

complaint

Miss W has complained that Amigo Loans Ltd (“Amigo”) shouldn’t have accepted her as a guarantor on a loan provided to a friend (“the borrower”). Miss W says that it was irresponsible for Amigo to accept her as a guarantor.

She says that the responsibilities of being a guarantor weren’t properly explained to her as she thought that she was only responsible for making the payments to the top-up of £1039 and not the additional amount that went towards settling the initial loan. She also says any reasonable checks would’ve shown that she couldn’t afford to make the loan payments and so she shouldn’t have been accepted as a guarantor.

background

Amigo hasn’t been entirely clear about the precise circumstances behind the outstanding loan balance in question. It told Miss W that she’d agreed to be the guarantor on the initial loan as well as the top-up. But as I understand it, Amigo’s position now is that it doesn’t allow borrowers to have more than one outstanding loan at a time, the top-up was a completely new loan, rather than just a top-up to the existing one.

As this was the case, the new loan included a sum to clear the outstanding balance on the initial loan too. And by signing the guarantee and indemnity agreement, Miss W became the guarantor for a total loan amount of £5750 not just the £1039 in additional funds that were transferred to Miss W’s account for her to pass on to the guarantor.

One of our investigators looked at what Amigo and Miss W said. She thought that Amigo hadn’t done anything wrong when accepting Miss W as a guarantor. And as the borrower had failed to make payments, it wasn’t unfair for Amigo to now enforce the terms of the guarantee and pursue Miss W for these payments. So the investigator didn’t recommend that Miss W’s complaint should be upheld.

Miss W disagreed with our investigator’s assessment and asked for an ombudsman to review her complaint.

my provisional decision

On 18 April 2019, I issued a provisional decision setting out my initial findings on Miss W’s complaint. I won’t copy that decision in full, but I will instead provide a summary of my findings.

Firstly, I summarised the regulatory framework, relevant law, relevant publications, what I consider to be good industry practice (this is copied in full in the appendix to this decision and I ask Amigo and Miss W to read this again in order to give proper context to this final decision).

In light of the relevant rules, guidance, good industry practice and law, I explained that there were four overarching questions I needed to consider in order to decide what was fair and reasonable in the circumstances of this complaint. Those questions were:

1. Did Amigo complete reasonable and proportionate checks to satisfy itself that the borrower would be able to repay this loan in a sustainable way?

- If so, did it make a fair lending decision?
 - If not, would those checks have shown that the borrower would have been able to do so?
2. Did Amigo obtain Miss W's properly informed consent before binding her to the guarantee and indemnity agreement?
 3. Did Amigo complete reasonable and proportionate checks on Miss W to satisfy itself that she was in a position repay the loan in the event the borrower did not?
 - If so, did it make a fair decision?
 - If not, would those checks have shown that Miss W would have been able to do so?
 4. Did Amigo act unfairly or unreasonably in some other way?

In considering the first overarching question – whether Amigo completed reasonable and proportionate checks to satisfy itself that the borrower would be able to repay the loan in a sustainable way – I explained that the rules and regulations required Amigo to carry out a reasonable and proportionate assessment of whether the borrower could afford to repay any loan in a sustainable manner.

I also explained that as the borrower wasn't a party to this complaint, I didn't have any evidence of the checks that Amigo carried out, or the depth that they went into, before it agreed to lend to the borrower. But the lack of information from both Amigo and the borrower on this matter didn't lessen the problem, as Amigo was seeking to enforce the guarantee and indemnity agreement. And Miss W says she should never have been accepted as a guarantor in the first place.

That said, I didn't think that the lack of information about the checks Amigo carried out on the borrower mattered too much in this case. And as this was the case, I didn't think that it was necessary for me to make a finding on whether the checks Amigo carried out on the borrower were proportionate.

I said this even though the statement of account suggested only a single monthly payment was made by the borrower and Amigo was seeking to enforce the guarantee and indemnity agreement against Miss W. And both of these factors were indications that the monthly loan payments may have been unaffordable for the borrower in the first place.

I then went on to explain that the rules and regulations in place at the time Amigo sought to bind Miss W to the guarantee and indemnity agreement required it to obtain her properly informed consent before doing so. And it had to do this by getting Miss W's agreement to the guarantee *after* having provided her with an adequate explanation of the circumstances in which the guarantee and/or indemnity might be called upon and what the implications of the guarantee being called upon would be.

The level of explanation required for it to be adequate depended on a number of factors, including the actual and potential costs of the credit, the risk to the guarantor and the channel or medium through which the transaction takes place. I explained that, in this case, Amigo had relied on the pre-payout call it had with Miss W as well as the Terms of Agreement it provided her with.

I then went on to explain that having carefully listened to the call and reviewed the agreement, I had a number of observations.

My first observation was that Amigo's representative proceeded on the basis that Miss W had been the guarantor for the initial loan taken by the borrower. I pointed out that Amigo now accepted that this was an error. That said, it was clear to me that Amigo's representative only made reference to funds of £1039.73. And while the representative did go on to confirm that the monthly payments were £280.54 over a term of three years, there was no reference – at any stage during the call - to Miss W agreeing to guarantee a loan of £5750.

So I understood why Miss W was left with the impression that she was only guaranteeing £1039.73. And I didn't think that it was unreasonable for her to have reached that conclusion either.

I acknowledged that Amigo also argued that - irrespective of the discussion on the call - Miss W was provided with the Terms of her Agreement and she confirmed that she had read, understood and accepted them. But I explained that it seemed to me that the purpose of the pre-payout call was to obtain Miss W's informed consent to being the guarantor on this loan.

So, in my view, this was the channel or medium that this transaction took place. And, in these circumstances, I didn't see how Amigo could fairly and reasonably seek to correct an omission in the information it provided on the call with information it provided through another medium. Equally I didn't think it was fair and reasonable to expect Miss W to have picked out the relevant parts of different communications and piece them together to get an idea of her obligations, when it was Amigo's responsibility to provide an adequate explanation of them.

I also added that I thought Amigo was somewhat overplaying the extent to which it confirmed Miss W had read, understood and accepted the Terms of Agreement during the call. I thought this because the representative asked whether Miss W was the person that had read and signed online agreeing to stand as guarantor. The representative didn't ask whether Miss W had understood the Terms of Agreement. So I'm not persuaded that Amigo did clearly explain, in a fair and reasonable way, that Miss W was agreeing to stand as a guarantor on a loan of £5750.

I also explained that I had concerns about the adequacy of the explanation provided about the circumstances in which the guarantee might be called on and what the implications of this might be.

Miss W's Guarantee and Indemnity agreement says:

“YOU MAY HAVE TO PAY INSTEAD of the Borrower and fulfil any obligations under the Guarantee & Indemnity. However, if the Borrower fails to keep his side of the Agreement, Amigo Loans must send him a default notice (and a copy to you) giving him a chance to put things right before any claim is made on you.”

But the representative merely said that Miss W would be responsible for making any payment that the borrower fails to make. She didn't say anything about Amigo needing to issue a default notice and giving the borrower the chance to make things right first.

Equally while the representative went on to say that Miss W failing to keep to her responsibilities as a guarantor could result in court action to clear the balance in full and that this in turn could lead to a charging order or an attachment of earnings order, she didn't seek to explain what either of these orders were.

All the representative said was that Miss W should seek advice from Citizens Advice (rather than independent legal advice from a legal professional (which could include Citizens Advice)). I didn't think that this was fair and reasonable bearing in mind that Amigo itself was required to communicate and explain matters using plain and intelligible language.

So bearing in mind the potential implications Amigo itself foresaw, the seriousness of them and its failure to fairly and reasonably use what I considered to be plain and intelligible language, I didn't think that Amigo provided an adequate explanation about the circumstances in which the guarantee might be called on and what the implications of this might be to Miss W.

