decision	
complaint by:	Mrs W
complaint about:	LENDER D
complaint reference:	
date of decision:	10 September 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 Mrs W's complaint about Lender D.

summary of the complaint

Mrs W's complaint is about nine short term (often referred to as 'payday') LENDER D between November 2009 and July 2012.

Mrs W has explained that she took out the first loan with, she says, the hope that she would be able to pay it back at the end of the month. She says that from there her financial situation began to spiral out of control and she was left with no choice but to take out more loans for progressively higher amounts to pay the loan interest and cover her living expenses.

Mrs W complains that all of these loans were unaffordable, and that LENDER D was acting irresponsibly when it approved them.

background to the complaint and this decision

After Mrs W brought her complaint here she accepted an offer of redress from LENDER D in full and final settlement of her concerns about loans four to nine. So those loans no longer form part of the complaint that Mrs W is asking us to consider.

No such offer was made in relation to the first three loans given to Mrs W though. LENDER D says that Mrs W's complaint about those loans was made too late.

Mrs W told us that she still wanted us to consider these first three loans, so one of our adjudicators looked into the time limit issue raised by LENDER D. Having done so, the adjudicator thought that Mrs W *had* complained about these loans in time – so they could now be considered further.

LENDER D disagreed with this and provided detailed submissions setting out its reasoning. So the complaint was referred to me, as an ombudsman, to make a decision on this jurisdiction issue.

Having considered the evidence and arguments relating to jurisdiction, I issued my provisional decision on my jurisdiction to both parties on 22 August 2017.

A copy of that decision is attached, which includes a more detailed summary of the background to this complaint. My provisional findings on jurisdiction and the reasons for those findings are also set out at length, including what evidence and arguments I considered at the time.

The parties will be aware of the content of my provisional decision, and I will revisit this in more detail below. So I will not repeat it at length here. In summary though, I provisionally found that Mrs W's complaint *had* been made in time:

- I accepted that Mrs W had complained more than six years after the event(s) she's complaining about (the sale of these loans);

- I was satisfied that, to have cause for complaint, Mrs W needed to know there was a potential problem (that the loan was unaffordable), that the problem caused her loss *and* that the loss was attributable to LENDER D;

- I found that Mrs W only actually became aware that she had cause to make her complaint within three years of when she complained;

- I was *not* persuaded that Mrs W ought reasonably to have realised that she had cause for complaint before then such that her complaint might have been made too late. In reaching that provisional conclusion I was not persuaded that she ought reasonably to have attributed responsibility for the position she found herself in to LENDER D, and I was not persuaded on the evidence I had seen that she did.

These provisional findings were reached taking into account the rules which I was satisfied apply to complaints made to this office.

responses to my provisional decision

Mrs W accepted the findings reached in my provisional decision. So she hasn't provided anything further for me to consider.

LENDER D highlighted a number of points I'd made in my provisional decision referencing Mrs W's representations and the conversations we'd had with her about her complaint. So a copy of Mrs W's initial complaint to us, together with recordings of two conversations she had with our staff about her awareness of cause to complain (which I referred to in my provisional decision) were provided to LENDER D.

LENDER D made further representations on my jurisdiction both before and after it received this evidence, which I have read and considered carefully – along with all the other evidence and arguments – and summarised below.

subjective knowledge

- Mrs W's initial complaint makes it clear that she was well aware shortly after she took out these loans that she could not afford the repayments.

- We should have queried further the information Mrs W came across that allegedly made her aware of cause to complain and when this happened (more specifically than “recently”).

- We have asked the wrong question when we asked Mrs W when she became aware the business had done something wrong. We should have asked when she became aware of her cause for complaint.

- In citing research carried out by the Department for Business Innovation & Skills in 2013 when considering Mrs W’s subjective knowledge I incorrectly focussed on objective matters rather than what Mrs W knew at the time and whether that knowledge was sufficient for her to have cause for complaint.

- I incorrectly referred to our conversations with Mrs W as ‘testimony’ – if I am inferring that the information Mrs W provided should be given significant weight then that is plainly incorrect.

objective knowledge

- LENDER D maintains that DISP 2.8.2 (2) (b) reflects the position under section 14A of the Limitation Act 1980. So, as with the Limitation Act 1980, the complainant bears the burden of proving that they complained within three years of when they ought to have become aware that they had cause for complaint;

- other than confirming I was mindful of the approach the courts take and mentioning the judgment referred to by LENDER D, it is not clear in my provisional decision the extent to which – if at all – I had proper regard to the guidance given by the courts;

- the comments in my provisional decision on the ‘prevailing circumstances in 2009 and 2010’ effectively reflects a blanket policy decision focussing on an entire class of consumers and bears no relationship to the facts of Mrs W’s complaint;

- there was ample information on the internet from 2009-2012 at the latest which was publically available and made it clear that payday lenders had a duty to lend responsibly – this included, in particular, the OFT’s Irresponsible Lending Guide, information on the Financial Ombudsman Service website and articles on the Guardian and Telegraph newspaper website.

