of 18 months. It says 18 months is clearly longer than the maximum period of 12 months, which is the period referred to in Section c(ii).

I've carefully thought about what L2G has said.

It's interesting to note that L2G chose to focus its response on the fact that Section c(ii) refers to a maximum period of 12 months. And, despite our adjudicator subsequently drawing its attention to it, L2G appears to be ignoring the fact that Section c(ii) of the HCSTC definition says a loan will be caught by the provision if the credit is due to be repaid ***or substantially repaid*** within a maximum period of 12 months.

In my view, the inclusion of "or substantially repaid", within Section c(ii), leaves open the possibility that credit taken over a term of longer than a maximum of 12 months might fall within the provision. So I don't think the fact that Miss R's loan has a term of 18 months automatically means it doesn't fall within the scope of Section c(ii). And I've given careful thought to whether Miss R's credit was due to be substantially repaid within a maximum of 12 months.

Was Miss R provided with credit that was due to be substantially repaid within a maximum period of 12 months?

Credit is defined in the handbook. And it is defined as:

"(3) (in relation to a credit-related regulated activity, operating an electronic system in relation to lending or an MCD credit agreement) includes a cash loan and any other form of financial accommodation, but an item entering into the total charge for credit is not treated as credit even though time is allowed for its payment."

As Miss R was provided with a cash loan, I'm satisfied that her loan is covered by the definition of credit. While credit is defined in the handbook, substantially repaid isn't. So, in these circumstances, I need to apply a natural meaning to substantially repaid (as per GEN 2.2.9G) in order to decide whether I think Miss R's loan is caught by Section c(ii) of the definition of HCSTC.

Substantially is defined as *"to a great or significant extent"* in the Oxford dictionary. I'm also mindful that GEN 2.2.1R says that *"Every provision in the Handbook must be interpreted in light of its purpose"*. Indeed CONC 5A.1., where the rules for the cost cap on HCSTC are found, reminds firms to interpret the provisions of the chapter in the light of their purpose.

With this in mind, in reaching my decision on what I think the definition of substantially repaid is, I think it's important to take into account the comments FCA made in Policy Statement 14/3 ("PS 14/3"), which set out the FCA's detailed rules for its regime for consumer credit.

PS 14/3 was published in February 2014 and it responded to the questions the FCA invited, on its proposed regime for consumer credit, in Consultation Paper 13/10 (Detailed proposals for the FCA regime for consumer credit) ("CP13/10") and Quarterly Consultation Paper No.3 13/18.

The FCA's rationale behind its definition of HCSTC and its response to questions arising out of CP 13/10 and QCP3 13/18 starts on page 44. Section 5.3 says the definition of HCSTC tried to capture the business models currently in the market and future-proof it against "potential gaming" from firms.

Section 5.4 also confirms that, in the consultation, the FCA asked *"Do you agree with the definition of a high-cost short-term credit provider as set out at the start of this chapter?".* In section 5.6 the FCA highlighted specific responses that it received in relation to the proposed term included in the definition of HCSTC. Section 5.6 said several firms argued that anything more than six months was not short-term, others that the definition would capture loans up to 24 months because of the way it is drafted.

The FCA response to these points was set out in section 5.9. It said:

"Our definition stems from our analysis of the market, with conduct rules that are specifically designed to respond to concerns about firms' business models. Despite some respondents being concerned that our definition was too broadly defined, we believe it is appropriate to future-proof and address potential gaming."

So, in my view, the FCA clearly declined the opportunity to confirm the number of months a loan had to run for before it would be clear that there was no intention that the credit would be substantially repaid within a maximum period of 12 months. And it declined to confirm that there was no intention for loans with terms of up to 24 months to be included in its definition of HCSTC – even though it was provided with the opportunity to do so and it could be argued that it was invited to. If anything, the FCA arguably instead confirmed that a broad definition of HCSTC should be taken and was appropriate to ensure that firms didn't try and get around the rules.

I've considered whether Miss R's loan was due to be substantially repaid within a maximum of 12 months (and so falls within Section c(ii) of the definition of HCSTC bearing in mind I've already set out why I think it met all of the other criteria in the provision) in this context.

Miss R's loan was due to be repaid in 18 monthly instalments of £203.90. So I don't think it was unfair or unreasonable for our adjudicator to have concluded Miss R's loan was due to be substantially repaid within 12 months as two thirds of the total amount payable was due to be repaid within this period. This is especially the case when it is considered that there is an argument to say – if she made her repayments on time – Miss R would have fully repaid the credit she was advanced five months into to agreement.