In my view, Miss W quite reasonably believed that, at worst, she'd only be responsible for a loan of £1039.73. And even then bearing in mind the channel or medium the transaction took place and the potential risk to Miss W, I didn't think that the implications of the guarantee being called upon were fairly and reasonably explained to her.

As this was the case, I confirmed that I was minded to find that Amigo didn't properly obtain Miss W's informed consent, in a way that was fair and reasonable, before binding her to the guarantee and indemnity agreement it was now seeking to enforce against her.

I then explained that as well as requiring Amigo to obtain Miss W's informed consent to being bound to the agreement, the rules and regulations in place also required Amigo to carry out a reasonable and proportionate assessment of whether Miss W could afford to repay this loan in a sustainable manner should the borrower fail to do so.

I made it clear that Amigo was required to carry out this guarantor focused assessment in addition to a similar one on the borrower. These checks had to be customer-focused – so Amigo had to think about whether Miss W would be able to repay the loan sustainably in the event she had to.

In practice this meant that Amigo had to reasonably conclude that making the payments to the loan, in the event she had to, wouldn't cause Miss W undue difficulty or adverse consequences. In other words, it wasn't enough for Amigo to simply think about the likelihood of it getting its money back, it had to consider the impact of loan repayments on Miss W.

I then explained that what constitutes a proportionate affordability check will be dependent upon a number of factors including – but not limited to – the particular circumstances of the consumer (e.g. their financial history, current situation and outlook, and any indications of vulnerability or financial difficulty) and the amount / type / cost of credit they are seeking. Even for the same customer, a proportionate check could look different for different applications.

In light of this, I thought that a reasonable and proportionate check ought generally to have been *more* thorough:

- the *lower* a customer's income (reflecting that it could be more difficult to make any loan repayments to a given loan amount from a lower level of income);
- the *higher* the amount due to be repaid (reflecting that it could be more difficult to meet a higher repayment from a particular level of income);
- the *longer* the term of the loan (reflecting the fact that the total cost of the credit is likely to be greater and the customer is required to make payments for an extended period); and
- the *greater* the number and frequency of loans, and the longer the period of time during which a customer has been given loans (reflecting the risk that repeated refinancing may signal that the borrowing had become, or was becoming, unsustainable).

There might also be other factors which could influence how detailed a proportionate check should've been for a given loan application – including (but not limited to) any indications of borrower vulnerability and any foreseeable changes in future circumstances.

I set out that I'd carefully thought about all of the relevant factors in this case.

My thoughts on Amigo's checks started by noting that Amigo appeared to be relying heavily on the online questionnaire which it asked Miss W to complete prior to the pre-payment call taking place and it accepting her as a guarantor on this loan. I had significant concerns about the weight Amigo placed on this information because the use of the word "assessment" in the title of this document didn't, in itself, mean that an assessment, let alone a reasonable and proportionate one of Miss W's ability to sustainably repay this loan in the event the borrower didn't, took place.

I explained my view that an assessment requires some kind of evaluation, judgement, appraisal or scrutiny. And, in this case, I thought that Amigo simply accepted the information provided without question and without any attempt to scrutinise or evaluate it. I thought this was the case because Miss W was recorded as having a monthly income of £3000 even though she was also recorded as having been employed as a Senior Healthcare Assistant.

I didn't think that it was impossible for Miss W to have had a monthly income of this amount in the job she had. But given the declared income was substantially above the average for an individual in this line of work, I thought that it would have been reasonable and proportionate for Amigo to have taken steps to have verified the monthly income it was provided with in this case. I also explained that I thought it would still be sensible and proportionate to verify, at least, employment status and income irrespective of whether the declared figure was wholly out of kilter.

Furthermore, there didn't appear to have been any scrutiny of the rest of the information included on the questionnaire either. For example, I hadn't seen anything to suggest that Miss W's rent declaration was verified. And I was also concerned at the fact that Miss W didn't appear to have been asked about her existing monthly credit commitments either.

There was a section entitled credit file, on the questionnaire, and a balance of £1072.00 on a credit card. There was also a monthly payment of £32.16 recorded for this. I didn't see how a monthly payment of £32.16 was sustainable for a credit card balance of around £1000 as I couldn't see how this ensured the balance was repaid within a reasonable period of time.

And as Miss W had recent defaults on at least one loan account, I was surprised that this didn't show up, or it at least wasn't reflected in the information recorded, in the credit search Amigo looked to have carried out either.

I noted that Amigo said it was entitled to rely on the information Miss W provided within the questionnaire and that there was no rule dictating that a creditor must request proof of income or expenses before paying out a loan. I also acknowledged that it had relied on an FCA publication, first published in June 2016, entitled "*Understanding consumer credit – Creditworthiness and affordability: common misunderstandings*". Amigo says in this publication the FCA said "*the lender must make a reasonable assessment in the individual case but we do not dictate how this must be done*".

I set out that I was familiar with the document Amigo had referred to. But I didn't think that the document supported the argument Amigo was advancing as strongly as it believed. The document said that the circumstances of the individual application would dictate what would be reasonable. It didn't suggest that it would never be necessary to request proof of income or expenses before a lender advanced credit.

I then went on to set out that the circumstances where it would be fair, reasonable and proportionate for a lender to carry out further checks were provided for within the rules themselves. CONC 5.2.4G(2) provides guidance on the proportionality of affordability/creditworthiness assessments. And it makes it clear that 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. Equally CONC 5.3.1G(4)(b) says that where it takes income or expenditure into account, it is not generally sufficient for a firm to rely solely on a statement of those matters made by the customer.

So, in my view, a less detailed affordability assessment, without the need for verification, was far more likely to be fair, reasonable and proportionate in circumstances where the amount to be repaid was relatively small, the consumer's financial situation was stable and they would be indebted for a relatively short period.

But, in circumstances where a customer's finances were likely to be less stable, they were being expected to repay a larger amount for a longer period of time and there was the potential for charging and attachment of earnings orders, I think it was far more likely that any affordability assessment would need to be more detailed and contain a greater degree of verification, in order for it to be fair, reasonable and proportionate.

I then went on to consider Amigo's checks and what was fair, reasonable and proportionate, in this case, in this context.

I explained that in Miss W's case, the worst case scenario – where the borrower didn't make any payments to this loan – would have seen her being required to make payments of around £280 for three years. So the total charge for this credit was approaching £5000. And the content of the pre-payment call Amigo had with Miss W led me to think that it saw charging and/or attachment of earnings orders as a reasonably foreseeable consequence of Miss W not fulfilling her obligations under the guarantee and indemnity agreement.

CONC defines sustainable as being without undue difficulties and in particular the customer should be able to make repayments on time, while meeting other reasonable commitments; as well as without having to borrow to meet the repayments. I thought that this

meant a lender needed to do more than simply assess whether the loan repayments were technically affordable on a strict calculation.

I couldn't see how Amigo could fairly and reasonably have concluded that Miss W would be able to make these repayments on time, for up to three years, without difficulty, without first getting a thorough understanding of her financial circumstances.

Taking all of this into account, I thought that Amigo needed to get a reasonable understanding of Miss W's actual financial position in order to properly assess whether she'd be able to sustainably make the loan payments in the event she needed to. So as well as asking Miss W about the details of her income and expenditure, I thought that Amigo needed to take steps to verify what it was being told by Miss W. It could have done this by asking for information such as bank statements, copies of bills, or even proof of Miss W's income.

As there was no evidence that Amigo did properly scrutinise the information provided, or that it asked Miss W to provide documentary evidence to support the income and expenditure declaration made, I didn't think that it completed fair, reasonable and proportionate affordability checks before accepting her as a guarantor for this loan.

I then went on to consider whether reasonable and proportionate checks, for this loan would more likely than not have indicated to Amigo that Miss W would have been unable to sustainably repay it in the event she had to.

