Complaint

Miss H complains Novitas Loans Ltd ("Novitas") has treated her unfairly in relation to a loan she took out to fund legal proceedings.

Background

The background to this complaint, and my provisional findings on it, can be found in my provisional decision which is attached to and forms a part of this final decision.

I will however provide a brief summary of my provisional decision before I go on to consider the responses from both parties to the complaint.

Summary of the provisional decision

Miss H entered a credit agreement with Novitas, regulated by the Consumer Credit Act 1974 ("CCA") in November 2014. The loan was intended to fund legal proceedings and costs connected with Miss H's separation from her ex-partner, "P", and was arranged by a firm of solicitors ("X"), through one of its partners ("Mr C").

Miss H's complaint about the loan was focused on the following points:

- Mr C, and X, had acted in a fraudulent manner. They had misappropriated the loan funds, which had not been used to fund her legal matter. They had then sought to cover up their wrongdoing by deliberately delaying the legal proceedings and refusing to disclose the existence of the Novitas loan.

- Novitas had been at least negligent as it had failed to act on what Miss H considered to be clear warning signs about X's activities.

- Novitas had not checked whether she could afford to repay the loan, and had lent to her irresponsibly.

In my provisional findings I considered the basis for Novitas's liability to Miss H for X's allegedly wrongful actions, and its obligation to Miss H to lend to her responsibly. I found that Sections 56, 75, and 75A of the CCA may all give rise to potential connected lender liability for Novitas. I concluded Miss H could bring a claim against Novitas in respect of breaches of contract or misrepresentations by X.

On the question of Novitas's decision to grant the loan facility to Miss H, I didn't think its affordability checks had been proportionate to the circumstances of the borrowing, as required by the regulations which applied at the time. Further checks ought to have been carried out. And I thought that had Novitas made further enquiries into Miss H's financial circumstances or the nature of her legal claim, it would have appreciated there was a substantial risk she'd be unable to repay the loan in a sustainable manner and it would not have agreed to lend to her. I concluded that it wouldn't be fair or reasonable for Miss H to have to pay interest fees or charges on the loan. I noted the loan funds had not been paid to her – they had been paid to X – and that I therefore needed to consider whether (taking into account the principles of connected lender liability) she had benefited from the loan principal and should fairly pay it back.

In order to do so I investigated X's dealings with Miss H. Having done so I found X:

- Pressured Miss H into signing up for the Novitas loan.
- Took actions which obstructed mediation between Miss H and P, including refusing requests for mediation, with no reasonable explanation.
- Provided incorrect information to the barrister it had instructed for Miss H.
- Provided incorrect information to Novitas about the progress of the legal matter.
- Failed to update Novitas, and likely Miss H, on the progress of the legal matter.
- Delayed in making a court application, with no reasonable explanation.

I concluded X had been dishonest in its dealings with Miss H and had breached its contract with her, and that Novitas could be held jointly liable for the latter.

In terms of putting things right, I carried out an analysis of what I thought would have likely happened had X not breached its contract with Miss H. I considered that had things gone as they should, Miss H would probably have ended up going to mediation with P and incurred costs of up to £1,745. I said I was minded to direct Novitas to take the following steps with respect to Miss H:

1. End her loan agreement and remove any reference to it on her credit file.

2. Cap her liability for any debt which arose under the loan agreement, to £1,745. If she has already paid this amount then any overpayments must be returned to her with 8% simple interest per year added, calculated from the date she made the overpayments, to the date she is refunded. If she has not yet paid this amount then Novitas must attempt to arrange an affordable plan for repayment of the outstanding debt.

3. Pay her £300 compensation (in respect of its handling of the matter).

4. Reimburse reasonable costs incurred by her in completing the mediation arranged by X for November 2017, upon receipt of evidence of her having paid these costs. 8% simple interest per year should be added to any reimbursed amounts, calculated as per point 2 above.

The responses to the provisional decision

Neither party to the complaint was in complete agreement with the provisional decision. Novitas said that it disagreed with a number of findings, specifically:

- It considered my analysis of the operation and purpose of its lending product, and of the policy and safeguards it had in place to ensure responsible lending, was inaccurate. It noted that its product was designed to allow access to justice to people of limited financial means and that this should be factored into a decision.

- It thought the remedy I was minded to direct it to put into place failed to take account of the value of the legal advice Miss H had received and which was required before her case could have proceeded to mediation. In other words, I had arrived at too low a figure for the amount Miss H's liability should be capped at.

On the other hand, Novitas said it had considered the "fraudulent and dishonest" actions of X and accepted Miss H had not received the legal service she had been entitled to expect.

Miss H, for her part, was broadly in agreement with my provisional decision. She noted however, that I had referred to her having had independent legal advice about the loan and this wasn't strictly accurate. She said X had chosen and paid the solicitor who gave her independent advice. She did not feel that such advice could be truly considered independent. Miss H also provided some evidence of the costs she had incurred and which I had referred to in paragraph 4 of my intended directions to Novitas. More recently, Miss H said she wanted to highlight another couple of points: that Novitas had taken nine months to respond to a subject access request and had not responded at all to her (new) solicitors when they wrote to Novitas with a complaint on her behalf back in March 2018.

Novitas had said it intended to provide further detailed representations on the points it disagreed with which I outlined above. A deadline was set for Novitas to provide these representations, which has now passed. Our investigator wrote to Novitas to ask if it was still planning make further comments, and it replied that it had nothing further to add. The case has now been returned to me to decide.

My findings

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

Both parties to the complaint appear to accept (or at least have not disagreed with) the analysis in my provisional decision regarding the acts and omissions of X and Mr C, and what this means for Novitas's connected lender liability to Miss H. So I will say no more about that, other than to confirm that my findings remain the same as they were in my provisional decision.

Miss H did raise a minor point regarding the independent legal advice she received not being truly independent because X had chosen the solicitor and paid for the advice. She supplied a copy of an invoice from this solicitor which showed X had been billed for the advice and not her. In my provisional decision I said that Miss H was required as part of the arrangements for the loan, to receive independent legal advice about it. I also said that I did not think that having had this advice necessarily cancelled out any wrongdoing by X in respect of the loan application or discussions of the legal fees. I therefore didn't find it necessary to determine whether the advice was genuinely independent, and I remain of the view that it isn't necessary to make a finding on this. It follows that I make no further comment on it.

Regarding Miss H's other points about delays in responding to her subject access request and failing to respond to her complaint, I did not consider the delays in responding to the subject access request as part of my provisional decision. I consider this to be a separate complaint about something which happened after the complaint I am considering was made. Miss H should, if she wishes, raise the complaint about the delay in responding to her subject access request directly with Novitas.

I took a holistic view regarding the remainder of Novitas's handling of Miss H's dispute, which I concluded had been poor, but I particularly considered that Novitas's unyielding position on the matter had led to Miss H having to go to great lengths to argue her case and this had caused her inconvenience and frustration. Having looked over the history of the case again I think the amount of compensation I was minded to award is fair and so I won't be changing this.

