decision	
complaint by:	Mr H
complaint about:	Lender C
complaint reference:	
date of decision:	30 August 2018

The rules about complaining to the ombudsman set out when we can – and can't – look into complaints. In my decision, I've explained what this means for Mr H's complaint.

summary of the complaint

Mr H has complained about fifty-four payday loans Lender C lent to him between March 2010 and September 2014.

He's said he had to keep borrowing and in larger amounts as time went on and these loans trapped him in a "debt spiral" – where he had to borrow more on each occasion just to repay the previous loan, interest and charges.

background to the complaint

Mr H complained to Lender C on 10 May 2016.

Lender C issued its final response on 18 August 2016. The final response told Mr H that Lender C wasn't going to look at his complaint about his first three loans as he complained about them too late. This was because he complained more than six years after he was given these loans.

Part of Mr H's complaint has already been resolved. The first of the adjudicators that looked at Mr H's complaint thought that Lender C shouldn't have given Mr H loans four to fifty-four (i.e. all of the loans he took from June 2010 onwards). Lender C eventually accepted our adjudicator's view on these loans and has since redressed Mr H in line with her recommendation.

A second adjudicator then went on to look at whether Mr H had complained about his first three loans in time. He told Lender C that he thought we could look at Mr H's complaint about the loan he took in March 2010 and the two loans he took in April 2010. This was because he thought that while Mr H complained more than six years after he was given these loans, he complained within three years of when he knew, or he ought reasonably to have known, he had cause to.

Lender C disagreed with our adjudicator's view and provided its reasons for this in two separate responses. The case was then passed to me to consider whether Mr H had complained about the loans he took in March 2010 and April 2010 in time.

I carefully considered all of the arguments that had been made by both parties and issued a provisional decision on 21 September 2017. I've attached a copy of my provisional decision. As the provisional decision is attached I won't repeat it in full here. But, in summary having reviewed all of the evidence and arguments, I provisionally concluded that:

- I was required to consider and apply the time limits set out in DISP 2.8.2R(2) – not Section 14A of the Limitation Act 1980;

- Mr H complained more than six years after the events he was complaining about – being given a loan in March 2010 and two loans in April 2010;

- in order for Mr H to have been aware of cause for complaint that he would have had to have been aware of three things:

    - that there was a problem – in this case the loan(s) was unaffordable;
    - that the unaffordable loan caused him loss; and
    - that Lender C's actions (or its failure to act) may have caused the loss;

- Mr H only actually became aware that he had cause to complain in 2014 and he complained within three years of this;

- in order for it to be the case that Mr H ought reasonably to have had cause for complaint (or as Lender C puts it to have had constructive knowledge), the facts of the case would have to suggest that he ought reasonably to have been aware of three things:

    - that there was a problem – in this case the loan(s) was unaffordable;
    - that the unaffordable loan caused him loss; and
    - that Lender C's actions (or its failure to act) may have caused the loss;

- I wasn't persuaded that Mr H ought reasonably to have made the connection that Lender C might have been responsible for any difficulties he faced in repaying the loans he was complaining about. And so I wasn't persuaded that Mr H ought reasonably to have been aware of his cause to complain sooner than he actually became aware of this in 2014;

- Mr H had complained within three years of becoming aware, or the point at which he ought reasonably to have been aware, of his cause to complain. So we could and should look at Mr H's complaint about the loans he took in March 2010 and April 2010.

responses to my provisional decision

I invited both parties to provide any further evidence or arguments in response to my provisional decision by 23 October 2017.

Mr H confirmed receipt of my provisional decision. He said that he accepted it and had nothing further to add.

Lender C provided an initial response. It confirmed that it disagreed with my provisional decision and provided a number of reasons for this. In summary, it said:

- it is a matter of common sense that an ombudsman has to approach any determination (including jurisdiction) on the basis of what is fair and reasonable in all the circumstances of the case;

- it accepts that I am required to apply the time limits set out in DISP 2.8, rather than the time limits set out in Section 14A of the Limitation Act 1980. The *"reference to Section 14A and the surrounding case law is made solely to assist the Financial Ombudsman Service when taking account relevant law and thereby approaching the proper construction of DISP 2.8 in the correct manner".* So reconsideration should be given to the 'Legal background' section set out in its letter of 12 January 2017;

- my provisional decision concluded that it was necessary for Mr H to have been aware that Lender C might have done something wrong in giving him his loan in order for time to have started running. It doesn't agree that this is the correct approach in relation to 'constructive knowledge'. But even if it is the route taken to reach this conclusion is flawed for two reasons;

    - considerable reliance was placed on "the wider environment and circumstances in which short term loans were taken out" in 2010. But the evidence relied on doesn't support the conclusion reached;

    - no proper consideration was given to the steps a reasonable complainant ought to have taken to ascertain whether they had grounds for complaint. This leaves it open that a consumer could remain entirely passive and yet still benefit from the extension to the limitation period afforded by DISP 2.8.2R (2)(b);

- my approach to determining constructive knowledge had a fundamental flaw as it introduced an element of actual knowledge into the test for determining constructive knowledge;

- further consideration should be given to Lender C's previous comments in relation to the reasonable steps Mr H could've taken and the documentation he was provided with – such as the Missing payments warning and Clauses 2 and 5 of his loan agreement. The information provided should have prompted a reasonable person to ask a simple question such as *"did Lender C have to check I could afford this loan before giving it to me?"*;

- it would be entirely unreasonable if the Financial Ombudsman Service's jurisdiction to adjudicate on complaints was reliant on "*wholly adventitious matters"* such as whether an individual happened to have read a certain blog about unaffordable lending.

Lender C then provided a further response to my provisional decision, which it asked me to consider. In summary, the further response said:

- my decision should provide the fullest possible reasoning and explanation. In this case the point at issue is jurisdiction and in contrast to the wider discretion ombudsmen enjoy under the requirement to adjudicate on the basis of what is fair and reasonable, there will always be a correct answer on jurisdiction;

- Lender C is required to learn the lessons from ombudsman determinations. And its policy - of not considering whether the three year limb of DISP 2.8.2R (2) was engaged - was formulated on the basis of an ombudsman's final decision issued in June 2016;

- my provisional decision on this case marks a change of position by the Financial Ombudsman Service, which is not supported by any explanation or justification. And it didn't properly take into account the features of the particular product set with which Mr H's complaint is concerned;

- the Financial Ombudsman Service process doesn't allow for any forensic examination of any consumer assertion as to when they actually became aware of their cause for complaint;

- in order to properly consider what a complainant *ought reasonably* to have known, it is necessary to undertake a reasonable consideration of the circumstances relating to that individual at the relevant time and, potentially, prior to that. The Financial Ombudsman Service process is also "*forensically unsuited"* to determining this;

- Mr H says he only became aware he had cause to complain in 2014 after he read a blog about unaffordable lending. But this isn't an accurate reflection of what Mr H knew at that stage because he was included in a voluntary remediation scheme Lender C agreed with the Financial Conduct Authority. As a result, Mr H was sent an email in November 2014, which Lender C has provided an example copy of. It says the content of this email means Mr H should be treated as having knowledge (whether actual or constructive) of cause for complaint when he received it;

- Mr H would also have seen similar information on Lender C's website in October 2014. And Lender C's records indicate that he visited its website in early October 2014. So Mr H would've been aware of his cause to complain at this stage too;

- the above shows that it's clear I can't rely on Mr H's (and, by extension, most other complainants') account of when he had actual awareness of cause to complain and so it's vital for me to give proper consideration to the issue of whether a complainant ought reasonably to have had cause to complain, and when that was the case;

- Lender C was the subject of widespread detailed media coverage related to its remediation programme. And, in the event, I find that the arguments set out above not to be sufficiently persuasive the widespread press publicity relating to the remediation scheme means that Mr H, in any event, ought reasonably to have been aware of his cause for complaint in October 2014.