I started by explaining that Amigo was required to establish whether Miss W could sustainably make these loan repayments in the event she had to. And, in my view, this was wider than simply assessing just whether the loan payments were technically affordable on a strict pounds and pence calculation. I went on to explain that the loan payments being affordable on this basis could sometimes be an indication that a consumer could sustainably make repayments.

But this in itself didn't automatically mean that this was the case. This was because the rules and guidance were all clear in saying that a borrower shouldn't have to borrow further in order to make the repayments. And, in my view, it followed that a lender should realise, or it ought fairly and reasonably to realise, a borrower would be unlikely to be able to sustainably make their repayments if it was on notice the borrower was unlikely to be able to make their repayments without borrowing further.

I considered the information that had been provided in light of this.

I started by explaining that it wouldn't have come as a surprise to Amigo for it to have learned that the information I was provided with showed Miss W was earning substantially less than what it had recorded on its questionnaire. I could see that even when Miss W did the most amount of overtime, her take home pay was less than what Amigo had recorded as her basic monthly income.

I also explained that the information I saw showed that Miss W had defaulted on, at least one, loan and it had been passed to a debt recovery company as a result. And when Miss W's existing credit commitments and normal monthly living costs were deducted from her actual monthly income she had nowhere near enough funds to be able to make the payments for this loan for one month – let alone the 36 she may have had to as a worst case scenario – been expected to cover.

So I was satisfied that reasonable and proportionate checks would more likely than not have demonstrated that Miss W would not have been able to afford to make these loan payments in the event she had to. And, in these circumstances, I thought that reasonable and proportionate checks would more likely than not have alerted Amigo to the fact that Miss W would not be able to sustainably make the repayments to this loan.

Put simply I thought reasonable and proportionate checks would more likely than not have shown that Miss W wouldn't have been able to make these payments without undue difficulty or without the need to borrow. So I said that I intended to find that Amigo's failure to carry out reasonable and proportionate checks led to it unfairly accepting Miss W as a guarantor on this loan.

I then went on to consider the final one of the four overarching questions I set out on page two of this decision. And having carefully thought about everything provided and bearing in mind Miss W's reasons for complaining, I thought there were two questions for me to consider when deciding whether Amigo acted unfairly or unreasonably to Miss W in some other way.

The first of these questions was whether Amigo unfairly and unreasonably disclosed information about Miss W – primarily the existence of this complaint - to the borrower. And the second was whether Amigo treated Miss W positively and sympathetically once it was informed that she wouldn't be able to make the loan repayments because of her mental health condition.

I explained that Miss W believed Amigo had disclosed the existence of this complaint to the borrower. But having carefully considered everything provided, I hadn't seen anything to suggest that Amigo had done so.

What I'd seen suggested that the borrower approached Amigo for further funds in October 2018. And as I understood it, Amigo refused to proceed with the application with Miss W as a guarantor because Miss W had complained the month before. I was pleased to see that Amigo took note of Miss W's complaint and didn't accept her as a guarantor when the borrower requested further funds. And I thought that it was fair and reasonable for Amigo not to accept Miss W as a guarantor on the additional loan requested by the borrower.

I also thought that it wasn't unfair or unreasonable for Amigo to tell the borrower that they needed to find an alternative guarantor if they wished to borrow more money. That way the borrower was free to find someone else who may have been prepared to have been a guarantor for them and they might have been able to proceed with their application.

Equally, while Amigo told the borrower they couldn't proceed with a further loan application with Miss W as a guarantor, I hadn't seen anything to indicate that it told them Miss W had made a complaint.

So having carefully considered matters and taken everything into account, I didn't think that Amigo unfairly and unreasonably disclosed the existence of this complaint to the borrower.

I also explained that Miss W had said that Amigo had failed to properly take into account her mental health condition once she disclosed it. I carefully thought about what Miss W and Amigo had said about this and also considered all of the medical evidence provided.

I started by saying that whilst I acknowledged I'm not a medical professional, the evidence I received from those who are qualified to make these medical judgements persuaded me that it was more likely than not that Miss W had suffered from a mental health condition for a number of years. So I was satisfied that Miss W was suffering from a mental health condition at the time she was accepted as a guarantor for the loan in question.

I was also satisfied that this wasn't disclosed at any stage during the application process. And having listened to the pre-payment call, while I'd already explained why I was minded to find that Miss W didn't provide properly informed consent to being a guarantor on this loan, I didn't think that there was anything in the call itself that ought to have alerted Amigo to Miss W's condition, or that ought to have prompted it to make further enquiries into this.

That said, while I didn't think that Amigo had treated Miss W unfairly – with regard to her mental health condition – during the application process, I didn't think that it had treated her fairly and reasonably once Miss W disclosed her mental health condition.

In my view, rather than simply focusing on whether it ought to have accepted Miss W as a guarantor in the first place, Amigo also needed to ensure it treated Miss W positively and sympathetically when pursuing the loan payments from her. But other than asking Miss W to complete a Debt and Mental Health Evidence Form, I couldn't see that it did anything differently and it continued to pursue loan payments as normal.

In my view, this caused stress and anxiety during what must already have been a difficult period of time for Miss W. So as I wasn't persuaded that Amigo adapted its collection practice to take into account Miss W's possible mental health condition, I was minded to conclude that it hadn't treated her positively and sympathetically. And it followed that I intended to find that Amigo had acted unfairly and unreasonably towards Miss W in some other way.

All of this led me to issue a provisional decision which concluded that:

- I didn't need to make a finding on whether Amigo completed reasonable and proportionate checks to satisfy itself that the borrower would be able to repay this loan in a sustainable way;
- Amigo *didn't* obtain Miss W's properly informed consent before binding her to the guarantor and indemnity agreement;
- Amigo *didn't* complete reasonable and proportionate checks on Miss W to satisfy itself that she was able to repay the loan in the event the borrower did not and that such checks *would* have shown that Miss W was unable to do so;
- Amigo *did* act unfairly and/or unreasonably towards Miss W in some other way.

So overall my provisional decision found that Amigo unfairly and unreasonably accepted Miss W as a guarantor on this loan.

As Miss W was being expected to make repayments on a loan she shouldn't have been accepted as a guarantor for, I thought that she stood to lose out because of what Amigo did wrong.

I finally set out a method of putting things right for Miss W, which I found addressed Amigo's failings and Miss W's resulting loss.

Amigo's response to my provisional decision

Amigo responded to my provisional decision. In summary, Amigo's response said that:

- it was disappointed that I intended to uphold Miss W's complaint and asked me to review my conclusions in light of its further arguments;
- before the loan was paid out it completed a number of checks to establish whether the borrower could afford the monthly payments for the duration of the loan term. As well as requiring the borrower to complete a budget plan, it carried out a number of checks to verify the information provided and ensure it was reasonably accurate. This included using the services of a Credit Reference Agency ("CRA") to assess whether the borrower's total expenditure, the monthly instalment, and a buffer would be affordable to them, based on their income;
- the borrower called in November 2018 to explain that they'd experienced a significant change in their personal and financial circumstances. So it is unfair to assume that the payments were unaffordable for the borrower from the outset. And Amigo seeking to enforce the guarantee and indemnity agreement against Miss W isn't itself an indication that the loan was unaffordable at the outset either;
- the account was already nine days in arrears when the borrower called to explain their change in circumstances. And to prevent the account falling further behind when the next payment fell due it contacted Miss W in order for her to step in and make the payment;
- while the pre-payout call helps it ensure a customer is happy to enter into the agreement, it is its full application process, including the aspects completed online, that allows it to ensure an individual consents to be a guarantor. As such, the content of the pre-payout call should not be viewed independently of the pre-payout process or outside of the wider context of the application, in the way my provisional decision did;
- it accepts that the full loan amount wasn't disclosed during the pre-payout call but it is not reasonable to assume that Miss W wasn't aware of the total loan amount because of this. Miss W was shown a page, when she provided her details online, confirming that the total amount being borrowed. Equally the agreement Miss W signed online and the post-payout letter both confirmed the full loan amount. Miss W ought to have contacted Amigo to query any discrepancy should it have been the case she was unsure what she signed up to;
- it wouldn't be appropriate for it to have asked Miss W whether she understood the terms and conditions of her agreement, given that her understanding could only be considered in the context of her own understanding;
- the explanation it provided about the circumstances in which the guarantee and indemnity might be called upon was adequate. The terms and conditions explained that Miss W would be called to make the payments on the loan in the

event the borrower didn't. This message was also repeated on the pre-payout call;