Novitas did not provide the further representations it said it would, so I do not know exactly why it disagrees with my provisional findings about its decision to lend to Miss H, or what it thinks was inaccurate about how I represented its lending policy and the safeguards it had in place to ensure responsible lending. I have reviewed again my provisional findings against the evidence Novitas provided about the basis of its decision to lend to Miss H, and I haven't seen a reason to change those findings. Novitas did raise the point that its product is intended to facilitate access to justice to those who might otherwise not be able to afford it. I appreciate Novitas considers its product to fulfil a social purpose and that it believes this should be credited in some way when assessing whether its lending decisions are responsible. But Novitas hasn't elaborated on this, and without further submissions on this point there is little more I can add other than to say that the rules still required Novitas to assess whether Miss H would be able to afford to repay the loan sustainably.

Finally, Novitas has questioned the cap at which I suggested Miss H's liability should be set for the loan. It has said Miss H did receive legal advice and this hadn't been taken into account and such advice was required before proceeding to mediation. It hasn't suggested any alternative figure which it thinks is more likely to be accurate.

I did take into account the potential cost of legal advice when calculating the cap at which Miss H's liability should be set. In my provisional decision, I noted that a website the Government recommended people consult for information about the costs of mediation, said that £300 should be budgeted per person for legal advice. This was included in my calculation. I also considered the legal fees involved in drawing up a formal financial agreement, which were estimated at between £500 and £600. While I appreciate the ultimate figure I came to was an approximation, Novitas's submissions have not given me reason to think this was an unfair estimate of how much Miss H might have had to pay, had X not breached its contract with her.

Having considered all the evidence again, along with Miss H and Novitas's further submissions, I see no reason to depart from the findings and redress outlined in my provisional decision.

Putting things right

I will be directing Novitas to take the same actions I set out in my provisional decision, namely that in respect of Miss H it must:

1. End her loan agreement and remove any reference to it on her credit file.

2. Cap her liability for any debt which arose under the loan agreement, to £1,745. If she has already paid this amount then any overpayments must be returned to her with 8% simple interest per year* added, calculated from the date she made the overpayments, to the date she is refunded. If she has not yet paid this amount then Novitas must attempt to arrange an affordable plan for repayment of the outstanding debt.

3. Pay her £300 compensation (in respect of its handling of the matter).

4. Reimburse reasonable costs incurred by her in completing the mediation arranged by X for November 2017, upon receipt of evidence of her having paid these costs. 8%

simple interest per year* should be added to any reimbursed amounts, calculated as per point 2 above.

*In my provisional decision I omitted to say that if Novitas considers that it's required by HM Revenue & Customs to deduct income tax from this interest, it should tell Miss H how much it's taken off. It should also give her a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

My final decision

For the reasons explained above, and in my attached provisional decision, I uphold Miss H's complaint and direct Novitas Loans Ltd to take the steps outlined above in the "putting things right" section of this final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss H to accept or reject my decision before 23 August 2021.

Will Culley
Ombudsman

COPY OF PROVISIONAL DECISION

Complaint

Miss H complains Novitas Loans Ltd ("Novitas") has treated her unfairly in relation to a loan she took out to fund legal proceedings.

Background

Miss H had just left her ex-partner, "P", and was seeking advice on child maintenance matters and a loan she said she was paying on P's behalf. In October 2014 she met with a solicitor, who I'll call "Mr C", who was a partner in a firm I will call "X".

X said it could represent Miss H and that if matters went to contested court hearings it could cost up to £45,000. After an abortive application to another lender, X said it would apply to Novitas for a loan facility to cover the cost of the legal proceedings. Miss H agreed to go ahead and X organised the facility with Novitas with a borrowing limit of £45,000. The facility was regulated under the Consumer Credit Act 1974 ("CCA") and was to be repaid from money received by Miss H as a result of the legal proceedings. In particular, X noted on the application form for the loan that a property owned by P would be sold and this was to be the repayment vehicle. The loan facility was not secured on land, but any losses incurred by Novitas if Miss H was unable to repay it were covered by an insurance policy to cost 10% of the amount of principal drawn down. The loan was to run for 12 months from the date the agreement was signed, and then become repayable in full on 30 days' notice from Novitas. The interest rate on the loan was 18% simple per year.

The loan agreement was completed on 6 November 2014 and shortly after X presented Miss H with a document for her to authorise a drawdown of the full £45,000 available under the facility. The document also outlined that an additional £4,500 would be added to the balance for the insurance premium and a £500 admin fee. Miss H signed the drawdown document and £45,000 was paid over to X by Novitas.

P also obtained legal representation and, over the next three years, no agreement was reached between Miss H and P except on some parenting matters. Early in November 2017 the Solicitors Regulation Authority ("SRA") intervened into X and closed it down because "there was reason to suspect dishonesty on the part of Mr C". Miss H instructed a barrister who had already been working on her case under X's instruction, and a mediation session was held late in November 2017. I understand this resulted in Miss H and P coming to an agreement on the outstanding matters relating to their separation.

Miss H, at around the same time, began investigating the situation with the Novitas loan. She communicated with a number of different parties, including Novitas, the solicitors appointed by the SRA to deal with the intervention into X, the SRA, and her barrister. A loan manager at Novitas told Miss H that the funds from the loan facility had all been released to X and she was liable for the loan in full including fees and interest (which had been accruing for three years). I will not narrate everything that happened after this point, but Miss H and Novitas were unable to agree on what, if anything, she should be liable to pay. Novitas believed she was fully liable for the loan, in line with the terms and conditions she had agreed to. Miss H didn't agree that she should be held liable for the loan at all. In broad summary Miss H has argued the following:

- Mr C, on behalf of X, had essentially acted fraudulently. He had drawn down the full £45,000 available under the facility and not used that money to fund her legal matter. She had not received any invoices. Mr C had sought to prevent this information from coming to light by deliberately delaying the proceedings between Miss H and P and refusing or failing to disclose information about Miss H's loan to P's solicitors or even to the barrister it had instructed to represent Miss H. This prevented the legal matter from moving forward. When X was closed by the SRA and the loan information was disclosed, everything had been resolved

in a matter of weeks.

- Novitas had acted, at best, negligently. It had failed to act on signs that all was not well with X. This included approving the drawdown of the entire facility from the outset, when no legal work would have taken place; failing to take action when X didn't respond to requests for updates for months at a time, and not spotting there were significant discrepancies in the information given by X, and that given by P's solicitors (who were also funded by Novitas).

- Novitas had not properly checked whether there was any real prospect of her being able to repay the loan in any event, thus lending to her irresponsibly. It had agreed to provide funding for a claim which was very unlikely to succeed, and it had also not picked up on various issues with the loan application, including inaccurate information about Miss H and P's marital status.