- Mrs W’s circumstances suggest she “is an individual who was more than able to obtain information from a variety of sources on the internet”, so she could have accessed and/or understood this information – the burden of proof is on her to explain why it wasn’t reasonable of her to have regard to this information.

- there has been widespread media coverage about unaffordable lending dating back to 2010/2011 onwards, with increasing numbers of people taking advice about, and complaining about, payday loans – “if some 25,000 people were aware they had cause to complain about the circumstances of their loan, it is plain that Mrs W also ought to have been reasonably aware that she too had cause to complain”.

- finally, LENDER D acknowledged the request in my provisional decision for the evidence it had referred to in previous submissions – it said this was enclosed as evidence that such documents were in the public domain making it clear that lenders had a duty to lend responsibly.

I note LENDER D also said that it has been disadvantaged by not seeing the evidence relating to Mrs W's complaint/her awareness of cause to complain, but it has now seen this and had an opportunity to comment fully both on the evidence and on my provisional findings as our rules and procedural fairness require. So I am satisfied that it is appropriate for me to now decide the jurisdiction position here (although we will of course keep the jurisdiction position under review as the case develops).

That being the case, I have considered afresh all the available evidence and arguments provided throughout this case – including the further evidence and arguments received from LENDER D in response to my provisional decision – to decide whether Mrs W's complaint about these three loans was made in time,

Having done so, I am satisfied that Mrs W's complaint about all three of these loans *was* made within the time limits applying to this service and can now be considered further.

the time limits

As I explained in my provisional decision, the industry regulator, the Financial Conduct Authority ("FCA"), was required under Paragraph 13 (1) of Schedule 17 of the Financial Services and Markets Act 2000 ("FSMA") to make time limits for complaints referred to the Financial Ombudsman Service. These time limits are set out in the DISP section of the FCA's Handbook at DISP 2.8.

It is accepted that it is these time limit rules that I am required to apply when deciding whether or not Mrs W's complaint was made in time. However LENDER D says that the rules are 'an extension of' section 14A of the Limitation Act 1980 and that I am in turn required to give proper account to the case law that pertains to that provision.

Having again given careful thought to that, I don't agree with LENDER D that DISP 2.8 was intended to operate as 'an extension of' section 14A of the Limitation Act. Had it been the regulator's intention for the time limits in DISP to extend that Act or to replicate the relevant provisions of the Act, it could have drafted them in this way. That is clearly not the case. I've already set out a number of differences between the time limits in the rules and the Act in my provisional decision. I don't think it's necessary to repeat them here.

Nonetheless, I do accept that the time limits in DISP are, in some ways, similar to the statutory time periods for bringing a claim to court as set out in the Limitation Act 1980. In particular, I note the similarities between the concepts of actual and constructive knowledge in the Act and awareness in DISP.

As a result, I am fully aware of the associated case law to which LENDER D refers and have taken it into account when considering DISP 2.8.2 R (2) (b). However, I remain of the opinion that a detailed analysis of the case law would not be particularly helpful here. The further arguments LENDER D has made in relation to this haven't persuaded me otherwise.

DISP 2.8.2 R (2)

This being the case, I have considered whether Mrs W's complaint has been referred in time in accordance with the time limits in DISP 2.8.2.

To briefly recap, DISP 2.8.2 R (2) says 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'*.

the six year time period

In my provisional decision I explained that Mrs W's complaint about each of these three loans had been made after the six year time period – starting when the loans were each approved – had expired. The loans were approved in November 2009, February 2010 and June 2010 respectively, but Mrs W first complained in July 2016.

I remain satisfied – and she has not sought to argue otherwise – that Mrs W complained outside this part of the DISP time limits in connection with these three loans.

I turn therefore to the three year part of the time limit rules which is clearly the main point in dispute in this case.

the three year time period

The three year time period at DISP 2.8.2 R (2) (b) will start to run from the date on which the complainant became aware (the subjective test) or, when they ought reasonably to have become aware (the objective test), that they had cause for complaint.

I have revisited each part of the test in turn below.

Before doing so though, I will address LENDER D's position that Mrs W bears the burden of proving that she referred her complaint in time. LENDER D says this must be the position, as this is what she would be required to do if her claim were taken to court and the application of the 1980 Act were being considered.

I have already explained in my provisional decision and above why I am satisfied that the provisions of DISP and the 1980 Act are distinct from one another. It is DISP 2.8.2 R that I am required to apply in this case. As I say, I have taken account of the position at law and am mindful of the approach the courts take on the issue of the burden of proof – but it does not follow that I must apply that approach when considering the application of the time limits in DISP.