- while its agent didn't explain what an attachment of earnings order or a charging order was, this information was in Miss W's terms and conditions. The terms and conditions said *"If you or the Borrower breach any term of this agreement or the Borrower's agreement we may send the Borrower a default notice (and send you a copy). On expiry of that notice, we may: close the account; and demand immediate payment of the full debt. We may also take court action against both you and the Borrower. If we obtain judgment, we may apply for an attachment of earnings order (where we have the court's permission to get your employer to pay us out of your salary), warrant of execution (which may involve a bailiff visiting your property), property charging order (where we get rights to be paid out of the money paid when you sell your property) or the Scottish and Irish equivalents."*
- Miss W was also told that she should seek independent advice from the Citizen's Advice Bureau if she was in any way unsure or concerned about what she was being asked to sign up to;
- it disagreed that it simply accepted the information Miss W provided without any attempt to scrutinise or evaluate it;
- it completed a number of checks on the income and expenditure assessment to ensure the figures provided were reasonable and realistic. For example it compared each item of Miss W's expenditure to the national average. Miss W's income was also verified. If the information Miss W provided couldn't be verified through these checks then further information would have been requested. But this wasn't necessary here;
- at the time of this loan Miss W's credit file showed that she had four active creditors. It didn't show anything to suggest that Miss W had defaulted on an account;
- it considers that monthly payments of £32.16 towards an outstanding balance of £1072 would settle the debt in less than three years. And it doesn't agree that this isn't a reasonable period of time for these debts to be cleared;
- Miss W hadn't previously raised concerns about the service she received after she notified Amigo of her mental health concerns. So it wouldn't have expected me to comment on this in my provisional decision;
- once Miss W said she was unable to make payments, it completed a new budget plan with her and this determined that she didn't have the ability to make the payments to this loan. And as the account has remained in arrears it has been passed to its pre-litigation team;
- Miss W was sent a Debt and Mental Health Evidence form to complete and return, which she didn't do. So it disagrees that it would have been appropriate to act any differently.

So bearing in mind all of the above Amigo didn't think that it unfairly and unreasonably accepted Miss W as a guarantor on this loan, or unfairly and unreasonably pursued her for payment.

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

Miss W's response to my provisional decision

Miss W also responded saying:

- this loan was the second loan that the borrower had. So Amigo ought to have looked at whether their situation had got worse;
- she didn't read the paperwork in detail because she didn't know what a guarantor agreement should look like or what to look for;
- she doesn't think that the adviser completing the income and expenditure assessment could ever have had a credit card or they would have known that most of her monthly payments went to the interest being added, rather than to what she owed;
- she felt that Amigo didn't care about her mental health when she mentioned it. She doesn't think sending her case to a pre-litigation team, in circumstances where it was accepted she couldn't afford to pay, was fair.

my findings

I've considered all the available evidence and arguments provided from the outset, including the responses to my provisional decision, in order to decide what's fair and reasonable in the circumstances of this complaint.

In reaching my decision, I've taken into account the relevant law and regulations; relevant regulators' rules, guidance and standards; relevant codes of practice; and, where appropriate, what I consider to have been good industry practice at the time. I've set out all of this in the appendix to this decision.

Taking into account the relevant rules, guidance, good industry practice and law, I remain of the view that the four overarching questions that I set out in my provisional decision are what I need to consider in order to decide what is fair and reasonable in the circumstances of this complaint.

These questions are:

1. Did Amigo complete reasonable and proportionate checks to satisfy itself that the borrower would be able to repay this loan in a sustainable way?
 - If so, did it make a fair lending decision?
 - If not, would those checks have shown that the borrower would've been able to do so?

2. Did Amigo obtain Miss W's properly informed consent before binding her to the guarantee and indemnity agreement?
3. Did Amigo complete reasonable and proportionate checks on Miss W to satisfy itself that she was in a position repay the loan in the event the borrower did not?
 - If so, did it make a fair decision?
 - If not, would those checks have shown that Miss W would've been able to do so?
4. Did Amigo act unfairly or unreasonably in some other way?

Amigo hasn't challenged my conclusion that these overarching questions are relevant to me deciding this complaint. Indeed, Amigo's response to my provisional decision appears to accept that these are the relevant questions. The content of Amigo's response suggests it is my findings on these matters that it disagrees with.

Did Amigo complete reasonable and proportionate checks to satisfy itself that the borrower would be able to repay this loan in a sustainable way?

Both Amigo and Miss W have provided further arguments regarding the adequacy of the checks carried out on the borrower prior to the loan being provided. But my provisional decision didn't make a finding on whether Amigo carried out reasonable and proportionate checks on the borrower prior to providing the loan.

My provisional decision did say that the borrower only making a single monthly payment and Amigo seeking to enforce the guarantee against Miss W were indications that the monthly loan payments *may* have been unaffordable for the borrower in the first place. But as I had no evidence of any of the checks Amigo may have carried out and I thought there were a number of other reasons why Miss W shouldn't have been accepted as a guarantor on this loan, I didn't consider it necessary to make a finding on any checks that Amigo may have carried out.

So while Amigo and Miss W have made further arguments regarding the adequacy of the checks Amigo carried out on the borrower, as my provisional decision made no finding on whether these checks were reasonable and proportionate, I don't think that it is necessary for me to respond to these comments here as they don't alter my conclusions.

Did Amigo obtain Miss W's properly informed consent before binding her to the guarantee and indemnity agreement?

Amigo has argued that I placed too much weight on the pre-payout call in my provisional decision. It says that the purpose of the pre-payout call wasn't to gain Miss W's informed consent to stand as a guarantor. But rather the purpose of the call was to ensure that Miss W accepted her responsibilities under the agreement she'd electronically signed and accepted how the loan would work. Amigo also says that it is its full application process that allows it to ensure an individual consents to be a guarantor and so the pre-payout call should not be viewed independently or outside the wider context of the application.

I've thought about what Amigo has said. But I don't think that it has quite got to grips with all the reasons why I found it didn't obtain Miss W's properly informed consent before binding her to the guarantee and indemnity agreement.

My provisional decision made it clear that CONC 4.2.7G sets out that whether an explanation of a guarantee agreement is adequate will depend on a number of factors, including the actual and potential costs of the credit, the risk to the guarantor and the channel or medium through which the transaction takes place.

I did say that I considered the purpose of the pre-payout call was to obtain Miss W's informed consent to stand as a guarantor. I stand by this finding as CONC 4.2.7G refers to the channel or medium used by a firm when providing an explanation rather than channels or mediums. And Amigo's response indicates to me that Miss W would not be bound to the signed electronic agreement unless and until she confirmed that she accepted these responsibilities during the pre-payout call.

So I remain satisfied that the pre-payout call was an essential part of Amigo's process to obtain Miss W's consent. And, in these circumstances, I still think that Amigo ought fairly and reasonably to have provided a more thorough explanation of the circumstances in which the guarantee might be called upon and what the implications would be – including explaining what charging orders and attachment of earnings orders were – in the pre-payment call.