Miss H couldn't come to an agreement with Novitas and brought her complaint to this service for an independent assessment. The most recent assessment issued by one of our investigators made the following observations:

- Novitas was liable under Section 75A of the Consumer Credit Act 1974 for any claim Miss H had against X for breach of contract in relation to the services funded by the loan.

- Although there was no clear written contract between Miss H and X, it was clear enough that she'd agreed that X would represent her in the legal matters surrounding her separation from P. There was an implied term in contracts for services that these would be carried out with reasonable care and skill, within a reasonable time and for a reasonable charge (where this was not fixed). X had created unnecessary delays and there was a lack of evidence of the work X had been doing. It had raised two invoices detailing professional fees of £36,037.50 but these were vague and there was no evidence Miss H had received them as they were incorrectly addressed.

- There was some evidence that X had not been acting on a "fixed fee" basis as Novitas had claimed, because it had paid invoices at various points during the case to pay for counsel's fees and other disbursements.

- The SRA's intervention agents had opined that a failure to raise and deliver invoices to Miss H meant that costs were not lawfully owed by her to X, and had recommended to the SRA that she receive almost full reimbursement from the SRA's compensation fund.

- Overall it seemed likely X had failed to provide some of the services it billed Miss H for, and hadn't carried out those services it *had* provided with reasonable skill and care, and it would be fair for Novitas to provide a remedy, bearing in mind the provisions of Section 75A.

- Novitas had been entitled during the loan application to rely on the recommendations and advice of X when assessing the chance of her case succeeding.

- Novitas should recalculate the credit agreement as though it had been for a principal amount of £6,687.50, this being the amount which X had paid in disbursements and which could be verified, and the amount the SRA's intervention agents had said Miss H should pay. It should also take a number of other steps including removing adverse information from Miss H's credit file and working with her to find a way to pay off any remaining balance, and paying her £150 compensation for delays in responding to her.

Neither Novitas nor Miss H agreed with the investigator's findings and recommendations.

Miss H maintained that she should have no liability at all for the loan. She said that X had procured the loan dishonestly and this is something Novitas should have discovered because P also applied to Novitas for a loan a few days later, and the (correct) information on his application had been

inconsistent with that submitted by X. Miss H also repeated that Novitas had turned a blind eye to evidence of X's dishonesty throughout the protracted sequence of events that had followed the loan application. She questioned Novitas's judgement and motivation in allowing X to receive a drawdown of the full £45,000 within days of signing the agreement, noting that such costs would not have been incurred so quickly, but that on the other hand interest was being incurred from the point of the drawdown. More broadly, Miss H expressed her concerns about the business model of Novitas and its conduct both in relation to her and P's cases, and in general. She outlined the negative impact the events had had on her and P's health and lives.

Novitas, for its part, questioned whether this service could deliver a fair answer to Miss H's case or investigate the matter appropriately. It said it challenged whether the Financial Ombudsman Service had the necessary knowledge to determine a claim for negligence or breach of contract by a solicitor. It said it would have expected a legal expert, such as a member of the SRA or the Legal Ombudsman, to determine a case like this.

Novitas also said there was not enough evidence to show X had breached its contract with Miss H, and for which it could be held liable under the relevant section of the CCA, noting that no written contract appeared to have been produced. It argued that it was difficult to assess whether a breach of contract had occurred in the absence of the contract itself and that too many assumptions had been made by the investigator. Novitas thought it likely that more than £6,687.50's worth of work had been done by X, and didn't think X had necessarily failed to discharge its services to Miss H within a reasonable time. It said it had analysed its data on legal matters like Miss H's and found the average time taken to settle a case from the point a loan had been agreed was 15 months.

Because neither party has been able to agree a way forward, the case has been passed to me to decide.

My provisional findings

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

Suitability of the Financial Ombudsman Service for determining Miss H's case

Novitas does not appear to challenge the jurisdiction of this service to determine Miss H's case, but in its response to our investigator it has said it takes the view that a different alternative dispute resolution (ADR) scheme with expert legal knowledge would be better placed to resolve the complaint. I've considered this point carefully.

The Financial Conduct Authority (FCA) makes the rules which govern how the Financial Ombudsman Service must handle complaints. These are set out in the chapter of the FCA Handbook titled "Dispute Resolution: Complaints" and are generally known as the "DISP rules".

DISP 3.3 gives the ombudsman the power to dismiss a case without considering its merits, and DISP 3.3.4A and 3.3.4B set out the circumstances in which a case can be dismissed if it was referred to the Financial Ombudsman Service on or after 9 July 2015. One such set of circumstances is *"where it would be more suitable for the complaint to be dealt with by a court or a comparable ADR entity"*. Novitas is, in essence, arguing that Miss H's complaint should be dismissed under this rule.

It's important to note that the power to dismiss a complaint is a discretionary one. It is not uncommon for there to be some overlap in the types of complaints different ADR entities can deal with, and it could be the case that more than one ADR entity would be an appropriate arena for the resolution of all or parts of Miss H's complaint. There could also be reasonable arguments that in at least some respects it "would be more suitable" for another ADR entity to deal with her complaint due to the expertise that other entity holds on certain subjects.

But that does not mean I am bound to dismiss the complaint. Ultimately, I am required to make a determination based on what is, in my opinion, fair and reasonable in all the circumstances of the case. While I can understand Novitas's point of view that there may be other ADR entities with expert knowledge of legal matters, I don't think this means I'm unable to determine Miss H's complaint fairly.

Novitas's responsibilities arising from the nature of its agreements with Miss H and X

Miss H's credit agreement with Novitas is a consumer credit agreement regulated by the CCA. Specifically, it is a restricted-use credit agreement within the meaning of section 11(1)(b) of the CCA, and a debtor-creditor-supplier agreement within the meaning of section 12(b) of the CCA.

Put simply, this means it is a loan made under pre-existing arrangements between Novitas and X, to fund Miss H's dealings with X. Two other sections of the CCA apply to a loan of this nature and which come with some relevant responsibilities for Novitas. I will outline these below.

Section 56 of the CCA makes X the agent of Novitas for the purpose of the "antecedent negotiations" which took place between X and Miss H prior to her entering into the credit agreement. This means anything said or done by X during this period is taken as having been said or done on behalf of Novitas. It would cover, for example, misrepresentations made by X to Miss H.

Section 75A of the CCA is also applicable to Miss H's agreement. This allows Miss H, if she has a claim for breach of contract against X, to bring that claim against Novitas instead, so long as several conditions are met. One such condition is that the supplier (X) is insolvent, which is the case here and as Miss H's meets the other conditions, I conclude she would be able to bring a claim against Novitas. There are certain features of an agreement which can cause section 75A not to apply to it. These are where the agreement is secured on land, the cash value of the services paid for by the agreement does not exceed £30,000, the agreement is for more than £60,260, or the debtor has entered the agreement wholly or predominantly for business purposes.