Although I've summarised and only set out the main points of Lender C's responses, I can confirm that I've read and carefully considered all of the arguments it has made.

my findings

I've carefully considered all of the available evidence and arguments provided by Mr H and Lender C (including the responses to my provisional decision) in order to decide whether we are able to look at the remaining part of this complaint.

I want to make it clear that I'm not looking at whether Mr H's first three loans should or shouldn't have been given to him. This is only something that'll be looked at if I decide we're able to look at the complaint about Mr H's first three loans.

the relevant time limit

As I explained in my provisional decision, paragraph 13 (1) of Schedule 17 of the Financial Services and Markets Act 2000 ("FSMA") requires the industry regulator, the Financial Conduct Authority ("FCA"), to make time limits for complaints referred to the Financial Ombudsman Service.

These time limits are set out in the Dispute Resolution ("DISP") section of the FCA's Handbook at DISP 2.8, and it is *these* time limit rules that I'm required to apply when considering whether or not a complaint was made in time.

Lender C accepts that the applicable time limit here is the time limit set out in DISP 2.8.2R (2). But it says that it has referred to Section 14A of the Limitation Act and the surrounding case law as it is relevant to my application of DISP 2.8.2R (2)(b).

I've already explained that while I'm mindful of the approach the courts have taken when applying its time limits, the DISP rules and court time limits are separate and distinct from one another. I set out a number of differences between the time limits in my provisional decision. And I don't think it's necessary to repeat them here. But I do think it's important not to over-simplify the distinct time limits in DISP by simply directly applying the case law applicable to the Limitation Act 1980 as if it were the Act itself that I'm considering here.

I am – as I explained in my provisional decision - fully aware of the associated case law Lender C has referred to and I accept that it has some relevance when considering, for example, how the objective part of the knowledge test in DISP 2.8.2R(2)(b) applies. To be clear, I have taken it into account when considering DISP 2.8.2R(2)(b). And I don't think that my findings are incompatible with how the Limitation Act 1980 might apply to this case. But, in any event, even if they are, I remain satisfied that it is the time limits set out in DISP 2.8 that apply to this complaint. And I've set out what is relevant to considering this.

So I remain of the opinion that a detailed analysis and review of the case law pertaining to Section 14A of the Limitation Act 1980 is unnecessary and wouldn't be particularly helpful as I'm not applying the Act here. The further arguments Lender C has made in relation to this haven't persuaded me otherwise.

DISP 2.8.2 R (2)

As a reminder, DISP 2.8.2 R (2) states that, unless the business consents or there are exceptional circumstances for the complainant's failure to comply with the time limits, I can't consider a complaint that's been made more than:

(a) six years after the event complained of; or (if later)

(b) three years after the date on which the complainant *'became aware (or ought reasonably to have become aware) that they had cause for complaint'*.

Lender C has made it clear that it considers Mr H's complaint about the loans he took out more than six years before he complained to have been made out of time. And it doesn't consent to us looking at this part of the complaint. As this is the case, I've considered whether Mr H's complaint about those loans was made in time under DISP 2.8.2 R(2).

DISP 2.8.2 R (2)(a) – six years from the event complained of

Both Lender C and Mr H are in agreement that as Mr H complained to Lender C in May 2016 (and he hadn't complained to us before this), he complained more than six years after he was given a loan in March 2010 and two loans in April 2010. And as he's complaining that Lender C gave him these loans when it shouldn't have, his complaint was made more than six years after the events Mr H is complaining about.

Lender C maintains this should be the end of the matter. It says it formulated its policy (of not considering whether the three year limb of DISP 2.8.2 R(2) was engaged) on the basis of an ombudsman's final decision issued in June 2016. It says my provisional decision departed from what was said in that decision and marks a change in approach and I've not explained why there has been this change in approach.

I want to start by saying that it has always been the case and continues to be the case that, when determining whether a complaint was made in time, we have to consider and apply the facts of a particular complaint against the time-limit rules set out in DISP 2.8.2R(2). Indeed Lender C's most recent response suggests that it is aware (and it has been aware) that we've always been required to consider whether the three year limb of DISP 2.8.2R(2) provides a consumer with longer to complain, from reviewing decisions involving other financial products.

This is the reason why my provisional decision didn't provide an explanation about any change in approach as there is no change in that requirement. Equally Lender C's most recent response acknowledges that the issue of whether the three year limb of DISP 2.8.2R(2) provides a consumer with longer than six years has only been a relatively recent consideration because most complaints were in fact made within six years of each loan being complained about.

I've noted Lender C's comments about another case. I've taken that decision into account and I agree that consistency in approach is important. But I am not bound by that earlier decision. And, in any event, I find it offers little assistance here as it said nothing at all about the DISP 2.8.2R(2)(b), or the three year part of the time limit.

Ultimately, my role is to apply the provisions in DISP 2 to the facts of Mr H's case in order to decide whether I can assume jurisdiction to consider his complaint. So while I've carefully thought about Lender C's arguments, Mr H's complaint about his first three loans will have been made in time if I conclude his time limit for complaining was extended by DISP 2.8.2R (2)(b) and he complained within three years of when he was, or he ought reasonably to have been, aware he had cause to.

I've given careful thought to whether this is the case.

DISP 2.8.2 R (2)(b) – when did Mr H actually become aware that he had cause to complain?

Mr H has been asked when he *first* became aware he had cause to complain. And he told us that he actually became aware of cause for complaint in late April or early May 2014. He said that he'd just been made redundant, was looking to save money and eventually ended up reading a blog about unaffordable lending. He says the blog referenced a consumer's borrowing from Lender C and this caused him to start thinking about and remembering his own situation.

So Mr H has said that he became aware of his cause to complain *before* Lender C sent him the information it is now relying on to say the receipt of which meant he had actual – or at the very least constructive – knowledge of his cause to complain.

Lender C argues that "no reliance can properly be placed on the account given by Mr H because his recollection is so clearly flawed". Lender C says this is because it believes what Mr H says is clearly contradicted by what it sent him in November 2014 and what he would've started seeing in October 2014.

Lender C has in fact gone further, by inviting this service to apply its logic to other complainants too. It says that "a detailed examination of Mr H'ss situation … demonstrates clearly that it is extremely risky for the FOS to place reliance upon a complainant's recollection of their state of knowledge".