In any event, even if I put to one side my view that the call was the primary medium to obtain Miss W's properly informed consent (and accept Amigo's argument that I have to look at the process as a whole) I think that the information and explanations provided throughout the process had to be fair, reasonable and consistent. And my provisional decision also found that there were significant, substantial and material inconsistencies between what was said during the call and the information contained in the agreement.

For example, the amount of the funds referred to in the call was £1039.73 even though Amigo was seeking to bind Miss W as a guarantor to a loan of £5750. Equally the representative says that Miss W will be responsible for making any payment the borrower fails to make. But the guarantee and indemnity agreement states that Amigo would need to issue a default notice to the borrower before any claim can be made on the Miss W.

Rather than clarifying these inconsistencies Amigo's submissions have left me even more persuaded that it didn't obtain Miss W's properly informed consent to the guarantee and indemnity agreement, it is now seeking to enforce against her.

I say this because while my provisional decision highlighted the difference between what was said during the pre-payout call and what was on the guarantee agreement itself, about when Miss W would be expected to make payment, I thought this this was merely a case of the adviser failing to adequately explain the terms of the agreement. But Amigo's submissions suggest that it asked Miss W to step in and make the November 2018 payment only 15 days after the borrower didn't do so. As I've explained the terms of Miss W's guarantee and indemnity agreement said:

“YOU MAY HAVE TO PAY INSTEAD of the Borrower and fulfil any obligations under the Guarantee & Indemnity. However, if the Borrower fails to keep his side of the Agreement, Amigo Loans must send him a default notice (and a copy to you) giving him a chance to put things right before any claim is made on you.”

I don't know if Amigo did issue the borrower with a default notice – it hasn't said it did. But The Principles for the Reporting of Arrears, Arrangements and Defaults at Credit Reference Agencies (“principles”) published by the Information Commissioner's Office in January 2014,

is the accepted good industry practice regarding when it is appropriate to default a borrower. The principles describe a default as a record *“to show that the relationship has broken down”* between a debtor and a creditor. The principles also say that this *“may occur when you (the borrower) are 3 months in arrears, and normally by the time you are 6 months in arrears”*.

So if Amigo did issue a default notice to the borrower, before seeking payment from Miss W, it will have done this much sooner than when the generally accepted good industry practice suggests it's usually appropriate to. I say usually because there are some exceptions – but none of those appear to be present here.

And even then I can't see how Amigo will have allowed the borrower a chance to put things right before seeking to make a claim on Miss W, when it asked Miss W to make a payment a mere 15 days after the borrower failed to make it. In these circumstances, it seems to me that Amigo sought payment from Miss W before the terms of the guarantee and indemnity agreement permitted it to do so.

In these circumstances, I can't see how and why it would be fair and reasonable for me to find that Amigo gained Miss W's properly informed consent (to the guarantee and indemnity agreement) when Amigo appears to be expecting Miss W to have picked out the relevant parts of different communications and piece them together to understand her obligations - notwithstanding the contradictions – in circumstances where Amigo's actions (and its subsequent defence of those actions) suggest it didn't enforce the guarantee in line with its own terms or with industry good practice. Whether this is because Amigo has taken a deliberate decision to act outside those parameters or whether it doesn't realise that it has acted outside those parameters, I cannot say.

I say this while mindful that it was Amigo's responsibility to provide an adequate explanation of the circumstances in which the guarantee and indemnity might be called upon and what the implications of it being called upon would be. And while also mindful of the long standing legal principle that ambiguous or unclear contractual provisions are usually construed or interpreted against the party that drafted them.

So having carefully considered all of Amigo's points regarding this matter, I still find that it failed to obtain Miss W's properly informed consent to the guarantee and indemnity agreement.

Did Amigo complete reasonable and proportionate checks on Miss W to satisfy itself that she was in a position repay the loan in the event the borrower did not?

Amigo says the checks it carried out in order to establish Miss W's ability to repay the loan, in the event she had to, were reasonable and proportionate. It disagrees that it simply accepted the information Miss W provided without any attempt to scrutinise or evaluate it and it says it completed a number of checks on the income and expenditure assessment to ensure the figures provided were reasonable and realistic.

It says it compared each item of Miss W's expenditure to the national average. And Miss W's income was also verified. If the information Miss W provided couldn't be verified through these checks then further information would have been requested. But this wasn't necessary here.

My provisional decision indicated that Amigo appeared to be relying heavily on the online questionnaire which it asked Miss W to complete prior to the pre-payment call taking place.

Amigo says this wasn't the case and a CRA used a number of data points to assess whether Miss W's total expenditure, the monthly instalment and a buffer would be affordable for her.

I've carefully thought about what Amigo has said.

For the avoidance of doubt, I want to start by saying that Amigo is responsible for any decision to accept Miss W as a guarantor. Amigo has told me about the data points the CRA analysed. But given that Amigo insists that it was fair, reasonable and proportionate to accept Miss W as a guarantor, it needs to tell me not only what data the CRA analysed, but what the output was and also how it used and interpreted this information to make a fair and responsible decision here. And without this information I won't simply take it as a read that the CRA data led to Miss W's income and expenditure declaration being properly scrutinised.

I say this especially mindful that while Amigo says it wasn't aware of the defaults on Miss W's credit file, it says the CRA analysed the payments Miss W was making and there's no mention of whether it even searched for defaults. And while it says that the search showed four active accounts on Miss W's credit file, it has still only provided the details of one of them (even though it has now referred to the others) and this is the only one that appears to have been factored into the income and expenditure assessment. So I still have significant concerns about the verification of the income and expenditure provided on the online questionnaire.

Equally having carefully read Amigo's response to my provisional decision, it's clear that it has accepted the budget plan assessment it completed with Miss W after she said she couldn't afford the payments (which was only months after the loan was provided), shows she doesn't have the ability to make the payments to this loan. So I'm unsure as to whether Amigo is arguing that Miss W's circumstances changed after the loan was provided, or whether reasonable and proportionate checks didn't need to go as far ascertaining Miss W's actual financial position.

I want to be clear in saying that given the particular circumstances in this case - the term of the loan, the total charge for the credit and Amigo seeing charging and/or attachment of earnings orders as a reasonably foreseeable consequence of Miss W not meeting her obligations - I think that it would have been fair, reasonable and proportionate to ascertain Miss W's actual financial position before accepting that she could make the payments in the event she had to.

Amigo also says that the payment allocated to Miss W's outstanding credit card balance was enough to ensure it would have been cleared within three years. So it disagrees with my finding that the balance wouldn't have been cleared within a reasonable period of time.

Leaving aside my concerns as to whether three years is a reasonable period of time, I, in any event, don't think that Amigo's calculations add up here. I think that Amigo has simply divided the outstanding balance by the proposed monthly payment – or at least that's the only method I can see which produce a similar number here – to work out how many months it would take to repay what was owed.

But this was an outstanding balance on a credit card. So the interest wasn't crystallised at that point, or factored into the budgeted payments. Indeed as Miss W has said, I think most of the monthly payment budgeted would have been swallowed up by the monthly interest. And Amigo's calculations don't appear to take any account of the interest that would accrue

during the period the balance was to be repaid – and this would inevitably and substantially extend the time it took Miss G to clear these balances beyond three years.

So even if I were to agree that three years was a reasonable period of time – I want to make it clear that I don't – I, in any event, don't see how the payments Amigo recorded would have led to the balance being cleared within three years. Amigo might have drawn confidence that it would get its money back because Miss W had been making payments – albeit the minimum amount possible. But Amigo was required to do more than simply assess the likelihood of it receiving its loan payments from Miss W.

Amigo also had to consider the impact that making these loan payments would have on Miss W's financial position. And I don't think that the minimum payments Miss W was making to her existing credit card balance, in itself, meant that Miss W was an indication that she could sustainably repay this loan in the event she had to.