I'm satisfied that the only exclusion which *may* apply is the exclusion related to the lower threshold of the cash value. I say this because, although X appears to have requested £45,000 up front, it told Miss H this was the highest amount she would have to pay, and that in reality she would probably end up paying significantly less than this and be refunded the difference. One email, for example, suggests a cost of £12,000-£15,000 was quoted to Miss H. If it is indeed the case that the cash price of the services was £30,000 or under, then section 75 of the CCA would apply instead, which would allow Miss H to bring the same claims against Novitas in respect of breaches of contract by X, but also for misrepresentation by X. Because section 56 already provides for a route by which Miss H can claim against Novitas for X's alleged misrepresentations, I don't need to subject this issue to further analysis.

Novitas's duty to lend responsibly

Miss H has expressed concerns over the decision of Novitas to lend to her. At the time Novitas lent to Miss H the FCA had recently made new rules regarding responsible lending, set out in its Consumer Credit Sourcebook ("CONC"). These rules were for the most part based on, and frequently referred to, the Irresponsible Lending Guidance ("ILG") issued in 2010 and 2011 by the previous regulator of consumer credit activities, the Office of Fair Trading ("OFT"). In many respects therefore, CONC simply codified into rules what had previously been guidance for the sector.

As far as Novitas's responsibilities were concerned as a lender, CONC outlined what it was expected to do before agreeing to lend to Miss H.

CONC 5.2 dealt with the assessments Novitas needed to carry out before making its agreement with Miss H:

CONC 5.2.1 R

1) Before making a regulated credit agreement the firm must undertake an assessment of the creditworthiness of the customer.
[Note: section 55B(1) of CCA]

(2) A firm carrying out the assessment required in (1) must consider:

(a) the potential for the commitments under the regulated credit agreement to adversely impact the customer's financial situation, taking into account the information of which the firm is aware at the time the regulated credit agreement is to be made; and
[Note: paragraph 4.1 of ILG]

(b) the ability of the customer to make repayments as they fall due over the life of the regulated credit agreement, or for such an agreement which is an open-end agreement, to make repayments within a reasonable period.
[Note: paragraph 4.3 of ILG]

(3) A creditworthiness assessment must be based on sufficient information obtained from:

(a) the customer, where appropriate; and
(b) a credit reference agency, where necessary.
[Note: section 55B(3) of CCA]

…

CONC 5.2.3 G

The extent and scope of the creditworthiness assessment or the assessment required by CONC 5.2.2R (1), in a given case, should be dependent upon and proportionate to factors which may include one or more of the following:

(1) the type of credit;
(2) the amount of the credit;
(3) the cost of the credit;
(4) the financial position of the customer at the time of seeking the credit;
(5) the customer's credit history, including any indications that the customer is experiencing or has experienced financial difficulties;
(6) the customer's existing financial commitments including any repayments due in respect of other credit agreements, consumer hire agreements, regulated mortgage contracts, payments for rent, council tax, electricity, gas, telecommunications, water and other major outgoings known to the firm;
(7) any future financial commitments of the customer;
(8) any future changes in circumstances which could be reasonably expected to have a significant financial adverse impact on the customer;
(9) the vulnerability of the customer, in particular where the firm understands the customer has some form of mental capacity limitation or reasonably suspects this to be so because the customer displays indications of some form of mental capacity limitation (see CONC 2.10).
[Note: paragraph 4.10 of ILG]

CONC 5.2.4 G

(1) To consider all of the factors set out in CONC 5.2.3 G in all cases is likely to be disproportionate.
[Note: paragraph 4.11 of ILG]

(2) A firm should consider what is appropriate in any particular circumstances dependent on, for example, the type and amount of the credit being sought and the potential risks to the

customer. The risk of credit not being sustainable directly relates to the amount of credit granted and the total charge for credit relative to the customer's financial situation.
[Note: paragraph 4.11 and part of 4.16 of ILG]

(3) A firm should consider the types and sources of information to use in its creditworthiness assessment and assessment required by CONC 5.2.2R (1), which may, depending on the circumstances, include some or all of the following:
(a) its record of previous dealings;
(b) evidence of income;
(c) evidence of expenditure;
(d) a credit score;
(e) a credit reference agency report; and
(f) information provided by the customer.
[Note: paragraph 4.12 of ILG]

(4) A high level of scrutiny in the assessment required by CONC 5.2.2R (1) would normally be expected before the lender enters into a regulated credit agreement secured by a second or subsequent charge on the customer's home.
[Note: paragraph 4.17 of ILG]

CONC 5.3 provided further guidance on what Novitas should have taken into account when making its assessments, and made rules on what it considered were unfair business practices in relation to lending:

CONC 5.3.1 G

(1) In making the creditworthiness assessment or the assessment required by CONC 5.2.2R (1), a firm should take into account more than assessing the customer's ability to repay the credit.
[Note: paragraph 4.2 of ILG]

(2) The creditworthiness assessment and the assessment required by CONC 5.2.2R (1) should include the firm taking reasonable steps to assess the customer's ability to meet repayments under a regulated credit agreement in a sustainable manner without the customer incurring financial difficulties or experiencing significant adverse consequences.
[Note: paragraph 4.1 (box) and 4.2 of ILG]

(3) A firm in making its creditworthiness assessment or the assessment required by CONC 5.2.2R (1) may take into account future increases in income or future decreases in expenditure, where there is appropriate evidence of the change and the repayments are expected to be sustainable in the light of the change.
[Note: paragraph 4.9 of ILG]

(4) If a firm takes income or expenditure into account in its creditworthiness assessment or its assessment required under CONC 5.2.2R (1):
(a) the firm should take account of actual current income or expenditure and reasonably expected future income or expenditure (to the extent it is proportionate to do so) where it is reasonably foreseeable that it will differ from actual current income or expenditure over the anticipated repayment period of the agreement;
(b) it is not generally sufficient for a firm to rely solely for its assessment of the customer's income and expenditure, on a statement of those matters made by the customer;
(c) its assessment should be based on what the firm knows at the time of the assessment.
[Note: paragraph 4.13, 4.14 and 4.15 of ILG]

(5) An example of where it may be reasonable to take into account expected future income would be, in the case of loans to fund the provision of further or higher education, provided that an appropriate assessment required by this chapter is carried out and there is an appropriate

exercise of forbearance in respect of initial repayments, for example, deferring or limiting the obligation to repay until the customer's income has reached a specified level. Any assumptions regarding future income should be reasonable and capable of substantiation in the individual case and the products should be designed in a way to minimise the risks to the customer.
[Note: footnote 21 to paragraph 4.9 (box) of ILG

(6) For the purposes of CONC "sustainable" means the repayments under the regulated credit agreement can be made by the customer:
(a) without undue difficulties, in particular:
(i) the customer should be able to make repayments on time, while meeting other reasonable commitments; and
(ii) without having to borrow to meet the repayments;
(b) over the life of the agreement, or for such an agreement which is an open-end agreement, within a reasonable period; and
(c) out of income and savings without having to realise security or assets; and
"unsustainable" has the opposite meaning.

