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Case No: E40BM024

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
CIRCUIT COMMERCIAL COURT (OBD)

Birmingham Civil Justice Centre
The Priory Courts, 33, Bull Street, Birmingham B4 6DS

Date: 5 August 2020

Before :

HHJ WORSTER

(sitting as a Judge of the High Court)

Between :

Michelle Kerrigan and 11 ors

- and -

Elevate Credit International Limited

(t/a Sunny)

(in administration)

Claimants

Defendant

Andrew Clark (instructed by **Barings Solicitors**) for the **Claimants**
Ruth Bala and **Robin Kingham** (instructed by **Edwin Coe LLP**) for the **Defendant**

Hearing dates: 2-5, 9-12, 16-19, 23-25 March 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HHJ WORSTER

HHJ WORSTER :

Introduction

1. I heard the trial of this matter in March 2020. On 29 June 2020 a Notice of the appointment of Administrators of the Defendant was filed with the court. Notwithstanding the normal effect of an administration on proceedings, the Claimants asked that I proceed to hand down a judgment. The Defendant does not oppose that course. The principal reason for giving a judgment is that the discussion of these sample claims may be of assistance to other parties to similar litigation. In the course of preparing the judgment a number of issues have arisen which I have been unable to resolve and which I have thought best to leave so that they may be explored on another occasion. Consequently I have not proceeded to quantify claims or to work through the detail of some of the issues of causation. But I have tried to cover as many of the issues of principle as I can.
2. The Defendant carried on business as “Sunny” lending money at high rates of interest over relatively short periods to individuals; so called High Cost Short Term Credit (“HCSTC”). The 12 Claimants borrowed money pursuant to regulated consumer credit agreements from Sunny over various periods from 2014 to 2018. That group of 12 are a sample of a far larger group who have made claims against Sunny, 6 chosen by the Claimants’ lawyers and 6 by the Defendant’s. In addition to the litigation against Sunny, the Claimants solicitors represent other large groups of Claimants who bring similar claims against other lenders in the same market.
3. Trying a group of sample cases is a costly process. There have been a number of interlocutory hearings and the trial lasted 16 days over 4 weeks. Oral submissions in the final week were affected by the COVID 19 outbreak, and were supplemented in writing, But that process has enabled the parties to investigate and argue the issues in greater depth than would be proportionate if each case were tried on its own. The process has involved the formulation and refinement of the way in which the claims are put, and a fuller consideration of the arguments which could sensibly be pursued. It has involved the substantial disclosure of documents and information about the process Sunny used to determine whether or not to lend money to a particular individual. The hope was that whilst the outcome of the claims would not determine all of the issues which may arise in the rest of this litigation, it would have provided some substantial assistance to the parties as to the merits or otherwise of their arguments. That was prior to the administration of the Defendant.
4. These 12 claims involve the consideration of three causes of action:
 - (i) a claim pursuant to section 138D of the Financial Services and Markets Act 2000 (“FSMA”) for the contravention of the Financial Conduct Authority’s rules;
 - (ii) a claim for an order under section 140B of the Consumer Credit Act 1974 (“CCA”) on the basis that the relationship between creditor and debtor arising out of the loan agreements is unfair to the debtor; and
 - (iii) in the case of 1 Claimant (Christopher Kuschel) a claim for damages in negligence for the psychiatric injury caused to him by the Defendant’s lending decisions.

5. The Claimants seek a variety of relief:
- (i) damages for the interest incurred under the loans;
 - (ii) general damages to compensate for loss of credit rating;
 - (iii) the repayment of interest;
 - (iv) the repayment of capital (in respect of the Claimants loss of credit and in respect of the anxiety and distress caused by the unfairness in the relationships);
 - (v) the discharge of outstanding balances;
 - (vi) orders that the Defendant procure the removal of adverse entries on credit reference agency databases;
 - (vii) interest to reflect the Claimants' loss of the use of their money at rates comparable to those they paid under the terms of the loans;
 - (viii) general damages for personal injury.

(i)-(ii) are sought by the FSMA claims, (iii)-(vii) in the unfair relationship claims, and (viii) in the negligence claim. The claims for exemplary damages are not pursued, nor does Mr Kuschel pursue the claim for damages for personal injury for breach of section 138D of FSMA. The consideration of the FSMA claim takes up a substantial portion of this judgment. The negligence claim is “novel” and also requires some detailed consideration, In contrast, the scope of a CCA claim is relatively well established and the principles need less exploration.