But my suspicion here is that L2G adding all of the interest from the outset and its method of amortising this loan (i.e. the way it allocates different proportions of each repayment towards the interest and capital) means that Miss R payments would've been mostly made up of interest in the initial stages. And my suspicion is that the amount of the monthly payment going towards the £900.00 she initially borrowed in the first 12 months of the loan term won't have been enough to clear anywhere near half of it. But this is my suspicion and L2G hasn't made this argument or broken down these payments in this way for me.

It's also my understanding that Miss R could only have had a loan with an APR of well in excess of 100% and a term of 18 months from L2G. L2G hasn't provided an explanation as to how and why Miss R could only have had a loan on such disadvantageous terms – although my own suspicion is that a loan over a shorter period of time would've seen far more of the amount initially borrowed repaid within the first 12 months and would've definitely confirmed this credit as being HCSTC.

I'm also 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 charges were reasonable for credit taken over a longer period.

This is especially the case when it is considered that the potential harm to a consumer - as a result of having to pay such excessive charges over a longer period – is arguably greater. Although for reasons I'll explain in the next section of this decision, it's possible the FCA thought existing legislation provided similar protection for such borrowers.

In any event, in my view, what has happened here, at the very least, appears to have the hallmarks of the "potential gaming" of the HCSTC definition that the FCA sought to guard against and put firms on notice of when it published PS 14/3. But this isn't a matter for me to decide here, as I'm required to decide what's fair and reasonable in the circumstances of this case – not whether L2G breached the terms of its authorisation by providing HCSTC, which is a matter for the regulator to decide.

And I don't think deciding whether or not this credit was HCSTC is crucial to me deciding what's fair and reasonable in the circumstances of this particular case. I say this because irrespective of whether the credit provided was HCSTC, in my view, L2G acted unfairly and unreasonably towards Miss R in some other way. I'll explain why in the following section of this provisional decision.

why I think that L2G acted unfairly and unreasonably towards Miss R in some other way

Having looked at Miss R's credit agreement, I can see it sets out the interest rate on the loan is at a simple fixed rate of 205.2% per annum. The credit agreement also sets out that this translates to an Annual Percentage Rate ("APR") of 1,008.5%. I don't think that both of these figures can be accurate as I can't see how a simple fixed rate of 205.2% translates into a APR of 1,008.5%.

The credit agreement also clearly explains that the total charge for the credit is £2.770.20. And the agreement also sets out that Miss R was due to make eighteen payments of £203.90. So given Miss R was only receiving £900 and she had to pay back £3,670.20 (over 18 months) I think that the cost of this loan is on any basis exceptionally high.

I accept that the total cost of the loan was clearly set out to Miss R before she agreed to it. But whilst the clarity of Miss R's agreement and the monthly repayment, on the face of things, being affordable (Miss R hasn't said it wasn't at the outset and says her inability to make payments has been as a result of her change in employment after the loan was provided), might normally be enough for me to conclude that L2G didn't do anything wrong, I still think that it acted unfairly and unreasonably towards Miss R given the particular circumstances of this case – irrespective of whether this loan is HCSTC.

To explain, Miss R was clearly refinancing and taking further funds from L2G. And I'm mindful that a copy of a bank statement that L2G appears to have taken at the time it provided this loan to Miss R show that she'd had returned direct debits.

So I think that L2G ought to have picked up that Miss R may have been looking to borrow further funds because she was struggling to manage her finances. And, in these circumstances, I think that it would have been fair, reasonable and proportionate for L2G to

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

have recognised this and also factor it in to any product offered, when lending to her. In my view, L2G didn't do that and instead unfairly took advantage of the situation by providing such an expensive product.

As I've explained earlier in this decision, the circumstances behind this loan application aren't clear (and I'd welcome any clarity the parties might be able to provide on this in any responses to this provisional decision) – all I know is that Miss R only received £370.05. And this suggests that the rest of the £900 went towards refinancing or repaying a previous loan from L2G.

I don't think that it was unfair per se for L2G to refinance Miss R's loan, given her apparent need to re-borrow - after all this might've allowed her to repay what she already owed more gradually and leave her finances with more breathing space. That said even though it wasn't unfair per se for L2G to refinance any existing loan, this doesn't mean that it was fair or reasonable for L2G to provide this particular 18-month loan, on the terms it did.

If L2G is correct and Miss R won't have paid a significant portion of the £900.00 initially borrowed by the end of 12 months, then Miss R will have repaid close to £2,500.00 and paid less than £450.00 towards what she borrowed. So she will have paid around £2,000.00 to reduce the amount she initially borrowed by less than half.

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 this loan had an interest rate so outrageous[3] (i.e. one which works out at well in excess of 100% per annum) 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 loan agreement had a quoted simple interest rate of 252% and APR of in excess of 1,000%;
- the prevailing interest rates in December 2017;
- Miss R's weak bargaining position, considering her need to refinance, in comparison to L2G and it only providing an 18 month option;
- L2G argument isn't that this loan isn't high-cost but that it isn't short-term.