I have concerns about the argument that Lender C is developing here. I think that there is an implicit argument that we can't adequately test Mr H's and other complainants' assertions. But I see no contradiction at all between what Mr H has told us (about the point at which he actually became aware of cause for complaint) and the information Lender C sent to him in late 2014. In fact, Mr H's recollections start the three-year time limit *earlier* than Lender C's November 2014 letter.

It is entirely possible for a complainant to have attained actual knowledge of cause for complaint prior to receiving information from a respondent business, or prior to when a complainant generally ought reasonably to have known they had cause to complain.

For example, the complainant may have sought advice and had been informed they had reason to complain. And, in this case, Mr H says he first became aware of his cause to complain because of information he read – a blog on unaffordable lending – *before* the information Lender C has referred to, which may or may not have been sufficient to engage DISP 2.8.2 R (2)(b).

I'd also add that we have a statutory duty (Section 225 FSMA) to resolve disputes *"quickly and with minimum formality by an independent person".* So considering evidence and deciding the appropriate weight to place on a given complainant's evidence and submissions are matters we routinely consider not only when determining whether a complaint has been made in time but also when determining whether or not a complaint should be upheld. So these questions aren't unique to this complaint or even to complaints involving high-cost short term credit as Lender C appears to suggest.

For the sake of completeness, I also want to explain that I didn't reach my finding that Mr H became aware of his cause for complaint in 2014 simply because he said this. I weighed up both the plausibility and consistency of what he said against everything else I'd been provided with. And in the absence of any further persuasive argument or credible reason to doubt what Mr H says, I remain of the view that Mr H didn't attain actual awareness of his cause to complain until he read a blog on unaffordable lending in 2014.

This means that Mr H will have complained in time *unless* it's the case that he *ought reasonably* to have been aware that he had cause to complain (or as Lender C puts it he had constructive knowledge) by 9 May 2013 at the latest.

So it seems to me that my consideration of whether Mr H complained in time essentially boils down to determining one key question – *when ought Mr H reasonably to have become aware he had cause to complain about his first three loans?* If the answer to this question is on or before 9 May 2013 then Mr H's complaint (about his first three loans) will have been made too late and this will mean we can't look at it.

DISP 2.8.2R (2)(b) – Ought Mr H reasonably to have become aware he had cause to complain by 9 May 2013?

In my provisional decision, I made it clear that that there are effectively two parts to DISP 2.8.2R (2)(b). There's a subjective part, which relates to the complainant themselves - i.e. were they aware they had cause to complain. And there's also an objective part, which requires me to consider whether a reasonable person, in those circumstances, ought to have been aware they had reason to make the complaint they have made earlier than they say they actually did.

In my provisional decision, I explained that having cause to complain required a complainant to not only be aware of a potential problem, but also to be aware that the problem may have been caused by someone else (and who that someone is). And it follows that for it to be the case that Mr H ought reasonably to have been aware of his cause to complain, I will need to be persuaded that he *ought* reasonably to have been aware (even though he may not have been actually aware) of three things:

1) that his loan(s) was unaffordable;
2) that the unaffordable loan caused him loss; and
3) that Lender C's actions (or its failure to act) may have caused the loss.

I also explained, in my provisional decision, that given what he's said about approaching Lender C after he'd already taken ten previous payday loans and having debt problems which meant he sometimes couldn't eat, I think that Mr H ought reasonably to have been aware that he was borrowing because he was struggling to repay previous loans.

And Mr H would also have been aware, or ought reasonably to have been aware, that he was paying an increasing amount of interest the more loans he took out. So I think that Mr H also ought reasonably to have been aware that he may have suffered a loss, or that he was suffering a loss as he was taking out these loans. But I wasn't persuaded that Mr H realised that Lender C might've been responsible for his repayment problems – nor did I think that Mr H ought reasonably to have made that connection either. In my view, Mr H would, quite reasonably, have seen Lender C's offer of further loan as a solution to his problem, rather than a cause of it.

Lender C agrees with my conclusions on stages one and two. It agrees Mr H ought to have realised that his loan(s) was unaffordable and that he had suffered or would suffer a loss. But it disagrees on stage three.

It's unclear whether it disagrees with stage three on the basis that it isn't necessary for a consumer to attribute responsibility for their problem to the respondent business, or whether it disagrees with my conclusion that it isn't the case Mr H ought reasonably to have made the connection that Lender C might have been responsible for his problem.

I say this because Lender C's response says *"However, the provisional decision does go on to conclude that it was necessary for Mr H to be aware that Lender C might have done something wrong in giving him the funds he'd asked for in order for time to start to run against him. We make it clear that we do not agree that this is the correct approach in relation to constructive knowledge (the approach we consider should be taken to this is issue is explained below).".* The remainder of the response then goes on to explain why Mr H ought reasonably to have made the connection that Lender C might've been responsible for his problem.

But I think Lender C may have misinterpreted the relevant part of my decision. My provisional decision said:

"That said, I think that having cause to complain requires a consumer to not only be aware of a potential problem (in this case, the unaffordable lending), but also to be aware that the problem may have been caused by someone else (and who that someone is).

In some instances it'll be quite clear that the business might have (at least) some responsibility for what happened to the consumer. So, for example, it's likely that a consumer taking out a product on the basis of information given to them by a business would normally have reason (or ought reasonably to have had reason) to think the business might have done something wrong when they later found out that the information was misleading. Usually, a reasonable person would attach some blame on the person providing them with information they relied on if that information turned out to be inaccurate or untrue.

But equally it's possible (and sometimes perfectly reasonable) in some situations, for a consumer to not realise someone else might have some responsibility for their problem ***until something or somebody else made that connection for them*** [my emphasis]*. And I think that's what happened here".*

I want to make it absolutely clear that I did not reach the conclusion time would only start running against Mr H once he attained actual knowledge Lender C might've been responsible for his problem, as Lender C appears to be suggesting. Clearly such an approach would ignore the 'ought reasonably to have been aware' element present in DISP 2.8.2R (2)(b).

And I want to make it clear that my provisional decision agreed (and I still agree) that time would've started running against Mr H from the point he ought reasonably to have made the connection that Lender C might've been responsible for his problem, if this was earlier than when he actually realised this in 2014.

The reason why I found that Mr H complained in time, in my provisional decision, was because what I'd seen and been presented with hadn't persuaded me he ought reasonably to have made the connection Lender C was responsible for his problem. In other words, what I'd seen hadn't persuaded me that Mr H ought to have made the connection between him being unable to repay his loan and Lender C perhaps being responsible for this. And I think that it is important for me to point this out.

Lender C's arguments on the evidence relied on in my provisional decision

Lender C has also challenged some of the evidence I relied upon when contextualising the wider environment and circumstances in which short term loans were taken out, when

Mr H took his in 2010. It says it has grave concerns about the reliance I placed on the two publications I cited.

On page six of my provisional decision, I said:

"In reaching my decision about what a consumer 'ought reasonably' to have known, I think it's important to take into account the wider environment and circumstances in which short term loans were taken out, when Mr H took his in 2010.