…

(11) Where a firm requests information from a customer for its creditworthiness assessment or its assessment required by CONC 5.2.2R (1) and the information provided by the customer is false and the firm has no reason to know this is the case, the firm should not contravene CONC 5.2.1 R or CONC 5.2.2 R.
[Note: paragraph 4.10 of ILG]

…

CONC 5.3.2 R

A firm must establish and implement clear and effective policies and procedures to make a reasonable creditworthiness assessment or a reasonable assessment required by CONC 5.2.2R (1).

[Note: paragraph 4.19 of ILG]

CONC 5.3.3 G

Under the procedures required by CONC 5.3.2 R a firm should take adequate steps, insofar as it is reasonable and practicable to do so, to ensure that information (including information supplied by the customer) on an application for credit relevant to a creditworthiness assessment or an assessment required by CONC 5.2.2R (1) is complete and correct.

[Note: paragraph 4.29 of ILG]

CONC 5.3.4 R

A firm must not base its creditworthiness assessment, or its assessment required under CONC 5.2.2R (1), primarily or solely on the value of any security provided by the customer, but this rule does not apply in relation to a regulated credit agreement under which the firm takes an article in pawn and the customer's total financial liability (including capital, interest and all other charges) is limited under the agreement to the proceeds of sale which would represent the true market value (within the meaning of section 121 of the CCA) of the article or articles pawned by the customer.

…

CONC 5.3.7 R

A firm must not accept an application for credit under a regulated credit agreement where the firm knows or ought reasonably to suspect that the customer has not been truthful in completing the application in relation to information supplied by the customer relevant to the creditworthiness assessment or the assessment required by CONC 5.2.2R (1).

[Note: paragraph 4.31 of ILG]

…

To summarise very briefly the rules above as they apply to this case: Novitas had to assess Miss H's application for the loan facility, to check if she would be able to afford to repay it in a sustainable way. Its assessment had to be proportionate to the circumstances, taking into account the characteristics of the lending being proposed, and Miss H's financial situation. In order to be sustainable, repayments would need to be able to made on time and out of income or savings and without having to realise security or assets. Novitas had to assess whether the commitments Miss H was signing up to were likely to adversely impact her financial situation. In doing the above, Novitas could take into account potential future increases in income so long as any assumptions made about these were reasonable and capable of being substantiated with appropriate evidence.

Novitas's decision to lend to Miss H.

The regulatory expectations thus set out, I move on to the checks Novitas carried out prior to lending to Miss H. Based on the evidence I have before me, it appears Novitas relied on the following information:

- The results of a credit check carried out by a third-party lender, which emailed Novitas to say it was "fine to lend".
- A self-declaration from Miss H in relation to her being free of insolvency and adverse credit history.
- An application form which appears to have been completed by X, outlining the anticipated vehicle for repayment of the loan, the strategy for the legal case and any risks foreseen for repayment.
- An assignment (described as a "security") of Miss H's rights to any proceeds from her legal proceedings against P, which it was anticipated would come from Miss H gaining a share in P's property which would then be sold.
- An insurance policy taken out for Novitas's benefit but paid for by Miss H in the sense that it was added to the loan balance. It appears this would repay to Novitas the capital it had lent if Miss H defaulted and certain steps had already been taken to recover the monies owed.

It doesn't appear that any efforts were made to ascertain Miss H's income or expenditure, or the level of any savings she may have had. I do not find this surprising because it's apparent from the evidence that Novitas did not contemplate that Miss H might end up in a situation where she would have to pay back what she owed from her income or savings.

Novitas has essentially explained that it expected Miss H to gain a share of P's property, which was said to have £780,000 in equity (this doesn't appear to have been verified at the time), and on sale of the property the loan would be repaid.

CONC states that repaying a loan is not considered sustainable if to do so requires realising security or assets. It also states that basing an assessment of creditworthiness primarily or solely on the value of a security is an unfair business practice.

It appears that Novitas based its assessment of creditworthiness primarily on the value of P's property and the chance that Miss H might gain some equity in it. And this was not a security in the sense that it was something Miss H was guaranteed to be able to fall back on: it was conditional on her being successful in her legal matter against P. So there was a chance she might have no means of repaying what was a very substantial loan, at all.

Novitas has told this service that in 2018 it presented its lending model (which it says was unchanged from the time it lent to Miss H) to the FCA, which had not raised any concerns about it. I was not privy to these discussions and I don't know exactly what was shown to the FCA, however from my experience in considering cases involving lending decisions, I'm aware that lending models do not always operate in practice as they do in theory. And from a copy of Novitas's lending policy which I have seen, I note there appears to have been considerable discretion for it to approve applications for borrowing which did not satisfy the criteria set out in the policy. Miss H, for example, does not appear to have satisfied the criteria but her application was approved. So I don't think the FCA's supposed acceptance of Novitas's lending model is something which I can attach much weight to here.

Novitas has referred to accepting the expert opinion of X regarding the chances of success of the legal matter, and on the proceeds being enough to repay the loan. Novitas appears to have accepted X's opinion uncritically. I can understand why it might be, in some circumstances, acceptable to do so. While a solicitor approaching Novitas for funding would of course have an interest in painting an optimistic picture of their chances of success, on the other hand Novitas would be entitled to assume the solicitor was acting in the best interests of their client. There is evidence now to suggest X was not acting in Miss H's best interests, but that doesn't necessarily mean Novitas ought to have known this at the time.

Nevertheless, this was an application for a substantial loan at a not insignificant rate of interest. The terms of repayment were such that a very large lump sum would have been required to repay it. And the information provided to Novitas by X to support the application was, in my opinion, rather lacking in detail. Given the amounts involved, I don't think Novitas's checks here were proportionate.

Miss H has suggested Novitas were unaware she and P were unmarried, and that X was pursuing a legal claim ("TOLATA") with much less certain prospects of a settlement than if she and P had been married. There is some evidence to suggest Novitas was indeed under the impression Miss H and P were married. For example, some of her loan paperwork refers to P as her spouse, and internally the loan appears to have been classified by Novitas as being related to a divorce. P's solicitors also intimated in an email to X that they had spoken to Novitas and been told it was against its policy to lend in support of a TOLATA claim and that they were therefore very surprised Novitas had done so. So I can see how Miss H would think Novitas must have mistaken the purpose of the loan X had applied for on her behalf. I asked Novitas to clarify its position on this, and it explained that it didn't see any difference between divorce proceedings and a TOLATA claim, as far as its lending policy was concerned. Ultimately, I don't think either possibility assists Novitas here. If its policy was not to lend in support of a TOLATA claim then it appears it went against its policy either by accident or exception. If its policy was that it *would* lend in support of a TOLATA claim and saw no difference in risk between that and a divorce, then this calls into question its creditworthiness assessment.