On my reading, DISP 2.8.2 R is silent as to who has the burden of proving whether a complaint is made in time. I am aware of further provisions in DISP which address the complaint handling procedures that apply when I am considering whether I have jurisdiction to consider a complaint, specifically:

> *DISP 3.2.1 R*
> The *Ombudsman* will have regard to whether a *complaint* is out of jurisdiction.
>
> *DISP 3.2.3 R*
> Where the *respondent* alleges that the *complaint* is out of jurisdiction, the *Ombudsman* will give both parties the opportunity to make representations before he decides.
>
> *DISP 3.2.4 R*
> Where the *Ombudsman* considers that the *complaint* may be out of jurisdiction, he will give the complainant an opportunity to make representations before he decides.
>
> *DISP 3.2.5 R*
> Where the *Ombudsman* then decides that the *complaint* is out of jurisdiction, he will give reasons for that decision to the complainant and inform the *respondent*.
>
> *DISP 3.2.6R*
> Where the *Ombudsman* then decides that the *complaint* is not out of jurisdiction, he will inform the complainant and give reasons for that decision to the *respondent.*

In my view, there is nothing in this to suggest that either party bears the burden to prove or disprove its position or that the burden shifts once one party has sufficiently made its case.

Rather, I am required to give both parties an opportunity to make representations where my jurisdiction is in dispute, after which I must decide whether I have the power to consider the complaint.

I am satisfied that that is in line with the informal nature of the Financial Ombudsman Service as an alternative service to the courts for resolving disputes such as this. I am further satisfied that I have given appropriate regard to the evidence provided by both parties in this case and have applied DISP 2.8.2 R in accordance with the complaint handling procedures in DISP.

when did Mrs W become aware that she had cause for complaint?

As I explained in my provisional decision, Mrs W confirmed to us that she only became aware that she had cause to complain 'recently' when she became aware of media coverage relating to payday loans and she was being told she should complain. She told LENDER D when she referred her complaint that she had received advice from a Facebook page.

She has been clear and consistent whenever she's spoken to us about this.

In that regard, I note that in her telephone conversation with a case handler at this office on 8 December 2016 she said she only complained when she heard that she could – up until that point she thought it (that she'd been given an unaffordable loan) was her fault because she was the one borrowing the money.

I note also that in a subsequent telephone conversation with a different case handler on 5 May 2017 she confirmed she only recently became aware that the business had done something wrong when she saw on the news and television that payday lenders shouldn't have been providing loans like her own, and so a complaint could be made. She explained that she'd asked for the money and the business had given it to her – she didn't think anything of the lender's role in considering her financial circumstances. When she started to get into financial difficulty she thought that her only option was to borrow more money – she didn't think the business had done anything wrong because she thought it was all her fault.

I appreciate that LENDER D does not consider we have asked the right questions of Mrs W to establish awareness of cause for complaint. It considers we should have queried further the media coverage she referred to in order to establish more precisely the date of her subjective awareness. However, I am satisfied that we have obtained sufficient information for me to address these questions and that I have the information I need to make my decision on the matter.

Mrs W's representations about how she came to realise she had cause for complaint suggest, in my view, that she only became aware of cause to complain within three years of her complaint being made. That finding is to my mind entirely implicit in her use of the word 'recently', and I have not seen any evidence to suggest that is not the case.

LENDER D further says that in focussing on when she was aware the lender *had done something wrong,* we have asked the wrong question of Mrs W. It says we should have asked when she was aware *she had cause for complaint.* I've given this careful thought, but I don't agree that there is a meaningful distinction between the terminologies used here. I am satisfied that in asking Mrs W when she knew the business had done something wrong, particularly in the context of the complaint she had made about affordability failings, we have effectively asked her when she was aware of her cause for complaint.

LENDER D also says it is incorrect to refer, as I did in my provisional decision, to what Mrs W told us as "testimony". I accept that her representations are not testimony in the sense that the word might be attributed to a statement given in a court of law. The fact that I referred to "testimony" was not intended to attribute any special status to her evidence.

That said, her representations are evidence that I must weigh up when deciding the issue of subjective awareness. I am also mindful that she is ultimately the only person who knows when she actually became aware of her cause for complaint against LENDER D.

But I have not simply accepted Mrs W's representations at 'face value' as LENDER D suggests. Having considered what she's told us about what happened, I find Mrs W's representations to be a credible and consistent.

Indeed, that is why I referred to research carried out by the Department for Business Innovation & Skills in 2013[1] – not to indicate what her subjective knowledge was likely to have been, but to illustrate that what Mrs W had told us was consistent with those findings.

Having considered carefully what she's said, including listening to the recordings of the conversations she had with our case handlers about these points, I find Mrs W's representations on when she became aware of her cause for complaint to be consistent and ultimately plausible.

It remains the case that I have not seen anything which suggests she became aware she had cause to complain more than three years before she did complain – such as evidence that she attempted to make an earlier complaint.

On balance, having considered the representations of both sides, including LENDER D's latest submissions responding to my provisional findings, I am satisfied that it is more likely than not that Mrs W *did not* realise she had cause to complain more than three years before she complained in July 2016.

ought Mrs W reasonably to have become aware that she had cause for complaint before July 2013?

This is the objective aspect of the time limits in DISP 2.8.2 R (2) (b) which requires me to consider whether Mrs W ought reasonably to have been aware of her cause for complaint more than three years before its referral.