For many borrowers, the role of short-term lenders was to provide relatively (compared to other borrowing types) small amounts of money to consumers, when other mainstream lenders wouldn't lend to them. Most consumers approached such lenders knowing that they might well have difficulty paying back what they borrowed. And for many it would have seemed like such loans were 'there if you want it' up to a certain amount, with the borrower seeming to control much of the process – selecting how much they wanted to borrow and for how long (up to specified limits) and completing the process in minutes."

I then went on to say:

"It would – in my view, quite reasonably – have seemed to many consumers seeking short term loans, at this time, that it was part and parcel of such arrangements that they might not be able to repay them in full from disposable income at the first attempt. Instead, they might have to take out another loan or significantly alter their other financial arrangements to repay the loan. That was all part of the service the short term lender provided and the experience of many with a previous history of borrowing.

Indeed not being able to pay back loans on time, or having to defer them was seen as the norm, given the refinancing of such loans was readily available and even encouraged in the event of payment difficulties. And it seems to me this would only have added to a borrower's view that short term lenders were assisting them by providing a service to them when they were already in difficulties when most others wouldn't."

While Lender C has challenged the way I have relied on the evidence I cited, it doesn't appear to challenge the overall conclusion I reached, or at least parts of it. But to be clear, I referred to the Office of Fair Trading's ("OFT") "Payday Lending Compliance Review Final Report" ("final report"), which was published in March 2013, simply as an indication of what the then regulator thought of the payday lending market. I did not suggest that this report was a detailed account of borrower attitudes towards payday lending.

I agree that the final report was a compliance review of the payday lending sector to investigate the extent to which payday lenders complied with the Consumer Credit Act, other legislation and met the standards set out in the OFT's guidance to irresponsible lending ("ILG").

The review was prompted by concern that some payday lenders may have been taking advantage of people in financial difficulty. And it sought to highlight examples of what the OFT considered poor practice and evidence of non-compliance with the relevant law and failure to meet the minimum standards expected. The analysis was also put together to help the FCA's work on payday lending ahead of it assuming responsibility for regulating the sector.

Page three of the report illustrates that it was common for borrowers to be unable to repay their payday loans without borrowing again. It says:

"Additionally, firms describe and market their product to consumers as one-off short term loans (costing on average £25 per £100 borrowed for 30 days), but in practice around half the revenue comes from loans which last longer and cost a lot more because they are rolled over or refinanced. Lenders do not need to compete hard for this source of revenue because by this time they have a captive market. This, and the misuse of continuous payment authorities to reclaim monies owed, may distort incentives for lenders, encouraging them to make loans to people who cannot afford to repay them first time".

Page ten of the report also says:

"One in three loans is rolled over or refinanced, accounting for almost 50 per cent of revenues. Yet, as noted above, lenders are not competing for these revenues. Consumers in this position are largely captive and the evidence suggests that lenders are slow to make them aware of the alternatives available to them. In our view, it is not acceptable to sell a loan with the expectation that a consumer will need to rollover. However, we saw at least a third of lenders actively promoting rollovers at the point of sale."

In my view, the contents of the final report do suggest that the regulator found a payday loan market where not being able to settle a loan in full – either through rolling over or refinancing – wasn't out of the ordinary and in many instances encouraged. And it is in this context that I find support for my conclusion that it wasn't unreasonable for a payday loan borrower to have held the view that their inability to repay without borrowing again wasn't problematic – and not necessarily an obvious indication of a potential failure on the part of the lender.

I've also considered the points Lender C has made about the research paper entitled *"Making Consumer Credit Markets Fairer"* ("research paper"), which was commissioned by the Department for Business Innovation & Skills and published in October 2013. I accept that the report does contain a warning that qualitative findings are not representative of the views of the general public. But the purpose of referring to this paper wasn't to set out what the view of the general public was.

I referred to the research paper on the basis that it gave some insight on the perceptions of those who had already used or were planning to use payday loans. Indeed the authors of the research paper say that *"qualitative research is designed to be detailed and exploratory and provides insight into the perceptions, feelings and behaviours of people".*

The authors also explain, on page 15, that the make-up of the research groups was tailored to take account of research carried out by the Consumer Finance Association ("CFA") – the principal trade association representing the interests of short-term lending businesses operating in the United Kingdom. This was to take account of the variety of groups that used payday loans and to achieve a balanced and meaningful sample frame.

So while I accept Lender C's argument that there are some sections of the paper that are less supportive of the view reached in my provisional decision, I don't think it is unreasonable for me to have considered and then placed some limited weight on this paper. I also want to reiterate that I did not reach my finding on the wider environment and circumstances in which short term loans were taken out in 2010 solely on the basis of the research paper alone.

Lender C has referred to the ILG. But it hasn't elaborated on why this is relevant in terms of understanding the nature of the payday lending market in 2010. And while it has referred to Mr H's credit agreements and the accompanying information (which I will go on to consider), this information is specific to Mr H and it doesn't really shed much light on the nature of the market as a whole. Equally as I've set out above, while it is has objected to some of the information I relied on, I can't see that Lender C has challenged the presumption that consumers having to borrow again and lenders re-lending wasn't particularly unusual in 2010.

the information Lender C has referred to in its most recent response

As I've set out, on page four of this decision, Lender C has referred to a letter it sent to Mr H in November 2014 as well as information on its website and press articles from October 2014. It has argued that this information ought reasonably to have made Mr H aware of his cause to complain.

However Mr H complained in May 2016, which is clearly within three years of the date of all the information Lender C has referred to. And as I've already explained, what Mr H says means that DISP2.8.2 R (2)(b) was already engaged before Mr H may or may not have seen this information.

So while I understand Lender C's eagerness for this information to be considered (bearing in mind the implications for other cases), as I'm required, in this decision, to consider whether Mr H complained in time, I don't think that the information referred to affects my conclusions here. And I haven't considered whether that information ought reasonably to have made Mr H aware of his cause to complain as I'm satisfied that he *already* had actual knowledge of his cause to complain by this stage.

I've instead focused on the other information Lender C has relied on – the information provided at the time of the loans - and considered whether Mr H ought reasonably to have been aware of his cause to make this complaint by 9 May 2013 at the latest.

the information Mr H was provided with at the time he was given his loans

I've given further consideration to the points Lender C has made in relation to the information contained on the credit agreements Mr H was provided with – not least because Lender C has now provided me with what it has described as an example agreement (dated March 2010). As it has been described as an example agreement, I'm assuming for these purposes it is similar to what Mr H would have been provided with.

I've given careful thought to the content of the loan agreement and the supplementary information provided.

It's fair to say that Mr H was provided with a "Missing payments" warning on his credit agreement, which said:

"Missing payments could have severe consequences and make obtaining credit more difficult".

Lender C has also referred to information contained in the Lender C Loan Conditions document which was provided as an annexe to the main contract. It has referred to Clause 2 which is entitled Loan Approval and says:

"2. Loan Approval

a. If and when we provisionally approve your loan application, actual payment of the loan amount is subject to:

i. us ensuring that the information you gave us was not inaccurate or deficient in any respect (if we discover that it was, then the Agreement will be void and this information will be reported to credit reference and fraud agencies);

ii. us checking your credit reference and the information you provide to assess the affordability of the loan."