The History of Regulation

6. The history of the regulation of lending of this sort is of particular relevance, not least because it informs the Defendant about the issues it has to consider and address when designing its lending process in compliance with the regulations issued pursuant to FSMA. That lending process is automated, and prospective borrowers apply for loans online. Many do so using their mobile phones or other hand-held devices. It is intended to be quick to use - the Defendant's website promised that the money would be in their account within 15 minutes. I return to the detail below.
7. Counsel prepared an agreed schedule of material relevant to the development of the relevant rules and statutory provisions, and the following treatment of the subject owes much to their submissions. I have focussed in particular on the papers which pre- date the relevant rules and the changes made to them, but I had submissions on a number of other papers and other sections of the papers I have referred to. It is obviously not sensible to reproduce them all in this judgment. These statutory regimes fall into three periods as follows:
- (i) 1 February 2011 to 31 March 2014; referred to as the “first regulatory period”;
 - (ii) 1 April 2014 to 1 January 2015 referred to as the “second regulatory period”;
and
 - (iii) from 2 January 2015; referred to as the “third regulatory period”.

8. The relevant history begins with Directive 2008/48/EC of the European Parliament and of the Council of 23rd April 2008 on credit agreements for consumers. This required EU member states to take appropriate measures to promote responsible practices during all phases of the credit relationship and stated that it was important that creditors should not engage in irresponsible lending or give out credit without prior assessment of creditworthiness (Article 26). For that purpose, the Directive provided that creditors should be allowed to use information provided by the consumer, and that they should also consult relevant databases in order to assess the credit status of a consumer (Article 28).
9. The Directive was implemented in UK law by the Consumer Credit (EU Directive) Regulations 2010. Regulation 5 introduced section 55B into the CCA with effect from 1st February 2011. Section 55B provided that:
 - (1) *Before making a regulated consumer credit agreement, other than an excluded agreement, the creditor must undertake an assessment of the creditworthiness of the debtor.*
 - ...
 - (3) *A creditworthiness assessment must be based on sufficient information obtained from –*
 - (a) *the debtor, where appropriate, and*
 - (b) *a credit reference agency, where necessary.*

Section 55B remained in force until 31st March 2014.

10. There was no civil cause of action for breach of section 55B CCA, but section 140A of the CCA provided that:
 - (1) *The Court may make an order under Section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following –*
 - (a) *any of the terms of the agreement or of any related agreement;*
 - ...
 - (c) *any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making the agreement or any related agreement).*
 - (2) *In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant including matters relating to the creditor and matters relating to the debtor.*

This came into effect on 6th April 2007.

11. Thus a failure by a creditor to undertake a proper creditworthiness assessment prior to entering into a regulated credit agreement would almost certainly affect the fairness of the relationship and so trigger the Court's power to make appropriate orders under section 140B.

(1) *An order under this section in connection with a credit agreement may do one or more of the following—*

- (a) *require the creditor ... to repay (in whole or in part) any sum paid by the debtor ... by virtue of the agreement or any related agreement ... ;*
- (b) *require the creditor ... to do or not to do (or to cease doing) anything specified in the order in connection with the agreement or any related agreement;*
- (c) *reduce or discharge any sum payable by the debtor ... by virtue of the agreement or any related agreement;*
- (d) *...*
- (e) *otherwise set aside (in whole or in part) any duty imposed on the debtor ... by virtue of the agreement or any related agreement;*
- (f) *alter the terms of the agreement or of any related agreement;*

12. The burden is on the lender to prove that the relationship was fair; see section 140B(9):

- (9) *If, in any such proceedings, the debtor ... alleges that the relationship between the creditor and the debtor is unfair to the debtor, it is for the creditor to prove to the contrary.*

The unfair relationship provisions of ss.140A-C of the CCA 1974 applied throughout the three regulatory periods which cover the claims. The Claimants first line of attack in the second and third periods is the FSMA claim, but they argue that even if the FSMA claims fail, the relationship between the parties arising from the relevant credit agreements was unfair to them.

13. In addition to those statutory provisions, Part III of the CCA provided for a system of licensing by the Office of Fair Trading ("OFT"). By section 21 a licence was required to carry on a consumer credit or hire business. Section 25(1) required a person applying for a licence to satisfy the OFT that he was a fit and proper person to engage in activities covered by the licence. In determining whether an applicant was a fit and proper person the OFT was to have regard to any circumstances appearing to it to be relevant. That included evidence tending to show that the applicant, its agents and employees and its controller (if a body corporate) had:

- (2A) ... (e) *engaged in business practices appearing to the OFT to be deceitful or oppressive, or otherwise unfair or improper (whether unlawful or not).*

By section 25(2B):

For the purposes of subsection (2A)(e), the business practices which the OFT may consider to be deceitful or oppressive or otherwise unfair or improper include practices in the carrying on of a consumer credit business that appear to the OFT to involve irresponsible lending.

14. Section 25A(1) required the OFT to prepare and publish guidance in relation to how it determined or proposed to determine whether persons were fit persons for the purpose of section 25. In March 2010 it published guidance under section 25A(1) in relation to “irresponsible lending”. That was revised in February 2011 (“OFT 1107”). Chapter 4 of OFT 1107 included guidance in respect of pre-contractual assessments of affordability; see authorities bundle 3 tab 37 pp 757-9.
15. OFT 1107 adopted the complementary concepts of an assessment of affordability and an assessment of creditworthiness. An assessment of affordability was defined as:

A borrower-focused test which involves assessing a borrower’s ability to undertake a specific credit commitment ... in a sustainable manner, without the borrower incurring (further) financial difficulties and/or experiencing adverse consequences.