In light of the above, I'm unable to see how Novitas's decision to lend to Miss H was in line with what was required of it from a regulatory point of view. Indeed, it appears possible to me that Novitas's approach in Miss H's case falls into the category of an unfair business practice as defined in CONC.

Had Novitas enquired further into Miss H's financial circumstances or the nature of her legal claim, I think it would have reached the conclusion that there was a substantial risk she'd be unable to repay the proposed loan in a sustainable manner. Ultimately, I don't think it would have agreed to lend to her, had it carried out proportionate checks, and I am minded to conclude that it was therefore wrong to do so.

In my view it would not be fair or reasonable for Miss H to have to pay interest, fees or charges on a loan which was lent irresponsibly. So my starting point is that Miss H should have to pay back only the

loan principal she has received. But Miss H hasn't received any money – it was paid to X – so I've needed to go on to assess whether Miss H benefited from these funds and should therefore fairly pay them back. When doing so, I've considered the principles of connected lender liability I outlined earlier in this decision.

Potentially relevant considerations regarding X

Before going on to consider whether Miss H may have a valid claim against Novitas in respect of its connected lender liability, I think it would be useful to set out what is currently known about X and Mr C and which are relevant background to Miss H's case.

As I've already indicated, X was the subject of an intervention by the SRA. This intervention took place due to the SRA suspecting that Mr C had been dishonest. X had also been rebuked by the SRA for irregularities in accounting for client money, prior to the intervention.

I am aware that further irregularities have since been discovered. This included large deficits relating to client money and I understand the SRA's compensation fund has needed to pay more than £1.8m in connection with the intervention. It seems that some money which should have been held on account to pay for client legal matters, was instead transferred out of X to another entity Mr C had an interest in, which I will call X1.

X1 went into administration not long after X was closed by the SRA, and it was found by the administrators that Mr C had drawn money from X1 amounting to a six figure sum. Mr C has subsequently gone bankrupt and agreed to a bankruptcy restrictions undertaking (BRU). According to the Insolvency Service, a BRU is put in place to protect the public, due to "dishonest or blameworthy" behaviour leading to the individual's bankruptcy.

This all paints a most unflattering picture of Mr C. While there appears to a body of evidence to suggest that X and Mr C have been dishonest, it does not necessarily mean that they were dishonest in their dealings with Miss H. However, the evidence of this dishonesty has been a relevant consideration when I have weighed up the rest of her case.

The actions of X prior to the conclusion of the credit agreement and initial drawdown

Miss H has provided some further evidence since our investigator's assessment of the case, of the discussions which took place before she entered the credit agreement with Novitas.

The first documentary evidence of discussions between Miss H and X is dated 29 October 2014. This is an email from Mr C which set out the terms on which Miss H would be dealing with X. Mr C said he was going to wait to hear from P, and would apply to the court in respect of property and parenting matters if he heard nothing, while seeking a mediated settlement. On the subject of costs and fees, Mr C said he thought it would cost "around £45,000" to pursue her parenting and property disputes all the way to contested court hearings. He noted that X expected its costs to be "met at the outset". Mr C also said the following:

"Interest accrues on the loan at 1.5% per month but during the course of the loan we make that monthly payment for you so that the loan is not a financial burden to you. The loan and interest is repayable when the property is sold from the proceeds of sale."

He went on to say:

"I should record that If the matter settles and there are no contested hearings you will not be charged the full amount of the fees and our fees will be calculated on a time basis. Any costs not incurred will then be refunded."

At this point in time X appears to have had in mind another lender – "L" – to fund the legal

matter and indeed it asked Miss H to sign a credit agreement with a £5,000 limit and 36 month term. Curiously, Mr C said *"you will see the agreement shows a credit limit of £5,000 for illustrative purposes only but the application is for the full amount of the fees."*

Miss H returned the application form for L, and received an email from Mr C on 31 October 2014 in which he said L had made an error and he would be making an application via Novitas instead. He clarified some points for Miss H, including that the £45,000 covered *"**everything** that we do – telephone calls, emails, meetings, court hearings – everything"* [emphasis in original].

Miss H replied to this email with further questions about the £45,000 fee and referenced a conversation she had with one of Mr C's colleagues, who had apparently said £45,000 was a worst-case scenario if the case ended up in court, but she could expect to pay much less in the case of a mediated settlement. It doesn't appear Mr C replied to this email.

X also sent Miss H a "terms of business" which referred to an initial time estimate of 12 to 16 weeks, or 6 to 9 months if court proceedings were necessary. The document confirmed the "nature of instructions" as "TOLATA Claim" and that a fixed fee had been agreed. After this point the Novitas loan application took place as I've described above. Mr C emailed Novitas while it was considering the application to impress upon it the urgency of the matter, referring to an "emergency application" which needed to be made to the court. I will note here that X's statement that it would pay the monthly interest on the loan appears to have referred only to the prospective loan with L (which would have required monthly payments of interest), and not the Novitas loan.

Although it is common for solicitors to agree a fixed fee for a particular package of legal services, X's agreement with Miss H for her legal costs was rather unusual in that X was to take a £45,000 fee up front when it had said it did not believe it was likely all this money would be needed. It would only be necessary if the matter went to contested court hearings, which would have been a long way off (at least 6 to 9 months even by X's estimate). My understanding is that the normal practice is for payments to be taken in stages as a legal matter progresses. This is a logical way of doing things because it allows payments to keep in step with the actual costs being incurred by the solicitor.

To take a fee at the outset which covers every conceivable expense which could occur up to the point of contested court hearings does not appear to be logical. X's decision to require payment in this way is all the more puzzling in light of its knowledge that it was arranging for Miss H to borrow the money at a significant rate of interest, which would begin to accrue from the date of drawdown. By insisting on the maximum, hypothetical fee being taken up front, X was aware that it was putting Miss H in a disadvantageous position which would cause her to pay significantly more in finance costs, for no good reason that I can see. It would be difficult to argue that such an arrangement was in her best interests, and it invites the question of why X insisted on it.

While I am aware that Miss H was required to take independent legal advice in relation to the Novitas loan and how it worked, I don't think this necessarily cancels out any wrongdoing by X in respect of the loan application or the discussions over fees and drawdowns. I note that in his email of 29 October 2014 Mr C did not present any other funding options to Miss H, and asked her to complete and sign the paperwork so it could be processed "by Friday", which was in two days' time. Miss H has said she felt pressured by X and being led to believe this was her only option. She has referred to being in a vulnerable state at the time, which I accept that she was, having just left P and the home she shared with him, with her infant child.

The actions of X after the conclusion of the credit agreement and drawdown

Mr C's email to Miss H explained what it was that X was going to do for her, though this did not go into a great deal of detail:

"We will expect now to hear from P (or solicitors acting for him) in relation to the occupation of the house and will of course let you know when there are developments. If we hear nothing we will begin the process of (1) applying to the court in respect of the property (2) applying in respect of [your

child]'s entitlement and (3) continue to seek a mediated settlement of the claims… we envisage, if there is no settlement, that it will be necessary to make two applications to the court in respect of your interest in the property and [your child]'s entitlement to support from her father."