At the outset, I should say that Mrs W has not disputed my provisional finding that she ought reasonably to have known from the frequency and amount of her borrowing, combined with her financial situation at the time – she told us she had to borrow increasing amounts of money to pay the loan interest and cover her living expenses – that these three loans were unaffordable shortly after they were taken out (if not at the time of the borrowing itself).

LENDER D says it must follow that Mrs W should also have been aware she was being caused loss as she could not afford the repayments.

I accept it logically follows that awareness of a loan being *unaffordable* ought to go hand in hand with awareness of loss. Even when an unaffordable loan is repaid (and so no direct financial loss on *that* loan has been incurred), this is likely at the expense of having to borrow again or not meet payments on other outstanding debts – so interest/charges are incurred and this would likely also cause distress and/or inconvenience.

LENDER D also says, however, that it would have been reasonable for Mrs W to investigate further at this point as to how and why she had been given unaffordable loans (and presumably in LENDER D's view this would have led to her having cause to complain). I do not agree with LENDER D on this.

That is because, and as I explained in my provisional decision, having cause to complain requires a complainant to not only be aware of a potential problem (in this case, the unaffordable lending) but *also* to be aware:

[1] Ipsos MORI Social Research Institute, *Making Consumer Credit Markets Fairer,* Department for Business Innovation & Skills, 2013

- that the problem has caused them, or would cause them, loss; *and*

- that the loss may have been caused by someone else (which of course includes knowing who that someone is).

I do accept that, in many cases, awareness of a problem and the loss this caused will often lead a complainant to realise the loss may have been caused by a particular individual/business; so they will have cause to complain about that individual/business and the three year time limit for complaining will begin at that point.

I gave the following example of this in my provisional decision:

> *"So, for example, it's likely that a consumer taking out a product on the basis of specific 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 that will not always be the case, and I think Mrs W is a good example of that in practice, particularly given her plausible representations that she initially blamed herself for taking out these unaffordable loans.

To put this in context, I gave some background information in my provisional decision about the wider environment and circumstances in which short term loans were taken out in 2009 and 2010, with borrowers being able to get loans with speed and ease at the time, often with the expectation that the loan may not be repayable in full at the first attempt. I also explained how the current regulator, the FCA, took steps affecting the nature and size of the market; and referred to a quote from an Office of Fair Trading ("OFT") report from 2013 emphasising that borrowers were "not getting a balanced picture of the costs and risks of taking out a payday loan".

Taking everything into account, I wasn't persuaded that a payday borrower in the position of Mrs W ought reasonably to have attributed responsibility or blame on the lender when they found it difficult or were unable to repay short term loans.

LENDER D says that, in taking this position, it amounts to a policy decision by the Financial Ombudsman Service that because of the prevailing circumstances in 2009 and 2010, customers who had taken short term loans which they knew were unaffordable would not have had cause to complain. To be clear, that is not what has happened here. As the deciding ombudsman, I am making this decision based on the circumstances of Mrs W in this particular case.

In my view it is relevant (and appropriate) to take into account the wider environment and circumstances in which Mrs W's loans were taken out when considering whether a person in her position ought reasonably to have had cause to complain.

In doing so, I had regard to the OFT Report 'Payday Lending Compliance Review Final Report' and the BIS research findings in its paper: 'Making Consumer Credit Markets Fairer'. I considered these provided some indirect evidence as to the state of the payday loan market and the wider circumstances in which short term loans were provided at the time Mrs W agreed her own loans. I noted that, amongst other things, the research suggested that borrowers often expressed a strong sense of personal responsibility regarding financial difficulties caused by missed payments.

But I accept the reports have limitations. They cannot tell the whole story and I have therefore given them limited weight.

Ultimately I have to decide whether a reasonable person in Mrs W's circumstances ought reasonably to have been aware of her cause for complaint before July 2013. I certainly am not, as LENDER D suggests, focusing on an entire class of consumers when considering that question.

That being the case, I have carefully considered the latest evidence LENDER D has provided.

LENDER D has again referred to the OFT's Irresponsible Lending Guide published in 2010 and the information on the Financial Ombudsman Service website about unaffordable lending. It also referred to Citizens Advice Bureau ("CAB") data published in 2013 about large numbers of consumers seeking advice about payday loans, an OFT report (which it seems is the same report I referenced in my provisional decision and above) mentioning the requirement for lenders to lend responsibly, and articles on the Guardian and Telegraph newspaper websites about payday lending and complaints data relating to unaffordable lending.

LENDER D says that all of this shows there was "a wealth of information in the public domain which made it abundantly clear that individuals could complain about payday loans". It says that:

> *"…if some 25,000 people [the number referenced in one of the CAB reports regarding the number of people who had sought online advice] were aware that they had cause to complain about the circumstances of their loan, it is plain that Mrs W also ought to have been reasonably aware that she too had cause to complain."*

But the fact that some people – indeed an increasing number of people – were complaining about unaffordable lending at the time does not necessarily mean that others in the same position would also have blamed their lender, or that they ought to have done so. It is important to bear in mind, as LENDER D itself says, the circumstances of Mrs W and to ask what a reasonable person in those circumstances would have done.