Lender C has also referred to Clause 5 of the agreement, which is entitled our relationship with you and says:

"5. Our Relationship with You

a. If you miss a loan repayment, or find yourself in financial difficulties and you believe you cannot afford to repay the amount due under your Agreement, you should contact us as soon as possible by email to customercare@Lender C.com. We will do the following:

i. explain the procedures we will apply and your options;
ii. tell you if your account is being passed to a Collections Agency.

b. You should tell us or a Collections Agency, as the case may be, when your circumstances change in a way that may adversely impact your ability to repay the amount due under your Agreement.

c. If your relationship with us or the Collections Agency has broken down, this will be included in the information supplied to the credit reference agencies. You should be aware that this may have serious consequences for your ability to get credit in the future."

I want to start by saying that whether the information Lender C has referred to ought reasonably to have led the consumer to make such a connection will depend on things such as the content of the information, when it was provided and its prominence within the overall documentation given to the consumer.

I've considered Lender C's arguments and the documentation in light of this.

Lender C has provided *some* of the information from Mr H's application but it still hasn't explained at what stage this was provided to him. So I don't know whether it was in fact provided before Mr H had submitted his loan application, or whether it was provided after the application was approved, but before the funds were released.

In any event, I've considered the information and note that Clause 5a does suggest that Mr H should contact Lender C (and provides contact details) if he finds he is unable to repay what he owes. It also says that Lender C will then explain its procedures and what his options are.

Clause 5b also says that Mr H should contact Lender C if his circumstances change in a way that may adversely impact his ability to repay what he owed. But all of this information is in relation to what Mr H should do if his circumstances change after he had taken his loan. And Mr H's complaint isn't that Lender C failed to help him when his circumstances changed. So I don't see how this information would have led him to question the lending decisions Lender C made.

I've also reviewed the information provided in Clause 2 of the loan conditions. The information in this clause suggests that even though his loan might have been provisionally approved, the funds wouldn't be paid until Lender C had checked the information Mr H provided and completed a credit check to assess the affordability of the loan. But there was nothing to say that Lender C was doing this because it had a duty to ensure that Mr H could sustainably repay his loan. And that this wasn't being done simply to ensure that Lender C would get its money back. Interestingly enough there isn't a reference to the ILG or anything about Mr H's rights (and/or Lender C's obligation to ensure the loan could be sustainably repaid) in this section either.

Equally as the loan amount was paid to Mr H, I don't see why he would have had reason to believe that the information he provided might not have been checked in the way suggested – especially as it looks like he was only asked to provide details of his income. And bearing in mind what Mr H has said as part of his complaint – that he was borrowing to repay another payday lender he'd previously borrowed from on ten occasions – I don't think that this information together with him having trouble repaying and needing to borrow again means that he ought to have made the connection that Lender C might have been responsible for his problem.

In these circumstances, I think Mr H was reasonably entitled to hold the view that borrowing again was perfectly normal – as that is why he'd approached Lender C in the first place.

For the sake of completeness, I'd also add that as well having doubts about the information itself, I also have concerns about the prominence of the information Lender C has referred to.

To explain, of all the information referred to only the Missing Payments warning is included on the agreement Mr H signed. Mr H isn't complaining that he wasn't made aware of the consequences of missing a payment. And from the information provided, I can't see that he did miss a loan payment either. So I don't see how this warning ought to have prompted Mr H into enquiring whether Lender C might've been responsible for his problem as a result of giving him a loan it shouldn't have.

I'm also concerned at the fact that Lender C's Loan Conditions appear to have been provided in an annexe to the credit agreement – rather than in the agreement itself. And I haven't been provided with anything which suggests that Mr H had to read this information before he would have been able to proceed with his application.

Equally while there is a section headed ***"IMPORTANT – PLEASE READ THIS CAREFULLY TO FIND OUT ABOUT YOUR RIGHTS"***, on Mr H's credit agreement, this section is concerned with what Mr H could do if he wanted to know more about his rights under the Consumer Credit Act 1974.

The only example given of consumer's rights under the Act is in relation to early settlement of a loan and any rebate that may be due as a result. And while Lender C had the opportunity to insert a warning stressing the importance of reading the attached loan conditions in this section it didn't do so.

So I can't see that Mr H had to read the information Lender C has referred to before he was able to complete his application. And in the absence of a warning about the importance of reading this information (even though such a warning about the importance of certain information was included), I would not have been satisfied that he ought reasonably to have read this additional information either. This is especially the case bearing in mind the speed at which this whole process would have taken place.

Finally, I have also carefully considered what Lender C has said about it being entirely unreasonable for the jurisdiction to adjudicate on complaints to be reliant on adventitious matters such as whether an individual happened to have read a certain blog about unaffordable lending. But DISP 2.8.2R (2)(b) is a knowledge, or an imputed knowledge, based provision.

So it follows that in some cases a complainant will have attained, or it will be the case that they ought reasonably to have attained, the knowledge required to engage DISP 2.8.2 R (2)(b). But this won't be the case in others. And if, how and when this happens will always vary depending on the facts of the individual case. I'm certainly not saying that time could only start running against Mr H, or any other consumer for that matter, until and unless he read a blog about unaffordable lending.

What I am saying is that this is what actually caused Mr H to make the connection (that Lender C might have been responsible for his problem) in this case. And I haven't seen anything, in this case, which persuades me that Mr H ought reasonably to have been aware that Lender C's actions (or its failure to act) might have been responsible for his problem at an earlier stage either.

conclusions

Having thought about everything provided, I think that Mr H's complaint about the loans he took in March 2010 and April 2010 was made in time.

In summary, I think this is the case because:

- I accept that as Mr H complained more than six years after when the events he is complaining about happened he complained outside the time limit in DISP 2.8.2R (2)(a). But I think his time limit to complain was *extended* by DISP 2.8.2R (2)(b);

- DISP 2.8.2R (2)(b) requires me to consider when Mr H became aware, or he ought reasonably to have been aware, of cause for complaint.

- I think that in order for Mr H to have been aware of cause for complaint that he would have had to have been aware of three things:

    - that there was a problem – in this case the loan(s) was unaffordable;
    - that the unaffordable loan caused him loss; and
    - that Lender C's actions (or its failure to act) may have caused the loss;

- Mr H only actually became aware that he had cause to complain in 2014 and he complained within three years of this;

- although Mr H may only actually have become aware of his cause for complaint, time might already have started running against him if he ought to have been aware of this earlier;

- I think that in order for it to be the case that Mr H ought reasonably to have had cause for complaint the facts of the case would have to suggest that he ought reasonably to have been aware of three things:

    - that there was a problem – in this case the loan(s) was unaffordable;
    - that the unaffordable loan caused him loss; and
    - that Lender C's actions (or its failure to act) may have caused the loss;

- I'm not persuaded that Mr H ought reasonably to have been aware that Lender C might have been responsible for the loss he suffered. This is because, having carefully considered everything provided, I don't think that Mr H ought reasonably to have made the connection that Lender C might've been responsible for the financial position he says he was in. So I'm not persuaded that Mr H ought reasonably to have been aware of his cause to complain sooner than he actually became aware of this in 2014;

- Mr H complained within three years of becoming aware, or it being the case that he ought reasonably to have been aware, of his cause to complain. So we do have jurisdiction to consider Mr H's complaint about the loans he took in March 2010 and April 2010.

my decision

For the reasons set out above and in my provisional decision dated 21 September 2017, my decision is that Mr H's complaint about the loans he took in March 2010 and April 2010 was made within the time limits set out in DISP 2.8.2R(2).