Indeed Amigo's own website (in the section entitled '*Who can be a guarantor?*') says:

"Finding the right person to be a guarantor is easier than you think - you just need to make sure it's someone who meets the following criteria:

- *Able to afford the repayments if you don't pay*
- *Aged 18-75*
- ***A UK homeowner, or has a very strong credit history [my emphasis]***
- *A UK resident*

Your guarantor doesn't need to be a homeowner, we can still accept those who rent, but they will need to have a strong credit history. There is a greater likelihood of your guarantor being accepted if they are a homeowner, as this usually means their credit score is higher".

Miss W was not a UK homeowner. And even if I put my concerns about the default to one side, Miss W's history of only making the minimum payment on her credit card, isn't indicative of an individual with a very strong credit history.

So it seems to me that Miss W didn't meet Amigo's own stated criteria for being a guarantor. And, in these circumstances, I can't see how it was fair, reasonable or proportionate to accept her as a guarantor without asking her to provide evidence of her income and expenditure, rather than outsourcing this to a CRA.

Having carefully considered all of Amigo's points regarding the checks it carried out, I remain of the view that it didn't complete reasonable and proportionate checks to satisfy itself that Miss W would be able to make the payments to this loan in the event she had to.

Equally as Amigo hasn't offered any further arguments on Miss W's actual financial position – its November 2018 budget plan actually accepts Miss W can't make the payments as required – it follows that I remain of the view that reasonable and proportionate checks would more likely than not have shown Miss W wasn't in a position to sustainably make the payments to this loan in the event she needed to.

Did Amigo act unfairly or unreasonably in some other way?

Amigo has questioned why I considered whether Miss W was treated fairly after she disclosed her mental health condition when she hadn't made a specific and separate

complaint about this. It says that neither Miss W's original letter of complaint nor her completed complaint form refer to her being unhappy about these matters.

I've thought about what Amigo has said. To be clear, my provisional decision said that Amigo had an obligation to treat Miss W positively and sympathetically once she disclosed her mental health condition and her inability to make her payments, irrespective of whether Miss W complained about these matters.

That said Amigo will be aware that we have an inquisitorial rather than an adversarial remit. So my role includes finding out and investigating what lies at the heart of a complaint and not just what a consumer says or writes. And having considered all of the correspondence, I, in any event, think that Amigo has taken a narrow interpretation of Miss W's correspondence.

Miss W's letter of complaint said:

"I was willing to pay the £1039 that got paid into my account and stop being a guarantor. This needs urgent attention please. I am not in a fit mind and i am not mentally stable. This is very stressful for me. and i have been waiting for my complaint to be dealt with since 5th September" [sic].

And her complaint form also included the following statement:

"I have defaults in my name. I also have a learning disability and suffer with short term memory loss. I have sent evidence in to say at the time i was suffering mental health issues and that this should be considered however they do not want to know".

I think it's clear from this correspondence that Miss W was unhappy at how Amigo responded to the information and arguments she made about her mental health condition.

Equally, Amigo appears to accept that considering whether it acted unfairly and unreasonably to Miss W in some other way is a relevant question to my consideration of this complaint. Given what Miss W has said about her condition and Amigo's failure to take it into account, I don't see how I can fairly and reasonably consider this question in relation to the guarantee and indemnity agreement without considering whether Amigo acted fairly and reasonably towards Miss W once it was notified about her condition.

So I'm satisfied that it was fair, reasonable and appropriate for me to consider Amigo's actions once Miss W notified it of her mental health condition.

Amigo has also argued that it, in any event, treated Miss W positively and sympathetically. And I have carefully considered all of its arguments in relation to this.

I accept that Miss W didn't return Amigo's Debt and Mental Health Evidence form. I also know that it's Amigo's usual process to pass an account to its pre-litigation team once an account remains in arrears without a resolution being put in place. So Amigo followed it's usual process here. But that's precisely the problem here.

While Amigo might not have received a completed Debt and Mental Health Evidence form, it did receive information from medical practitioners treating Miss W. I know that it has received at least some of this information as it received copies from our investigator. So although Amigo's specific form might not have been completed, Amigo did have enough to know that Miss W might have had a mental health condition.

In these circumstances, it was unfair and unreasonable for Amigo to utilise its standard pre-litigation procedure and threaten court action – especially when Miss W had already said that she wasn't in a fit state of mind and she was suffering mental health issues. Amigo was on notice that this may well have caused additional distress and inconvenience at an already stressful time. And as this is what happened, I think that Amigo's actions did constitute a failure to treat Miss W positively and sympathetically.

So whilst I've carefully thought about all of Amigo's points on this matter, I remain of the view that Amigo acted unfairly and unreasonably towards Miss W in some other way.

conclusions

Having carefully thought about all of Amigo's further points, I've not been persuaded to alter the findings reached in my provisional decision. This means that having carefully thought about the four overarching questions, set out on page thirteen of this decision, I:

- make *no finding* on whether Amigo completed reasonable and proportionate checks to satisfy itself that the borrower would be able to repay this loan in a sustainable way;
- find that Amigo *didn't* obtain Miss W's properly informed consent before binding her to the guarantor and indemnity agreement;
- find that Amigo *didn't* complete reasonable and proportionate checks on Miss W to satisfy itself that she was able to repay the loan in the event the borrower did not and that such checks *would* have shown that Miss W was unable to do so;
- find that Amigo *did* act unfairly and/or unreasonably towards Miss W in some other way.

These findings lead me to conclude that Amigo unfairly and unreasonably accepted Miss W as a guarantor on this loan. As Miss W is being expected to make repayments on a loan she shouldn't have been accepted as a guarantor for, I think that she stands to lose out because of what Amigo did wrong.

So I'm upholding Miss W's complaint and Amigo should put things right.

fair compensation – what Amigo needs to do to put things right for Miss W

I've carefully thought about what Amigo should do to put things right in this case.

Where I find that a business has done something wrong, I'd expect that business – in so far as is reasonably practicable – to put the consumer back in the position they *would be in now* if that wrong hadn't taken place. In essence, in this case, this means Amigo putting Miss W in the position she'd now be in if she hadn't unfairly and unreasonably been accepted as a guarantor on this loan.

the guarantee and indemnity agreement

Miss W should never have been accepted as a guarantor on this loan in the first place. As this is the case, it is unfair and unreasonable for her to have to make any loan payments. So

to start with Amigo should release Miss W from any obligations under the guarantee and indemnity agreement and then terminate it.

I've not seen anything, either in the information provided prior to my provisional decision or in the responses to it, to suggest that Miss W has made any payments to this loan. But if she has made any payments, Amigo should refund them. And as Miss W will have lost the use of any funds used to make any loan payments, I now think that Amigo needs to refund to her, I think that she should be compensated for this.

We normally ask a business to pay 8% simple interest where a consumer hasn't had the use of funds because its actions resulted in something having gone wrong. I see no reason to depart from our usual approach here and I think awarding 8% per year simple interest, on any loan payments that were made, is fair and reasonable in the circumstances of this case.

Miss W's credit file

Miss W has provided us with a copy of her credit file and I've seen a number of "quotation search" entries from Amigo on it. Despite being asked to do so in my provisional decision, Amigo still hasn't provided an explanation of what these searches are. It previously said that Miss W is its customer and these searches are necessary to help manage the account as it is in arrears.

I remain of the view that this explanation lacks clarity and I don't know if these searches were necessary. But, in any event, as I think that Miss W should be released from the guarantee and indemnity agreement and shouldn't have to make any loan payments, I don't think that she is in arrears to Amigo.

So I think that it's fair and reasonable in all the circumstances of this case, for Amigo to remove any information recorded on Miss W's credit file as a result of this loan.

compensation for the distress and inconvenience Amigo acting unfairly and unreasonably towards Miss W caused

As well as unwinding any wrongdoing caused by the guarantee and indemnity agreement, I also have the power to make an award to reflect the emotional and practical impact Amigo's actions have had on Miss W.