I also disagree with LENDER D's position about the information it has referred to on various websites (including the Financial Ombudsman Service website) about unaffordable lending. I already explained in my provisional decision why I did not think it was reasonable to expect consumers like Mrs W to read or be familiar with specific or specialist publications like this and nothing LENDER D has now said causes me to change that view.

I certainly do not agree with LENDER D's position that Mrs W should explain why it was reasonable for her *not* to have regarded this information simply because she was capable of using the internet.

All in all, I agree with LENDER D that Mrs W appears to be an intelligent and articulate individual who is capable of using the internet to access information. But I do not think it necessarily follows that a reasonable person in those circumstances, who became aware of affordability problems with her loan and who understood that she had suffered loss as a result, would also become aware that her difficulties could be due to failings on the part of the lender. In my view, a reasonable person in Mrs W's circumstances would be more likely to take personal responsibility for the difficulties she faced.

Further, I do not agree that a reasonable person in Mrs W's position would, in response to repayment difficulties, necessarily be expected to investigate further to determine how and why she had been given unaffordable loans, as LENDER D suggests. Mrs W did, as we know, respond to her affordability problems by approaching her lender for a further loan. In circumstances where the lender has approved that loan (and in this regard I note that LENDER D in fact agreed a further eight loans to Mrs W) it seems to my mind unlikely that a reasonable borrower would, at the same time, take steps to investigate why she had been given the unaffordable loans in the first place, as LENDER D suggests.

I do accept though that information provided as part of the loan application process might, depending on what it said, be relevant to the question of whether a payday borrower like Mrs W ought reasonably to have been aware that she had cause for complaint against LENDER D.

To that end, I asked LENDER D to provide further information relating to the references it made to its website and copies of Mrs W's loan agreement(s)/pre-contract information.

LENDER D provided the requested information with its response to my provisional decision – it says this supports its position that "these were documents which were in the public domain, which made it clear that lenders had a duty to lend responsibly". But having looked at the information it has provided, I do not agree.

Having referred to a number of historical extracts from its website as evidence that Mrs W knew about LENDER D's obligation to lend responsibly – which I considered, in part, in my provisional decision – it has provided no further evidence of this.

In fact, the only additional piece of evidence provided by LENDER D is a copy of a contract between Mrs W and LENDER D for a loan taken out in 2012 (which is one of the loans that she originally complained about but, as I have explained, is no longer in dispute). LENDER D has given no further information about or context to this evidence.

Notwithstanding that, I have reviewed the contract to see if it contained anything which might have prompted an awareness of Mrs W's cause for complaint against LENDER D.

The contract only refers to LENDER D's "responsible lending obligations" once and this is in the context of LENDER D deciding whether to utilise its discretion to allow a customer to 'extend' or 'roll over' a loan. At no point does the contract explain what is meant by the term 'responsible lending obligations' and there does not appear to be any indication that there might be obligations that pertain to the affordability of the loan.

This brief statement is in a section of the contract which discloses a variety of "adequate explanations" information about payment dates, what will happen if the customer defaults / missed payments etc.

This being the case, I am satisfied that a reasonable person in Mrs W's position could not reasonably be expected to have understood from her contract with LENDER D that the lender had an obligation to check that her loan was affordable before agreeing to provide it to her.

I fully appreciate that LENDER D feels strongly about this complaint, but having considered all of the evidence provided by the parties in this case – including the evidence from LENDER D in response to my provisional decision – I am still not persuaded that Mrs W *ought* to have been aware of her cause to complain about any of these three loans any earlier than she says she *did* become aware (which I am satisfied was within three years of her complaint).

summary

Having thought very carefully about the time limit rules that apply to complaints brought to this service and how those rules should be applied, and having applied the evidence received over the course of this complaint to those rules, my findings on jurisdiction in this case are as follows:

- I accept that Mrs W complained more than six years after the event(s) she's complaining about (the sale of these three loans).

- I am satisfied that, to have cause for complaint, Mrs W needed to know there was a potential problem (that the loan was unaffordable), that the problem caused her loss *and* that the loss was attributable to LENDER D.

- I find that Mrs W only actually became aware that she had cause to make her complaint(s) within three years of when she complained.

- I am not persuaded, from what I've seen, that Mrs W ought reasonably to have been aware that she had cause for complaint before then.

This means that I am satisfied Mrs W complained about these three loans in time.

I am grateful to the parties for their cooperation and patience whilst this jurisdiction matter has been carefully considered and now resolved.

my decision

For the reasons set out in both my provisional decision and above, I am satisfied that Mrs W's complaint about these three loans was made in time. So it can now be considered by the Financial Ombudsman Service on its merits.

Kevin Wright
ombudsman

Copy of Provisional Decision

summary of the complaint

Mrs W's complaint is about nine short term LENDER D between November 2009 and July 2012.