It would seem therefore that X had agreed to seek a mediated settlement between Miss H and P, and make two separate applications to the court in respect of child and property matters.

X's terms of business did not hold X to any particular standard of service to be delivered to Miss H. But at the time Miss H entered her agreement with X, the relevant law which applied to a contract for services was the Supply of Goods and Services Act 1982 ("SGSA"). This says that where a supplier acts in the course of a business, there is an implied term in the contract that the supplier will carry out the service with reasonable care and skill. What constitutes reasonable care and skill is not defined, however it has generally been taken to mean the level of care and skill which would be exercised by a competent practitioner of the service in question. Because X was a firm of solicitors dealing with family work (and holding itself out to be a specialist in this area), I've taken into account relevant guidance from the SRA and the Law Society when thinking about what would constitute reasonable care and skill in the way X conducted matters.

The SGSA also provides that where a time for a service to be carried out is not fixed by the contract, it is an implied term that the supplier will carry out the service within a reasonable time.

It's clear that the issues arising from Miss H and P's separation were not resolved quickly or without difficulties, given it took three years for a full agreement to be reached. Miss H (and P) have laid the blame for this at X's door. Without what they view as a combination of X's incompetence and dishonesty, they are sure that their separation could have been resolved much more quickly via simple mediation and at a much cheaper cost. They point to the fact that in November 2017 when X was removed from the picture, they held a mediation session and everything was resolved.

Miss H and P are of this opinion now, some years after their separation, but I have to bear in mind that at the relevant time it's possible they held quite different views and it may not have been as easy to come to an agreement as it was in November 2017 after some time had passed. I've taken this into account when considering the impact of X's acts or omissions.

A few aspects of X's representation of Miss H stand out as being relevant to the question of whether it exercised reasonable care and skill in representing her, whether it acted in an honest way in its dealings with her, and whether it did what it said it would do in its initial email.

X appeared to have obstructed attempts to mediate between Miss H and P

Mr C explained in his initial email to Miss H email that he would be pursuing a mediated settlement. This is consistent with what would be expected of a family solicitor in these circumstances, exercising reasonable skill and care.[1] But X's actions afterwards appear to have been inconsistent with this stated aim.

P's solicitors informed X that P was proposing to work with a number of named mediators including one I will refer to as "T". T subsequently contacted Miss H on 3 December 2014 to invite her to an initial mediation meeting (MIAM) separate to P. Miss H passed on the email to X asking for their advice. X described the email as a "cheap manoeuvre" and said they would "deal with it". X then replied to T in a somewhat hostile manner, stating that Miss H was "not interested in your services" and demanded to know who T was, who regulated them, and how they had obtained Miss H's details. Miss H's emails to X didn't suggest that she was against mediation, and X had told her it would seek to mediate, so I don't understand X's approach here. It appears to have served to delay and obstruct efforts to mediate between the parties.

[1] In April 2014 it became a requirement for an initial mediation meeting (MIAM) to be attended by at least the potential applicant, before any court application could be made, unless specific exemptions applied. I have not been made aware of any exemptions which would apply to Miss H's case.

No mediation was arranged until November 2015, despite (it seems) much urging by P's solicitors. X said that P and his solicitors then pulled out of this mediation, days before it was due to take place, without good reason. P's solicitors, on the other hand, informed Novitas that there had been issues with disclosure which had prevented the mediation from going ahead. Specifically, the solicitors said it was Miss H's Novitas loan which had not been disclosed until just before the mediation was due to take place.

It was a condition of the Novitas loan that its existence was disclosed to P. While the terms of the loan indicated that it was Miss H's responsibility to disclose the loan by serving a "form of notice" on P, it appears that in practice Novitas expected this to be done by X. I say this firstly because Novitas sent Mr C a handwritten slip with the loan documents in November 2014, referring to the form of notice and stating it was "to be served on the spouse via their solicitor". And secondly, X was handling communications between Miss H and P and it would therefore have been expected it would handle the disclosure of the loan too. Miss H says X advised her to keep the existence of the loan confidential. I haven't seen written evidence of this although it seems plausible in light of the rest of the evidence. At the very least it does seem that X misled the barrister it had instructed for Miss H, as to the existence of the Novitas loan. The barrister wrote to Miss H in July 2019, explaining:

"I had no idea that you were in receipt of a Novitas loan until we prepared the case for the mediation [in November 2017], by which time X were the subject of an intervention. I was always puzzled as to how your case was being funded and recall being told by Mr C that your parents were helping to fund it… I was kept as much in the dark as you about the financial dealings of X…"

I am inclined to trust the evidence of the barrister that this is what Mr C told her. The conclusion I am bound to reach is that he was not telling the truth. It is extraordinary that X knowingly provided incorrect information to the barrister it had instructed for Miss H. This was bound to make it difficult for the barrister to represent Miss H effectively and in my view likely contributed to the delays in mediation taking place. Overall, I find there were several occasions where X took actions which prevented Miss H and P from mediating.

X delayed in making a court application and, in general, moving proceedings along

Some time after the SRA intervened in X, their intervention agents wrote to Miss H with evidence of disbursements which had been paid by X. One such disbursement was for a court fee, likely related to an application, and this was dated to February 2017.

Had there been an earlier court application, I would have expected there to be further evidence of a fee being paid for this. So it seems X didn't make any applications to the court between October 2014 and February 2017. The fact an application was apparently only made two and half years after the loan was agreed is inconsistent with what Mr C said in his October 2014 email to Miss H (in which he suggested he would be making applications imminently), and his comments to Novitas about needing the loan to be processed quickly so he could make an "emergency application".

It isn't clear why there was such a delay in making an application. While there could be a good explanation, no evidence has been produced to suggest that there was one. It is also troubling that Mr C appears to have given incorrect information to Novitas when it began pressing him for updates on the case. In April 2016 for example, he wrote to Novitas stating, incorrectly, that a court application had been made.

The barrister's letter to Miss H also provides some useful insight on the question of delays by X. She recalled the following:

"…your matter seemed to take an inordinately long time for X to prepare and … it was done in fits and starts with a great deal of repetition and gaps of months between preparing the claim to be issued."

Novitas itself appears to have become concerned about a lack of progress and repeatedly contacted Mr C, usually without a reply. When replies did come, they tended to be notable for their brevity or, as outlined above, containing incorrect information.

Overall conclusions regarding X

The submissions by the parties to this case come to about 2,000 pages. Even with such a great volume of information, I have to acknowledge that the evidential picture is not complete. Nevertheless, I am able to come to a conclusion on the balance of probabilities in respect of X's dealings with Miss H.

Specifically, I find that on balance, X:

- Pressured Miss H into signing up for the Novitas loan.
- Took actions which obstructed mediation between Miss H and P, including refusing requests for mediation, with no reasonable explanation.
- Provided incorrect information to the barrister it had instructed for Miss H.
- Provided incorrect information to Novitas about the progress of the legal matter.
- Failed to update Novitas, and likely Miss H, on the progress of the legal matter.
- Delayed in making a court application, with no reasonable explanation.