So I'm satisfied that the complaint falls within the jurisdiction of the Financial Ombudsman Service and should be reviewed on its merits.

Jeshen Narayanan
ombudsman

Copy of Provisional Decision

summary of the complaint

Mr H has complained about fifty-four payday loans Lender C lent to him between March 2010 and September 2014. He's said he had to keep borrowing and in larger amounts as time went on and these loans trapped him in a "debt spiral" – where he had to borrow more on each occasion just to repay the previous loan, interest and charges.

background to the complaint

Mr H complained to Lender C in May 2016.

Lender C issued its final response on 18 August 2016. The final response told Mr H that Lender C wasn't going to look at his complaint about his first three loans as he complained about them too late. This was because he complained more than six years after he was given these loans.

Lender C also offered to refund the interest and fees Mr H paid on twenty-one of the fifty-one loans it investigated. But it didn't think it had done anything wrong in relation to the other thirty loans taken between June 2010 and September 2014.

Mr H remained dissatisfied at Lender C's response and referred his complaint here. Two of our adjudicators thought about what Lender C and Mr H said and issued separate assessments on the complaint.

The first of our adjudicators thought that Lender C shouldn't have given Mr H loans four to fifty-four (i.e. all of the loans he took from June 2010 onwards). Lender C eventually accepted our adjudicator's view on these loans and has since redressed Mr H in line with her recommendation.

A second adjudicator then went on to look at the time limit issue on the first three loans Mr H complained about. He told Lender C that he thought we could look at Mr H's complaint about the loan he took in March 2010 and the two loans he took in April 2010. This was because he thought that while Mr H complained more than six years after he was given these loans, he complained within three years of when he knew, or he ought reasonably to have known, he had cause to.

Lender C disagreed with our adjudicator and provided an initial response to his assessment. In summary it said:

- objectively the unaffordability of these loans would have been clear to Mr H when he was unable to repay them in 2010 (the precise date in 2010 would depend on each loan);

- the nature of harm caused (by an unaffordable loan) is immediately apparent to a customer. It crystallises either at the time the loan is taken; or if not then, at the time the loan is due to be repaid;

- there is no possibility in these types of cases of a latent or hidden loss, where the customer only finds out much later that loss has occurred and they have cause to complain;

- Mr H would have been reasonably aware in 2010 that he could have contacted it if he was in financial difficulties; and he could have made a complaint to either it or the Finance and Leasing Association ("FLA") under the terms of the credit agreement.

When it was told the complaint was being referred to an ombudsman, Lender C supplemented its arguments with a further response. In summary the second response said:

- DISP 2.8.2R is closely aligned with section 14A of the Limitation Act 1980 (the "Act"). So it wouldn't be fair and reasonable to disregard the associated case law when determining when a complainant such as Mr H ought reasonably to have become aware of his cause for complaint;

- The Courts have given guidance on the level of knowledge required to engage section 14A[i]. This guidance sets out three important principles:

    - constructive knowledge is sufficient to start time running;
    - a common sense approach should be taken to assess what a complainant needs to be aware of, actually or constructively;
    - a complainant only needs to know that it is reasonable for them to begin to investigate further for them to have attained a sufficient level of knowledge.

- Our adjudicator's view went well beyond the sort of facts necessary for time to start running in the context of section 14A by requiring Mr H to have had actual knowledge:

    - (a) that Lender C had an obligation to assess affordability; and
    - (b) it hadn't complied with that obligation.

- Mr H should be taken to have had constructive knowledge of the facts referred to at (a) and (b) (set out above) when he repaid or found that he could not have repaid his loans if not earlier, because he could have made enquiries. And his credit agreements set out where he could make those enquiries;

- while I'm free to depart from the relevant law, I need to say that's what I'm doing and explain why I'm doing it, should I choose to do so.

Although I've summarised and only set out the main points of Lender C's responses, I can confirm that I've read and carefully considered all of the arguments it has made.

I want to make it clear that I'm not looking at whether any of Mr H's loans should or shouldn't have been given to him. This is only something that'll be looked at if I decide we're able to look at Mr H's case.

my provisional findings

I've considered all of the available evidence and arguments provided by Mr H and Lender C to provisionally decide whether we are able to look at this complaint.

the relevant time limit

Paragraph 13 (1) of Schedule 17 of the Financial Services and Markets Act 2000 ("FSMA") requires the industry regulator, the Financial Conduct Authority ("FCA"), to make time limits for complaints referred to the Financial Ombudsman Service. Paragraph 13 (1) says:

> (1) *The FCA must make rules providing that a complaint is not to be entertained unless the complainant has referred it under the ombudsman scheme before the applicable time limit (determined in accordance with the rules) has expired.*

These time limits are set out in the Dispute Resolution ("DISP") section of the FCA's Handbook at DISP 2.8, and it is *these* time limit rules that I'm required to apply when considering whether or not a complaint was made in time.

There are undoubtedly similarities between the time limits in DISP and those in the Limitation Act 1980. Indeed Lender C has referred to some of these. So I completely understand why Lender C has referred to the Limitation Act 1980 in its arguments and I'm mindful of not only the approach the courts take when applying these time limits but also all of the associated case law that Lender C has referred to as well.

That said, the DISP rules and court time limits are distinct from one another and they are not the same. For example, the rules made by the FCA under its FSMA powers:

- include a six-month time limit for a complainant to refer a complaint to us after a business has issued its final response to the complaint;

- do not include an overriding 'long stop' for bringing complaints to this service, as there is for some claims brought through the courts; and

- do not distinguish between complaints that involve contractual matters and negligence matters as the court time limits do (although there are different rules for some complaints, such as complaints about the sale of mortgage endowment policies and some pensions related complaints).

For the sake of completeness, I'd also add that while Lender C has referred to DISP 3.6.4 and an ombudsman having to decide what is fair and reasonable in all the circumstances of the case, DISP 3.6.4 concerns the determination of a complaint. And I'm not determining Mr H's complaint here. I'm merely deciding whether we have jurisdiction to look at it (i.e. I'm looking at whether we're even able to determine this complaint). I think it's important for Lender C to be aware of this distinction.

Taking all this into account, I'm satisfied that I need to decide how the time limits set out in DISP 2.8, rather than those in the Limitation Act 1980, apply to this complaint that Mr H has referred to the Financial Ombudsman Service.

The effect of DISP 2.8.2 R (2) is that, unless the business consents or there are exceptional circumstances for the complainant's failure to comply with the time limits, I can't consider a complaint that's been made more than:

(1) six years after the event complained of; or (if later)

(2) three years after the date on which the complainant *'became aware (or ought reasonably to have become aware) that they had cause for complaint'*.