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 L2G and Miss R at the time of this loan – bearing in mind all of the factors in play in this case - 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 Miss R was given a loan which had an interest rate which, on the face of things, wasn't commensurate to the risk L2G was taking in providing the funds.

[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

As the payments on this loan were for around £200 a month, L2G would've recovered the full value of the capital it was advancing to Miss R by month five (and this isn't taking into account any interest and charges it would've already received as a result of Miss R's previous loan or loans). So this means that all of the payments from month six were being made after there was no risk to L2G of it not getting what it originally lent back.

I think that this agreement (which required at least twelve out of the eighteen payments to be made once L2G 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 L2G ought to have been alert to the possibility Miss R was struggling to manage her money.

But instead of offering assistance and perhaps providing a product where Miss R would repay £200 (which still represented a significant proportion of her monthly income of around £1000) over a more reasonable period, which I think would've been the fair, reasonable and proportionate thing to do in the circumstances, L2G provided her with a product which required her to repay four times the amount she was borrowing over an 18-month period.

In my view, this had the effect of unfairly excessively increasing and prolonging Miss R's overall indebtedness. I also think that L2G failed to take into account the risk of this loan being unsustainable bearing in mind the total charge of the credit relative to Miss R's financial situation as it was. This is especially as it was using an interest rate that was only really meant to be used on products repaid over a short term period and bearing in mind the extent of Miss R's apparent financial position.

So taking all of this into account, I think that it was unfair for L2G to have provided this loan to Miss R, in these particular circumstances, irrespective of whether it is HCSTC.

Miss R's concerns about L2G failing to treat her positively and sympathetically

I've also carefully thought about what Miss R's said about L2G failing to treat her positively and sympathetically since she's run into payment difficulties on her loan. But having looked at the file of papers, it does look like L2G has gathered income and expenditure information from Miss R with a view to establishing how much she can realistically afford to repay at this moment in time. It's unclear whether an affordable payment plan has been set up.

But, in any event, it seems clear that L2G has recognised that Miss R is having difficulty making her payments. And it has, at the very least, taken reasonable steps towards setting up an affordable payment plan with her. So I don't think that L2G has failed to treat Miss R positively and sympathetically, or that it has acted unfairly and/or unreasonably towards to her in respect of this matter. And as this is the case, I'm not intending to uphold this part of the complaint.

what I think L2G should do to put things right in the circumstances of Miss R's case

I've given careful thought to what amounts to fair compensation in this case. Where I find that a business has done something wrong, I'd normally expect that business to – as far as reasonably possible – place the consumer in the position they would be in now if the wrong hadn't taken place. So I'm effectively looking for L2G to put Miss R in the position she'd now be in if she hadn't been given this loan on such egregious and unfair terms.

Miss R was given her loan and she used the funds – albeit I accept that some of it went towards repaying her previous loan. So it's not possible to put Miss R back in the position she would be in she hadn't been given her loan in the first place. And I have to look at what else I can do to put things right in the fairest way I can.

In cases where we think a loan shouldn't have been given we usually tell a business to refund all of the interest and charges the consumer paid on that loan. So I've started by thinking about whether a full refund of the interest and charges Miss R had to pay would be fair here.

But having carefully thought about everything, I don't think that would be the fair and reasonable thing to do here as I'm mindful that Miss R acknowledges the monthly payments were affordable for her when she initially took the loan. Equally, in her email of 17 August 2018, Miss R does acknowledge that she should pay some interest as well as what she initially borrowed.

Taking all of this together I think that 100% of the amount borrowed doesn't appear to be unreasonable here – especially as we're talking about a loan with an 18 month term. So, at present, I'm inclined to say that L2G needs to ensure that Miss R pays no more than this here.

For the avoidance of doubt, I also wish to make it clear that this isn't a case of me simply applying the cost cap in CONC 5A – irrespective of me reaching a decision on whether or not this happened. After all a breach of the cost cap set out in CONC 5A.2 would typically render the agreement unenforceable. That's not what I'm saying should happen here.

Overall and having given considerable thought to this matter, bearing in mind the particular circumstances Miss R's complaint, I think it would be fair and reasonable, in all the circumstances of this case, for L2G to do the following:

- reduce the outstanding balance on Miss R's loan to £1,800.00; and
- arrange an affordable payment plan with Miss R so that she can repay the above amount;

my provisional decision

For the reasons I've explained, I'm intending to uphold Miss R's complaint and tell Loans 2 Go Limited to put things right in the way set out above.

So unless the comments and evidence I get by 28 February 2019 change my mind, that's what I'll tell L2G to do in my final decision.

Jeshen Narayanan
ombudsman