Our website contains detailed examples of distress and inconvenience awards we might make and the reasons why might make them. These are set out in different categories and levels – to show the range of awards we make.

I've carefully considered whether Amigo should make an additional payment to Miss W with reference to these distress and inconvenience awards and categories.

Miss W contacted Amigo, in writing (in her letter of complaint), to explain that she had a mental health condition. She said that she was not in a fit mind, not mentally stable and events had been stressful for her. So, even though Amigo might not have been aware of Miss W's condition when it accepted her as a guarantor, it was aware of it, or at the very least it ought to have been alert to this possibility, when it sought to enforce the guarantee.

As this is the case, Miss W would've suffered the stress of being asked to pay a considerable amount of money – which my investigation has concluded (and Amigo's later budget assessments appears to accept) she had no means of repaying – at a time where she was already suffering mentally. And as I've explained, I can't see that Amigo did anything to mitigate the potential risks of causing Miss W additional stress when pursuing the guarantee and indemnity agreement against her.

Having considered all of this in the round, I think that Amigo's actions while pursuing the guarantee on this loan caused Miss W a substantial amount of distress, inconvenience, anxiety and suffering.

Our website sets out a compensation range of between £500 and £2000 where a consumer has suffered substantial distress and inconvenience. As I don't think that Amigo was aware, or that it ought to have been aware, of Miss W's condition at the time the guarantee was provided, I think an award at the lower end of this scale is fair and reasonable in all the circumstances of this case.

So having carefully considered everything, given the particular circumstances of Miss W's complaint, I'm awarding Miss W £500 for the distress and inconvenience that Amigo's actions in acting unfairly and unreasonably towards her caused.

All of this means that I think it would be fair and reasonable in all the circumstances of Miss W's complaint for Amigo to put things right by:

- releasing Miss W from all obligations under the guarantee and indemnity agreement and then terminating it;
- notifying the borrower that Miss W is a guarantor on the loan;
- refunding any loan payments that Miss W may have made;
- adding interest at 8% per year simple on the above payments from the date they were paid by Miss W, if they were, to the date of settlement†;
- removing any information recorded on Miss W's credit file as a result of this loan;
- paying Miss W a sum of £500 to reflect the distress and inconvenience it acting unfairly and/or unreasonably towards Miss W caused her.

† HM Revenue & Customs requires Amigo to take off tax from this interest. Amigo must give Miss W a certificate showing how much tax it has taken off if she asks for one.

my final decision

For the reasons I've explained, I'm upholding Miss W's complaint. Amigo Loans Ltd should pay compensation to Miss W in the way I've set out above.

Under the rules of the Financial Ombudsman Service, I am required to ask Miss W to accept or reject my decision before 1 July 2019.

Jeshen Narayanan
ombudsman

appendix – relevant considerations as set out in my provisional decision

A regulatory framework

B other key publications and good industry practice

A regulatory framework

Amigo provided this loan (as well as the initial advance) while it was authorised and regulated by the Financial Conduct Authority (“FCA”).

- *the FCA Principles for Business (“PRIN”)*

The FCA’s Principles for Business set out the overarching requirements which all authorised firms are required to comply with.

PRIN 1.1.1G, says

The Principles apply in whole or in part to every firm.

The Principles themselves are set out in PRIN 2.1.1R. And the most relevant principle here is PRIN 2.1.1 R (6) which says:

A firm must pay due regard to the interests of its customers and treat them fairly.

- *the Consumer Credit sourcebook (“CONC”)*

This sets out the rules and guidance which apply to guarantor loan providers like Amigo when providing loans. CONC 5 sets out a firm’s obligations in relation to responsible lending.

It’s clear there is a high degree of alignment between the Office of Fair Trading’s (“OFT”) Irresponsible Lending Guidance (“ILG”) and the rules set out in CONC 5. As is evident from the following extracts, the FCA’s CONC rules specifically note and refer back to sections of the OFT’s *Irresponsible Lending Guidance* on many occasions.

Section 5.2.1R(2) of CONC sets out what a lender needs to do before agreeing to give a borrower a loan. It says a firm must consider:

- (a) the potential for the commitments under the regulated credit agreement to adversely impact the customer’s financial situation, taking into account the information of which the firm is aware at the time the regulated credit agreement is to be made; and*

[Note: paragraph 4.1 of ILG]

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

[Note: paragraph 4.3 of ILG]

CONC also includes guidance about ‘proportionality of assessments’. CONC 5.2.4G(2) says:

A firm should consider what is appropriate in any particular circumstances dependent on, for example, the type and amount of credit being sought and the potential risks to the customer. The risk of credit not being sustainable directly relates to the amount of credit granted and the total charge for credit relative to the customer’s financial situation.

[Note: paragraph 4.11 and part of 4.16 of ILG]

CONC 5.3 contains further guidance on what a lender should bear in mind when thinking about affordability.

CONC 5.3.1G(1) says:

In making the creditworthiness assessment or the assessment required by CONC 5.2.2R (1), a firm should take into account more than assessing the customer’s ability to repay the credit.

[Note: paragraph 4.2 of ILG]

CONC 5.3.1G(2) then says:

The creditworthiness assessment and the assessment required by CONC 5.2.2R (1) should include the firm taking reasonable steps to assess the customer’s ability to meet repayments under a regulated credit agreement in a sustainable manner without the customer incurring financial difficulties or experiencing significant adverse consequences.

[Note: paragraph 4.1 (box) and 4.2 of ILG]

CONC 5.3.1G(6) goes on to say:

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.

[Note: paragraph 4.3 and 4.4 of ILG]

In respect of the need to double-check information disclosed by applicants, CONC 5.3.1G(4) has a reference to paragraphs 4.13, 4.14, and 4.15 of ILG and states:

- (a) 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.*

And CONC 5.3.7R says that:

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]

CONC also contains the additional obligations owed by guarantor loan providers to guarantors when providing a guarantor loan. The additional requirements in relation to an assessment of the guarantor's circumstances are contained in CONC 5.2.5R. It says:

Creditworthiness assessment where there is a guarantor etc

- (1) This rule applies if, in relation to a regulated credit agreement:*
- (a) an individual other than the borrower (in this rule referred to as "the guarantor") is to provide a guarantee or an indemnity (or both); and*
 - (b) the lender is required to undertake an assessment of the customer under CONC 5.2.1R or CONC 5.2.2R.*
- (2) Before entering into the regulated credit agreement, the lender must undertake an assessment of the potential for the guarantor's commitments in respect of the regulated credit agreement to adversely impact the guarantor's financial situation.*
- (3) A firm must consider sufficient information to enable it to make a reasonable assessment under this rule, taking into account the information of which the firm is aware at the time the regulated credit agreement is to be made.*

CONC 5.2.6G contains some guidance on the scope of the assessment of the guarantor. And it says:

- (1) The assessment of the guarantor does not need to be identical to the assessment undertaken in respect of the borrower, but should be sufficient in depth and scope having regard to the potential obligations which might fall on the guarantor.*
- (2) The provision of the guarantee or indemnity (or both), and the assessment of the guarantor under CONC 5.2.5R, does not remove or reduce the obligation on the lender to carry out an assessment of the borrower under CONC 5.2.1R or CONC 5.2.2R. Firms are reminded of the rule in CONC 5.3.4R that the assessment of the borrower must not be based primarily or solely on the value of any security provided by the borrower.*

CONC 4 sets out a firm's obligations, in relation to the provision of information, prior to contracting with consumers. A firm is required to provide adequate explanations when providing loans. The additional explanations firms are required to provide to guarantors are set out in CONC 4.2.22R. It says:

Credit agreements where there is a guarantor etc

- (1) This rule applies if:
 - (a) a firm is to enter into a regulated credit agreement; and*
 - (b) an individual other than the borrower (in this rule referred to as "the guarantor") is to provide a guarantee or an indemnity (or both) in relation to the regulated credit agreement**

- (2) The firm must, before making the regulated credit agreement, provide the guarantor with an adequate explanation of the matters in (3) in order to place the guarantor in a position to make an informed decision as to whether to act as the guarantor in relation to the regulated credit agreement.*

- (3) The matters are:
 - (a) the circumstances in which the guarantee or the indemnity (or both) might be called on; and*
 - (b) the implications for the guarantor of the guarantee or the indemnity (or both) being called on.**

- (4) For the purposes of (2), the rules and guidance listed in (5) apply as if:
 - (a) references to the customer were references to the guarantor; and*
 - (b) references to CONC 4.2.5R were references to this rule.**

- (5) The rules and guidance are:
 - (a) CONC 4.2.6G to CONC 4.2.7AG;**

CONC 4.2.6G (referred to above) says:

The explanation provided by a lender or a credit broker under CONC 4.2.5 R should enable the customer to make a reasonable assessment as to whether the customer can afford the credit and to understand the key associated risks.