Mrs W has explained that she took out the first loan with, she says, the hope that she'd be able to pay it back at the end of the month. She says from there, her financial situation began to spiral out of control and she was left with no choice but to take out more loans for progressively higher amounts to pay the loan interest and cover her living expenses.

Mrs W complains that these loans were unaffordable and that LENDER D was acting irresponsibly when it approved them.

background to the complaint

Mrs W made her complaint to LENDER D in July 2016.

In response, LENDER D said that time limits prevented complaints from being made about events that occurred more than six years before she complained – so it didn't investigate the first three loans Mrs W had taken out.

LENDER D also didn't agree that it had done anything wrong in relation to the remaining six loans that it had given within the past six years. Nonetheless, as a gesture of goodwill it offered to pay Mrs W an amount equivalent to the outstanding balance she owed, plus an additional £100 in compensation.

Mrs W didn't accept this offer. Instead, she referred her complaint here for further consideration.

After the complaint had been referred here, LENDER D decided to increase its offer. Mrs W accepted that new offer on the understanding her acceptance was in full and final settlement of her complaint about the six more recent loans. However, she still wanted the first three loans, which LENDER D says she'd complained about too late, to be considered by us.

Our adjudicator explained this to LENDER D so that it could arrange payment whilst we considered the question of whether Mrs W's complaint about the first three loans was made in time.

One of our adjudicators then considered that time limit issue. He explained to LENDER D that he thought Mrs W *had* complained about the first three loans in time, so they could now be considered further. This was essentially because he thought Mrs W had complained within three years of when she ought reasonably to have been aware that she had cause to complain about those loans.

LENDER D disagreed with the adjudicator and so the matter has now been passed to me, an ombudsman, to decide the jurisdiction issues.

LENDER D has provided detailed submissions setting out why it disagrees with the adjudicator. I've summarised what it's said below, but I can confirm that I've read and considered its submissions in full when reaching my provisional findings in this case. In summary, LENDER D says:

- The specific time limits applying to complaints referred to the Financial Ombudsman Service are essentially an extension of the position under section 14A of the Limitation Act 1980 ("the 1980 Act"). So, as with the 1980 Act, the complainant bears the burden of proving that they complained within three years of when they ought to have become aware that they had cause for complaint. This service has incorrectly put the burden on LENDER D to show that Mrs W complained more than three years after she knew or ought to have known that she had cause to complain.

- In determining awareness of cause for complaint, Mrs W didn't have to know that, as a matter of law, she had cause for complaint; she only needed to know the "factual essence" of what she's complaining about[2] – she would have known that when she realised the loans were unaffordable, which our adjudicator concluded would have been when the loans were taken out or shortly afterwards.

- Our adjudicator assumed that Mrs W would have thought she was responsible for taking out these unaffordable loans and didn't provide any evidence to support this assumption.

- It's not enough for Mrs W to assert that she didn't realise she had cause to complain until recently when she objectively ought to have known before this – LENDER D believes our adjudicator overlooked this part of the test and didn't properly examine Mrs W's explanation of why she didn't complain sooner.

- There has been ample information available online dating back to at least 2009 which ought to have made it clear to Mrs W that lenders have an obligation to lend responsibly. For example:

    - Information on Lender D's website (the website where these loans were taken out) referring to affordability checks, responsible lending practices etc.

    - The Irresponsible Lending Guide published by the Office of Fair Trading ("OFT") in 2010 which sets out irresponsible lending practices and refers to complaints being dealt with by the Financial Ombudsman Service.

    - Information on our website from September 2010 explaining that we were dealing with a significant number of cases about lending that was unaffordable from the outset and shouldn't have been approved by the lender.

    - Various other websites, forums and blog posts from 2009 onwards.

- Mrs W's loan agreement and pre-contract information described the product including, amongst other things, that it was unsuitable for longer term borrowing, and that extensions would only be granted where LENDER D was satisfied that was in line with its responsible lending obligations.

- Finally, LENDER D is concerned that complainants like Mrs W are aware from information on consumer websites why we might be asking them about awareness of cause to complain, so they won't be truthful when we ask them about this (in fact, they say that one such website has specifically told a consumer to lie to us).

I must therefore decide whether Mrs W complained about the first three loans in time.

To be clear, I won't be commenting on whether those loans should or shouldn't have been given to her here – that's something that can only be considered once the question of whether we are able to consider the merits of this complaint has been resolved.

the time limits

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.*

[2] Haward & Ors v. Fawcetts (a firm) & Ors [2006] UKHL 9

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. So I can understand why LENDER D has referred to the Limitation Act 1980 in its submissions, and I am mindful of the approach the courts take when applying these time limits.[3]

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).

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 Mrs W 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 D doesn't consent to this service considering Mrs W's complaint about the loans she took out more than six years before she complained. So I've considered whether her complaint about those loans was made in time under DISP 2.8.2.

the six year period

Each lending decision that Mrs W has complained about is a separate event relating to the provision of a distinct financial service – the provision of the individual loan in question. So, for the purpose of the time limit rules, separate six year periods run from the point at which each loan was approved. That means that the six year time periods for these three loans expired at the following times:

loan number	date loan provided	six year deadline
1	November 2009	November 2015
2	February 2010	February 2016
3	June 2010	June 2016

As I understand it, Mrs W's complaint was received by LENDER D in July 2016. So her complaint (or complaints) about these three loans was made after the six year period in DISP 2.8.2 had expired.