Lender C doesn't consent to this service considering Mr H's complaint about the loans he took out more than six years before he complained. So I've considered whether his complaint about those loans was made in time under DISP 2.8.2 R (2).

the six year period and what this means for Mr H's complaint

Mr H has complained that Lender C shouldn't have given him three payday loans (he's actually complained about fifty-four loans in total. But it isn't in dispute that he complained about the loans he took after June 2010 in time). So he's in effect complaining about three separate lending decisions and he therefore has a separate complaint about the provision of a distinct financial service – providing a loan – for each loan.

This means that for the purpose of these rules, Mr H had six years from the date each loan was approved in order to complain. The six year period started and ended for each of the loans on the following dates:

loan	date taken	six years to complain ended
1	16 March 2010	16 March 2016
2	05 April 2010	05 April 2016
3	26 April 2010	26 April 2016

Mr H didn't complain about any of these loans until May 2016. So it's clear that he complained more than six years after when the respective events he's complaining about happened.

the three year period - Does this provide Mr H with longer than six years from when the loans were taken out in order to complain?

Even though Mr H complained more than six years after the respective events he's now complaining about, this isn't the end of the matter. This is because the DISP rules can potentially provide Mr H with longer than six years to complain, as long as he complained within three years of when he was aware, or he ought reasonably to have been aware, he had cause to.

So I've considered when Mr H was aware, or he ought reasonably to have been aware, he had cause to complain.

When was Mr H aware he had cause for complaint?

When he spoke to the (second) adjudicator, Mr H confirmed when he became aware he had cause to complain. I've listened to this call and can confirm that Mr H told us he only became aware he had reason to complain in 2014.

This was when he read a blog about unaffordable lending and a lender having to carry out sufficient affordability checks. He couldn't recall the name of the website itself but said reading about a specific Lender C case led him to think about his own circumstances and realise he had the same issue. He's also said that he didn't complain until May 2016 because he wasn't sure of exactly how to go about it until then and he'd also had to take on starting a new job. Finally, Mr H also said that he already had payday loans and was refused help by another lender when he'd asked for it.

Having reviewed everything provided on this case, I've not seen anything which clearly shows Mr H knew he had cause to complain before 2014. For example there isn't anything to suggest that he tried to complain earlier than this or anything he's said which confirms he knew he had reason to complain earlier. I also find Mr H's account of when he realised he had reason to complain to be consistent as well as plausible.

And bearing in mind Mr H's circumstances – i.e. he had been borrowing since November 2009, was continually borrowing afterwards and he stopped borrowing from Lender C in 2014, I find what Mr H has told us about only realising he had reason to complain in 2014 not only to be plausible but also persuasive. So I think that Mr H didn't realise he had cause to complain until 2014.

Is it the case Mr H ought reasonably to have been aware of cause for complaint more than three years before he complained?

While I think that Mr H complained within three years of when he had actual awareness of cause to complain, this doesn't, on its own, mean he complained within the three year part of the time limit.

I say this because there are effectively two parts to the three year limb of the time limit. There's a subjective part, which relates to Mr H himself - i.e. was he aware he had cause to complain. And there's also an objective part (which Lender C appears to be referring to as constructive awareness).

So although Mr H may not have realised he had cause to complain until 2014, it still might be the case that he ought reasonably to have reached this conclusion earlier than this – i.e. because a reasonable person in his circumstances should really have known he had reason to complain.

I've also considered whether Mr H ought reasonably to have known he had cause to complain more than three years before he did.

I think the main substance of Mr H's complaint is that Lender C shouldn't have given him these loans because it should've realised they were unaffordable for him – more specifically he's said Lender C should have known from his salary and his credit reports that he had debt problems.

So I need to agree that Mr H ought reasonably to have suspected this might've been the case more than three years before he complained, in order for him to have complained outside this part of the time limit.

I've already set out (in the background section to this decision) why Lender C believes Mr H ought reasonably to have been aware of what he's complaining about since 2010. In Lender C's view, Mr H struggling to pay back the loans in question plus his credit agreements setting out it was possible he could complain means that Mr H had all the facts required to know (and so he was constructively aware) he had cause to complain by the time he was unable to repay his April 2010 loan at the latest.

I've carefully thought about everything Lender C has said. But having thought about everything, I don't think that Mr H ought reasonably to have been aware he had cause to complain more than three years before he complained. I'd like to explain why.

I want to start by saying that given what he's said about approaching Lender C after he'd already taken ten previous payday loans and having debt problems which meant that he sometimes couldn't eat, I think that Mr H ought to have been aware that he was paying an increasing amount of interest (and that his financial position was worsening) when he was taking out these loans. So I think that he ought to have been aware that he might've found it difficult to repay these loans at this stage.

That said, I think that having cause to complain requires a consumer to not only be aware of a potential problem (in this case, the unaffordable lending), but also to be aware that the problem may have been caused by someone else (and who that someone is).

In some instances it'll be quite clear that the business might have (at least) some responsibility for what happened to the consumer. So, for example, it's likely that a consumer taking out a product on the basis of information given to them by a business would normally have reason (or ought reasonably to have had reason) to think the business might have done something wrong when they later found out that the information was misleading. Usually, a reasonable person would attach some blame on the person providing them with information they relied on if that information turned out to be inaccurate or untrue.

But equally it's possible (and sometimes perfectly reasonable) in some situations, for a consumer to not realise someone else might have some responsibility for their problem until something or somebody else made that connection for them. And I think that's what happened here.

In reaching my decision about what a consumer 'ought reasonably' to have known, I think it's important to take into account the wider environment and circumstances in which short term loans were taken out, when Mr H took his in 2010.

For many borrowers, the role of short-term lenders was to provide relatively (compared to other borrowing types) small amounts of money to consumers, when other mainstream lenders wouldn't lend to them. Most consumers approached such lenders knowing that they might well have difficulty paying back what they borrowed. And for many it would have seemed like such loans were 'there if you want it' up to a certain amount, with the borrower seeming to control much of the process – selecting how much they wanted to borrow and for how long (up to specified limits) and completing the process in minutes.

In fact, as the OFT reported as late as 2013 in its 'Payday Lending Compliance Review Final Report' (by which time the industry had taken some steps to improve practices):

- *Lenders compete by emphasising speed and easy access to loans, but borrowers are not getting a balanced picture of the costs and risks of taking out a payday loan.*

- *Across the sector, there is evidence that the majority of lenders are not conducting adequate affordability assessments and their revenue streams rely heavily on rolling over or refinancing loans. Around one in three loans is repaid late or not repaid at all.*

And it's for these reasons, among others, that the current regulator, the FCA, has since introduced various regulatory requirements on short term lenders and the market has changed and reduced in size.

It would – in my view, quite reasonably – have seemed to many consumers seeking short term loans, at this time, that it was part and parcel of such arrangements that they might not be able to repay them in full from disposable income at the first attempt. Instead, they might have to take out another loan or significantly alter their other financial arrangements to repay the loan. That was all part of the service the short term lender provided and the experience of many with a previous history of borrowing.