[Note: paragraph 3.3 (box) of ILG]

CONC 4.2.7G (also referred to above) says:

In deciding on the level and extent of explanation required by CONC 4.2.5 R, the lender or credit broker should consider (and each of them should ensure that anyone acting on its behalf should consider), to the extent appropriate to do so, factors including:

- (1) the type of credit being sought;*

- (2) the amount and duration of credit to be provided;*
- (2A) the actual and potential costs of the credit;*
- (2B) the risk to the customer arising from the credit (the risk to the customer is likely to be greater the higher the total cost of the credit relative to the customer's financial situation);*
- (2C) the purpose of the credit, if the lender or (as the case may be) the credit broker knows what that purpose is;*
- (3) to the extent it is evident and discernible, the customer's level of understanding of the agreement, and of the information and the explanation provided about the agreement; and*
- (4) the channel or medium through which the credit transaction takes place.*

[Note: paragraph 3.4 of ILG]

Finally CONC 3 sets out a firm's obligations when communicating with its customers. And CONC 3.3.2R contains general guidance regarding the clarity of a firm's communications with customers. It says:

A firm must ensure that a communication or a financial promotion:

- (1) uses plain and intelligible language;*
- (2) is easily legible (or, in the case of any information given orally, clearly audible)*

B other key publications and good industry practice

CONC set out the regulatory framework that authorised consumer credit providers have to adhere to. But they represent a minimum standard for firms. And as I've explained, I'm also required to take into account any other guidance, standards, relevant codes of practice, and, where appropriate, what I consider to have been good industry practice.

the FCA's Portfolio Strategy Letter to firms providing high cost lending products

On 6 March 2019, The FCA wrote a 'Dear CEO' letter to the Chief Executive Officer of all the firms it allocated to its 'High Cost Lenders' portfolio. The letter set out the FCA's view of the key risks that High Cost Lenders pose to consumers and the markets they operate in. On page two of this letter, the FCA sets out its view of the key causes of harm. It says:

"To assess how firms in the High Cost Lenders portfolio could cause harm, we analysed their strategies and business models. We considered a wide range of information and data, including firms' regulatory histories, the number and nature of complaints, and findings from the HCCR. We also carried out diagnostic work on guarantor lenders, which involved issuing a data request to firms in October 2018.

Following our analysis, we see two key ways that consumers may be harmed across the High Cost Lenders portfolio:

- *a high volume of relending, which may be symptomatic of unsustainable lending patterns*
- *firms' affordability checks may be insufficient, leading to loans that customers may not be able to afford".*

We also see an additional potential harm from guarantor lending:

- *the proportion of loan repayments that guarantors make has risen considerably, which could indicate that affordability on the part of the borrowers is falling*

On page three of the letter, in the section entitled '**Complaints**' it says:

"We expect firms to fulfil all relevant obligations, including analysing the root causes of complaints and taking into account the Financial Ombudsman Service's relevant decisions. We gave further detail about what we expect from firms' complaint-handling procedures in the Dear CEO letter we issued to HCSTC firms in October 2018. This is equally relevant to all firms in the portfolio".

Further detail in relation to the FCA's future work was provided on page four of the letter. The section entitled '**Additional focus for firms providing guarantor lending**' said:

As well as the areas of focus above, we will also prioritise our supervisory work with firms that provide guarantor loans in the following area:

Payments made by guarantor:

Our diagnostic work on guarantor lending showed that many guarantors make at least one repayment and the proportion of guarantors making payments is growing. We want to

understand the root causes for this increase, and whether firms are conducting adequate affordability assessments. We are also concerned that guarantors may not fully understand how likely it is that they will be called upon to make a payment. So, as well as our broad portfolio-wide work on relending, we will start a piece of complementary work on guarantor lending. This will establish whether potential guarantors have enough information to understand the likelihood and implications of the guarantee being enforced.

the FCA's Dear CEO letter on affordability of High-Cost Short-Term Credit ("HCSTC") loans

On 15 October 2018, the FCA wrote a 'Dear CEO' letter to the Chief Executive Officer of all HCSTC providers. The letter was about the issues surrounding the increase in complaints about unaffordable lending.

The third paragraph of this letter said:

"We note that the Ombudsman has recently published four examples of determinations of individual complaints about payday loans to illustrate its approach to the issues raised in those complaints (see: <https://www.financial-ombudsman.org.uk/publications/technical.htm>). If relevant, firms should take these examples of determinations into account as part of establishing their own effective procedures for complaints handling (see DISP 1.3.1R)".

Paragraph eight of the letter went on to say:

"We would highlight in particular the risks in relation to repeat borrowing. These were flagged in our price cap proposals in CP14/10, in July 2014, in which we said that we were concerned that repeat borrowing could indicate a pattern of dependency on HCSTC that is harmful to the borrower. We noted that rigorous affordability assessments were key to avoiding harm in this area, and firms should ensure they are making responsible assessments of the sustainability of borrowing".

the FCA Executive Director of Supervision's (Retail and Authorisations) speech at the Credit Summit, London, on 21 March 2019

The FCA's Executive Director of Supervision gave a speech at the Credit Summit, which took place on 21 March 2019, entitled "What can the consumer credit sector expect from the FCA?".

The speech reiterated much of what was said in the High Cost Credit portfolio strategy letter (set out above) issued on 6 March 2019. And in his speech the Executive Director of Supervision said:

"Over the last few years we have seen a dramatic increase in the use of guarantor loans by consumers. Balances on guarantor loans are fast approaching £1 billion and these have more than doubled since 2016.

While these products provide an opportunity for those with thin credit files - poor or limited credit history - we do have concerns. Concerns about affordability. Recent work we have done in this area showed that many guarantors are making at least 1 payment and the proportion of guarantors making these payments is growing.

There is also growing anecdotal evidence that guarantors may not understand how likely it is that they will be called upon to make a payment. Our work will therefore focus on

affordability and on understanding whether potential guarantors have enough information to understand the likelihood and implications of the guarantee being enforced.

We have already amended certain rules to ensure that the protections they provide to borrowers also extend to guarantors, for example rules requiring forbearance, pre-contractual explanations and fair treatment. In assessing creditworthiness, we have clarified that firms must undertake a reasonable assessment of the potential for the guarantor's commitment to have a significant adverse impact on their financial situation.

And if the guarantor is called upon, we have published guidance on our view of what constitutes 'enforcement' of the guarantee under the CCA – in practice this means we expect firms to provide guarantors with adequate notice before exercising a Continuous Payment Authority (CPA).

There are also questions over the level of interest rates charged on these products considering that these guarantors are deemed to be credit worthy, we will therefore be considering this and the business models of these firms”.