[3] For example, in the case of Haward & Ors v. Fawcetts (a firm) & Ors [2006] UKHL 9

So I now turn to the three year part of the time limit rules to see how that applies to the complaints Mrs W has made.

the three year period

The three year period can potentially extend the six year deadline for complaining depending on when the complainant was aware or, when they ought reasonably to have become aware, that they had cause to complain.

Mrs W has told us that she took out the first loan with, she says, the hope that she could pay it back by the end of the month but, because she had very little disposable income available after covering her basic living expenses, she found herself in a situation where her finances spiralled out of control as she took out more loans for progressively higher amounts to pay the loan interest and cover her living expenses.

She says these loans were unaffordable and that she now realises LENDER D was acting irresponsibly when it approved them, although she blamed herself for her situation at the time.

when was Mrs W aware that she had cause for complaint?

When she spoke to my colleagues about this during the course of our investigation into these jurisdiction questions, Mrs W said that she only became aware that she had cause to complain recently when she came across media coverage relating to payday loans and friends were telling her that she should complain.

She told us that she'd asked LENDER D for this money and it was simply given to her, so she assumed at the time that she (rather than LENDER D) was responsible for her worsening situation:

> *"I had no idea that I had anything that I could've taken anywhere, because I was borrowing the money I thought that it's just my fault; I can't do anything about it."*

When asked if she thought LENDER D had done anything wrong at the time, Mrs W said:

> *"Not really. I thought it was all my fault really getting into that difficulty".*

Mrs W has been consistent when talking to us about this, which I consider adds to the persuasiveness and plausibility of her testimony. I'm also mindful that her account is similar to the findings of research carried out for the Department for Business Innovation & Skills in 2013[4]:

> ***2.3.3 Personal responsibility***
>
> *…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.* ***They tended to believe that they were sufficiently aware of the risks and costs involved in taking out the loan to be responsible for the consequences****…*
>
> ***...many also felt that payday loan customers were responsible for their decisions,*** *and the attendant risks and costs, regardless of how lenders used advertising or provided information about their products.*
>
> *"I don't blame anyone else, I knew the rules" – Payday loan customer*

[4] Ipsos MORI Social Research Institute, *Making Consumer Credit Markets Fairer,* Department for Business Innovation & Skills, 2013

From what she's told us, it seems to me that Mrs W had approached LENDER D at a time when she was financially vulnerable and it had lent her the money she'd asked for. So I don't think it's surprising that she blamed herself rather than LENDER D when she realised that these loans were unaffordable. Taking this and all of the above into account, I find Mrs W's testimony that she only recently realised that she had cause to complain to be plausible.

I haven't seen anything which clearly shows she knew she had cause to complain more than three years before she did complain – for example, evidence that she attempted to make an earlier complaint or testimony from her confirming that she knew that she should have complained sooner.

So, having considered the representations of both sides, I'm currently satisfied it's more likely than not that Mrs W didn't realise she had cause to complain more than three years before she complained in July 2016.

when ought Mrs W to have been aware that she had cause for complaint?

As LENDER D has rightly pointed out though, there is also an objective part of the three year awareness test that I must consider. So whilst Mrs W may have told us – and I find it plausible – that she *actually* became aware that she had cause to complain less than three years before she did complain, I must also consider whether she *ought reasonably* to have become aware that she cause to complain earlier than this.

I'm satisfied that Mrs W ought to have known from the frequency and amount of her borrowing, combined with her financial situation at the time – she's told us she had to borrow increasing amounts of money to pay the loan interest and to cover her living expenses – that these loans were *unaffordable* shortly after they were taken out (if not at the time of the borrowing itself).

But I do not consider that having this knowledge (that the loans were unaffordable) means that Mrs W *ought to have known* that she had cause to complain at this time.

I say this because it seems to me that having cause to complain requires a complainant to not only be aware of a potential problem (in this case, the unaffordable lending) but *also* to be aware that the problem has caused them, or would cause them, loss; and that loss may have been caused by someone else (and who that someone is).

Sometimes it will be quite clear that a 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 specific 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 I think that 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. Having thought carefully about the facts of this case, I think that's what happened here.

In reaching my decision on this point, I think it's relevant to take into account the wider environment and circumstances in which short term loans were taken out in 2009 and 2010.

For many borrowers – at least at that time – the perception was that the role of short term lenders was to provide relatively (compared to other borrowing types) small amounts of money, when other lenders (for example, banks) may not have lent to them. For many borrowers 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 up to a specified limit 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, 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 surplus or regular 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.

And it seems to me that all of this would have only enhanced the view that short terms loans were about 'readily accessible money', whatever your circumstances and that refinancing (rather than repayment from regular income) was an acceptable repayment strategy – particularly as that was the experience of many. In effect the short term lending service provided by these OFT regulated firms would have appeared to many consumers – rightly or wrongly – to be available whether you could afford to repay the loan straight away or not.