Based on my findings above I am minded to conclude, on the balance of probabilities, that X behaved dishonestly in its dealings with Miss H. But even if that isn't correct, at best X's handling of matters was lacking in reasonable care and skill, and (or alternatively) X breached the express term of its agreement with Miss H that it would work towards a mediated settlement with P.

I think this is clear enough that one does not need to be an expert in legal matters to reach this conclusion fairly. I conclude that X breached its contract with Miss H.

As outlined earlier in this decision, under section 75A (or alternatively section 75) of the CCA, Novitas would be jointly liable to Miss H for this breach of contract. I've thought about this when considering what, if anything, Novitas should do to put matters right for Miss H.

Putting things right

Our investigator was guided by the opinion of the SRA's investigation agents when determining what Novitas should do. The opinion of the intervention agents was that *"…the SRA's position is that if no invoices were raised and/or delivered to you then no costs will be lawfully due to X."* Because X had failed to invoice Miss H, the intervention agents intended to recommend to the SRA that Miss H did not have to pay X's legal fees. The intervention agents noted that the SRA could disagree with their recommendation. They also were of the view that any disbursements should be deducted from the £45,000 which would otherwise be refunded to Miss H.

The opinion of the intervention agents appears to have been based on the failure of X to comply with the SRA's rules on accounting for money paid to it by or on behalf of clients, as opposed to an analysis of the impact of any breach of contract by X. I'm limited to considering the latter, so I have gone on to consider what the consequences were for Miss H of X's breach of contract in failing to exercise reasonable care and skill in providing its services to her.

My starting point is that Miss H should be put in the position, as far as is practicable, she would have been in had X not breached its contract with her. I've concluded already that X didn't act with reasonable care and skill, so I've thought about what *would* have been considered reasonable care and skill in the circumstances, and what would likely have resulted had this been exercised. *The Resolution Good Practice Guide for Family Lawyers*[2] says the following:

[2] The Law Society Family Law Protocol asks that solicitors follow the Resolution codes. https://resolution.org.uk/resolutions-good-practice-guides/good-practice-guide-for-family-lawyers-working-

"Clients must be given information about MIAM sessions and that they are compulsory in all cases unless one of the limited exceptions apply. If a client is unwilling to attend a MIAM they cannot be forced to do so, but they should be aware of the risk of the court adjourning the proceedings and directing that alternative dispute resolution is attempted before the case continues. Many judges will want to know why mediation hasn't been attempted and may ask your client to explain their position: it could be embarrassing if the client tells the Judge that their lawyer didn't think it appropriate. If issuing court proceedings, the pre-action protocol should be followed."

So it seems exploring mediation – as X said it would do – would have been the reasonable and expected course of action. Based on what is known about Miss H and P's attitudes at the time from their and their solicitors' correspondence, I think it is likely that they would have agreed to go to mediation, and this would have been successful. I've gone on to establish what this is likely to have cost Miss H.

The Government, on its webpage about mediation for childcare arrangements, recommends people visit a particular website[3] for information about mediation and its expected costs. This website gives some idea of the typical costs per person. It says an initial meeting would cost £70-100, with subsequent sessions costing £120-150. Where child and financial issues are involved, they estimate up to six sessions would be needed with between £500-600 to formalise the financial agreement in a court order. It also says £300 should be budgeted for legal advice. This suggests a course of mediation for Miss H and P would have cost between £1,590 and £1,900 each including legal advice. The mid-point between these figures is £1,745. I think it's likely this is approximately what Miss H would have had to pay had X supplied its services to her with reasonable skill and care.

I'm currently minded therefore, that Miss H should pay no more than £1,745 to Novitas. Miss H appears to have had some savings at the time she first contacted X, so I think it's likely she could have afforded this without having to borrow money. So for that reason, and because I've already concluded Novitas's decision to lend to her was irresponsible, I don't think it would be fair or reasonable for her to have to pay any interest or other fees or charges on this amount.

Miss H has referred to additional costs she incurred after X went out of business. She says she had to continue paying costs associated with the mediation X had arranged for November 2017, such as the barrister's fees and the cost of room hire. They appear to have been incurred as a direct result of X's breach of contract, so if Miss H can quantify and evidence these costs then I'm also minded to say that Novitas must reimburse her for these as well.

I think Novitas's handling of the matter has been poor. It has drawn matters out by refusing to accept that X is likely to have done anything wrong in respect of Miss H, and as a result failing to examine its responsibilities to her which flow from X's wrongdoing. It has maintained this position despite being aware of broader evidence concerning X's activities. As a result, I think Miss H has had to go to extensive lengths to argue her case – and this has caused her a significant degree of inconvenience and frustration.

Miss H has also referred to significant negative effects on her health which have been caused by the stress of these past few years. I was very sorry to hear of this, but the root cause appears to have been X's actions, and I'm unable to make an award of compensation against Novitas to Miss H for her non-financial losses caused by X. That is because losses of this type are not generally recoverable for a breach of contract, as I've concluded has happened here.

Finally, Miss H has complained about Novitas agreeing to the £45,000 drawdown at the beginning of the agreement, and not intervening earlier when it ought to have suspected X was behaving dishonestly. I don't think this is something I need to make a finding on in her case as it would not

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[3] The name of this website appeared in the original provisional decision. It has been removed from the final decision to ensure proper anonymisation.

change my recommendations on how Novitas should put things right for her. Ultimately, I think Miss H should pay no more than she would likely have done, had Novitas not lent to her irresponsibly, and had X exercised reasonable skill and care.

However, taking into account the impact of Novitas's poor handling of Miss H's concerns overall, I am minded to award an additional £300 compensation to Miss H.

My provisional decision

For the reasons outlined and explained above, I intend to uphold this complaint and direct Novitas Loans Ltd to take the following steps with respect to Miss H:

5. End her loan agreement and remove any reference to it on her credit file.

6. Cap her liability for any debt which arose under the loan agreement, to £1,745. If she has already paid this amount then any overpayments must be returned to her with 8% simple interest per year* added, calculated from the date she made the overpayments, to the date she is refunded. If she has not yet paid this amount then Novitas must attempt to arrange an affordable plan for repayment of the outstanding debt.

7. Pay her £300 compensation.

8. Reimburse reasonable costs incurred by her in completing the mediation arranged by X for November 2017, upon receipt of evidence of her having paid these costs. 8% simple interest per year* should be added to any reimbursed amounts, calculated as per point 2 above.

I now invite both parties to the complaint to let me have any additional evidence or arguments they would like me to consider. I would ask that they provide this by 5 June 2021, though in light of the lengthy history of this case I will consider reasonable extensions to this deadline. Once all further submissions have been received, I will consider the case again.

Will Culley
Ombudsman