Indeed not being able to pay back loans on time, or having to defer them was seen as the norm, given the refinancing of such loans was readily available and even encouraged in the event of payment difficulties. And it seems to me this would only have added to a borrower's view that short term lenders were assisting them by providing a service to them when they were already in difficulties when most others wouldn't.

The lender was at the very least helping them delay the consequences of their existing financial difficulties. And if a consumer then struggled to pay back what they needed to, or couldn't do so at all, this wasn't necessarily because the lender might have done something wrong.

These points are broadly supported by a research paper entitled *"Making Consumer Credit Markets Fairer"*, which was commissioned by the Department for Business Innovation & Skills and published in October 2013. The research was carried out by Ipsos MORI and the Social Research Institute. And it was conducted with participants who had already used or were planning to use short-term loans.

Section two of this paper focused on the perception and uses of payday lending. In section 2.2, which focused on financial resilience and capability, it stated:

"Across the research, participants who had taken out a payday loan typically reported that doing so was a "last resort"; they had done so because they lacked other viable credit options, and because their need for the money was immediate and critical at the time of taking out the loan".

Section 2.3.3 focused on personal responsibility. And an extract from it says:

"many participants expressed a strong sense of personal responsibility regarding any misuse and difficulties caused by missed or mismanaged payments. Customers who had found themselves in difficulties in repaying payday loans – for example having bailiffs visit to reclaim debts – saw themselves as personally culpable".

So taking all of this into account, I don't think that a borrower struggling to make their payments from their usual income or savings, or even being unable to make them at all, automatically means that, as Lender C argues, they ought reasonably to have been aware they had reason to complain at that point. They wouldn't necessarily have been aware that the lender might've done something wrong in giving them the funds they'd asked for and which they may have seen, at the time at least, as helping them.

Of course this won't be the case for all borrowers. Some borrowers might've borrowed for other reasons – such as a convenient way of meeting an unexpected, unanticipated and immediate spending need, which they fully expected to repay in the following month.

Having difficulties making the payments might trigger the borrower to take other steps – for example seeking professional advice where they are then told the lender shouldn't have given them these funds in the first place. And this might well be enough for a borrower to have reason to complain. But in these circumstances it would be what happened afterwards rather than the consumer's inability to repay, or their difficulty in doing so, which means that they ought reasonably to have known they had cause for complaint.

So in these circumstances and in the prevailing environment in 2010, I don't think that it'll always be the case that a consumer with an unaffordable payday loan ought reasonably to have attributed some responsibility or blame for what happened to them on the lender, or necessarily thought that something might not have happened as it should have done when they found it difficult or were unable to repay the loan. Even if they might've been told that there was a complaints process.

I've considered Mr H's position in light of this.

As I've already explained, Mr H says he had already taken ten payday loans before he approached Lender C. He says he had to borrow more just to be able to survive the next month. In his own words, Mr H says *"I was often charged default charges by my bank for unpaid bills that totalled £100's per month on top and my sole priority in my mind was keeping up my payments to my lenders, often I had no food to eat"*. And *"I was depressed and could see no way out"*.

So Mr H clearly saw these loans as a way of managing and may well have even been grateful that Lender C was prepared to give him the money he was asking for, especially when it was allowing him to refinance his existing loans and the alternative was not having enough to meet his living expenses. Ultimately, he'd approached Lender C at a time when he was financially vulnerable and desperately in need of money, it had lent him the money he'd asked for – when, by the sounds of things, other, more mainstream, lenders wouldn't.

In these circumstances, I think it's most likely that when he was having difficulty repaying these loans he thought he was responsible for his own worsening situation, as he'd approached an Office of Fair Trading ("OFT") regulated lender, Lender C, in the first place.

After all I don't see how he would have, or even could have been expected to, necessarily know that Lender C was required to take reasonable steps to check he could repay his loans out of his disposable income and/or savings, rather than through having to take further loans. And that any possible failure by Lender C to do this might've meant that it was irresponsibly lending to him and therefore that it might've been doing something wrong.

Indeed Mr H's initial letter of complaint also suggested he felt responsible for having involved his parents because he had to borrow from them when they were *"elderly pensioners themselves with no savings"*.

Lender C has suggested that Mr H ought reasonably to have been aware that he could have contacted it if he was in financial difficulties and he could have made a complaint to it or the FLA in 2010. And it has specifically referred to some of the clauses on the three credit agreements Mr H signed to obtain these loans.

Clause 5a suggests Mr H should contact Lender C (and provides contact details) if he finds he is unable to repay what he owes. It also says that Lender C will then explain its procedures and what his options are. And Clause 5b says that Mr H should contact Lender C if his circumstances change in a way that may adversely impact his ability to repay what he owed.

I've thought about what Lender C has said. The first thing for me to say is that Lender C hasn't provided us with copies of these credit agreements. So I don't know just how prominently this information it has referred to would have been brought to Mr H's attention.

In any event, regardless of just how prominent this information might have been, these clauses all relate to what Mr H should do and what Lender C will do, should his circumstances change *after* the loan is taken out. There isn't anything in what Lender C has referred to which talks about Lender C's obligations (i.e. the need to take reasonable steps to check that Mr H could repay his loans out of his disposable income and/or savings) when lending money to customers. And that's the key issue here in terms of determining whether Mr H ought reasonably to have been aware he had cause to complain to Lender C.

Equally, while Clause 8, of Mr H's agreements, might've set out what Mr H needed to do to complain to it, the FLA, or us, I'm not persuaded that this makes a difference. What I'm considering here is whether Mr H ought reasonably to have known he had cause to complain about his loans with Lender C more than three years before he complained – not whether he knew it was possible to make a complaint. And simply making a consumer aware of a complaints process doesn't mean they will know, or that they should know, they have a reason to use it. This is especially the case when they say they were already in a difficult financial position at the outset and therefore any financial struggles wouldn't necessarily have led them to review their credit agreement.

So bearing in mind Mr H's particular circumstances at the time and his lack of knowledge of Lender C's obligations when lending money to him, either when he approached Lender C for loans or when he had difficulty paying them, I don't think he would've necessarily realised Lender C might have done something wrong when lending to him. And I don't that think he ought reasonably to have reached that conclusion here either.

Taking everything into account, I don't think it's the case that Mr H ought reasonably to have had cause to make this complaint about Lender C when he was, as he says, struggling to pay back these loans, or at any other stage more than three years before he complained.

Having thought about everything provided, I'm currently minded to conclude that Mr H complained in time because he complained within three years of becoming aware, or when he ought to have been aware, of the reason he's now complaining. So I'm intending to say that we're able to look at his complaint.

my provisional decision

My provisional decision is that I think we can look at Mr H's complaint as I think it was made within the time limit I must apply.

If Lender C or Mr H have anything further to add before I issue my decision on this matter, they should ensure anything they send reaches me by 23 October 2017.

Jeshen Narayanan
ombudsman

[i] Spencer-Ward v Humberts [1995] 1 E.G.L.R 123
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