In these circumstances and in the prevailing environment in 2009 and 2010 when these loans were granted, I'm not persuaded a consumer such as Mrs W with an unaffordable (in the sense that she could not repay the loans from her regular income) short term loan or loans, ought reasonably to have – in every case – 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 when they found it difficult or were unable to repay the loan(s).

LENDER D does not agree with this and has pointed to various documents and online resources from around this time which, it believes, ought to have made it clear to Mrs W that lenders have an obligation to lend responsibly (and so, in turn, she should have blamed LENDER D when she realised these loans were unaffordable). I've thought carefully about what LENDER D has provided and referred to but, from the evidence I've seen so far, I am not persuaded by what it says.

The fact that these publications were in the public domain and so, in theory, accessible to Mrs W doesn't (with the possible exception of the documents provided as part of her loan application processes, which I note LENDER D has referred to but hasn't provided copies of) necessarily mean that she ought reasonably to have been aware of them and read them. Nor does it automatically follow that consumers ought reasonably to have realised they have cause for complaint from that kind of generic information (although that will depend on the information and the complaint made).

The OFT's Irresponsible Lending Guide is a good example of this – I don't think consumers such as Mrs W can reasonably be expected to have read or be familiar with specialist publications like this. And indeed whilst there may have been information on our website about unaffordable lending from September 2010 I do not consider Mrs W *ought reasonably* to have been aware of that information.

I do accept that *in some cases* consumers may see or read something in the media or some other publication which causes them to think about their own circumstances, and this then leads them to look into whether they have a reason to complain. But that doesn't mean that the three year time limit ought reasonably therefore to have begun from an earlier publication that Mrs W (or indeed consumers in other cases) may not even have seen (and reasonably so).

I also accept that any information provided as part of the loan application process might, depending on what it said and its prominence, also be relevant to the question of whether a payday lending borrower like Mrs W ought reasonably to have realised that LENDER D perhaps shouldn't have lent to them and that it caused their loss.

In its submissions, LENDER D has provided an extract from, amongst other things, the 2011 version of its website, which said:

Lender D has strictly adhered to responsible lending practices since its launch in 2007…

You have the right to…

Access reliable and licensed credit that won't put you in debt. *We run full consumer credit history checks and a proprietary credit scoring model that assesses your ability to repay. We also review select loan applications manually in order to ensure a proper credit decision.*

LENDER D hasn't given any detail around the context of this or indeed any of the other extracts it's referred to from its website. Aside from post-dating the loans by a couple of years, as far as I can see this particular statement, as an example, seems to have been located towards the bottom of the "About Us" section of the website, meaning that an applicant could reasonably successfully apply for a loan without ever seeing it.

I do not consider the fact that this appeared on the website means that Mrs W ought reasonably to have realised she had cause to complain. Even if I were to accept (which I make no finding on) LENDER D's view that the contents of this statement ought reasonably to have made applicants aware that it was required to lend responsibly (and so might have some responsibility for what happened), it was not given sufficient prominence to reasonably have that effect.

Equally, whilst LENDER D has referred to extracts from Mrs W's loan agreement(s)/pre-contract information, it hasn't provided copies of those agreements or full details of the pre-contract information.

If LENDER D wants to provide more information about any of the above, it can of course do so in response to this provisional decision and I will consider what impact, if any, that might reasonably have had in the context of this complaint. If it does, I'd ask it to bear in mind what I've said above about how prominent, in my view, these statements ought to have been when considering if it still wants to rely on them in this case.

Having considered all of the evidence referred to by LENDER D so far, I'm not presently persuaded by what it's said that Mrs W *ought* to have been aware of cause to complain about any of these three loans any earlier than she says she *did* become aware (which was within three years of her complaint).

In summary then, my current thinking on this case is as follows:

- I accept that Mrs W complained more than six years after the event(s) she's complaining about (the sale of these loans).

- I am satisfied that, to have cause for complaint, Mrs W needed to know there was a potential problem (that the loan was unaffordable), that the problem caused her loss *and* that the loss was attributable to LENDER D.

- I find that Mrs W only actually became aware that she had cause to make her complaint(s) within three years of when she complained.

- I am not persuaded that Mrs W ought reasonably to have realised that she had cause for complaint before then. I am not persuaded that she ought reasonably to have attributed responsibility for the position she found herself in to LENDER D and I am not persuaded on the evidence I've seen that she did.

Applying the rules that apply to complaints made to this office, I'm currently minded to conclude Mrs W's complaint has been made in time.

my provisional decision

For the reasons set out above, I'm currently minded to conclude that Mrs W's complaint about these initial three loans was made in time, so that complaint can be considered by the Financial Ombudsman Service on its merits.

If either LENDER D or Mrs W have anything further to add before I issue my decision on this matter, they should ensure everything they send reaches me by 5 September 2017.

Kevin Wright
ombudsman