An assessment of creditworthiness was defined as:

A creditor-focused test which involves the creditor assessing whether a borrower merits the provision of the credit that he is seeking to acquire on the basis of considering sufficient information related to such matters as the borrower’s earning power and previous record of payment.

16. The approach taken in OFT 1107 informed the approach of the regulator and the rule makers over the periods under consideration. Chapter 4 begins with guidance as to the assessment of affordability.

4.1 ***In the OFT’s view**, all assessments of affordability should involve a consideration of the potential for the credit commitment to adversely impact on the borrower’s financial situation, taking account of information that the creditor is aware of at the time the credit is granted. The extent and scope of any assessment of affordability, in any particular circumstance, should be dependent upon- and **proportionate** to- a number of factors (see paragraph 4.10 of this guidance document).*

4.2 *Whatever means and sources of information creditors employ as part of an assessment of affordability should be sufficient to make an assessment of the risk of the credit sought being **unsustainable** for the borrower in question. In our view this is likely to involve more than **solely** assessing the likelihood of the borrower being able to repay the credit in question. We consider that before granting credit ... creditors should take reasonable steps to assess a borrower’s likely ability to be able to meet repayments under the credit agreement **in a sustainable manner**.*

The OFT encourages the sharing of data between creditors subject to data protection and other legal considerations. The process of assessing

affordability is assisted by creditors registering accurate data with credit reference agencies, in a timely manner, about the performance of an account and/or settlement of outstanding debts/arrears.

*Borrowers are encouraged to always undertake **their own** assessment of affordability concurrent with that undertaken by the creditor.*

4.3 *The OFT regards 'in a sustainable manner' in this context as meaning credit that can be repaid by the borrower:*

- *without undue difficulty – in particular without incurring or increasing problem indebtedness*
- *over the life of the credit agreement ...*
- *out of income and/or available savings, without having to realise security or assets.*

4.4 *The OFT would regard 'without undue difficulty' in this context as meaning the borrower being able to make repayments (in the absence of changes in personal circumstances that were not reasonably foreseeable at the time the credit was granted):*

- *while also meeting other debt repayments and other normal/reasonable outgoings and*
- *without having to borrow further to meet these repayments.*

17. The Claimants would emphasise the guidance that an affordability assessment was not limited to the issue of whether the borrower could repay the loan but should consider the potential for the loan to adversely impact on the borrower's financial situation (4.1), and whether repayments could be made in a sustainable manner (4.2) without incurring or increasing problem indebtedness (4.3). Mr Clark also noted the encouragement to share data (4.2).

18. The Defendant would emphasise that the extent and scope of the affordability assessment would be *dependent upon and proportionate to* the factors in 4.10. Those include some or all of the following as appropriate:

- *the type of credit product*
- *the amount of credit to be provided and the associated cost and risk to the borrower*
- *the borrower's financial situation at the time the credit is sought*
- *the borrower's credit history including any indications of the borrower experiencing- or having experienced financial difficulty*

The key features in relation to the loans the subject of this litigation are their relatively low amounts, the short contractual terms and the lack of security.

19. The creditor would only be expected to take account of 'future financial commitments' of which it was aware, but would be expected to take reasonable steps to obtain the relevant information. In that context the guidance says this:

We do not consider that the creditor could be held culpable under circumstances in which it made a reasonable request for information from the borrower, in order to inform its assessment of affordability, and the information provided by the borrower was substantively incorrect/untrue and the creditor (acting reasonably) was not aware of this.

20. The guidance acknowledged that it would not be proportionate to consider all factors in all cases. The creditor should *take a view on what was appropriate in any particular circumstance* (4.11). Paragraph 4.12 considers the types and sources of information which might be obtained. The non-exhaustive list is as follows:

- *record of previous dealings with the borrower*
- *evidence of income*
- *evidence of expenditure*
- *a credit score*
- *a credit report from a credit reference agency*
- *information obtained from the borrower, whether on an application form or separately (this would include information derived from 'personal contact' with the borrower ...*

Creditors were to use their own discretion “acting reasonably” but were reminded that the OFT might ask for details of the practice and procedures they adopted for assessing affordability so that it could form a view as to whether they were effective. In that context it is worth noting that while the focus in an affordability assessment might be on the borrower and that in a creditworthiness assessment might be on the lender, the material relevant to both would be similar.

21. The sort of loans made to these Claimants plainly required information about their income and expenditure for an assessment of affordability to be made. Paragraphs 4.13 to 4.16 of OFT 1107 gave guidance as to those matters:

4.13 *In the OFT's view, **if** creditors take **income** into account in assessing affordability, such considerations should take account of both actual current income and reasonably expected future income (to the extent that it is proportionate to do so) where it is reasonably foreseeable that the latter will materially differ from the former over the anticipated repayment period of the credit agreement. All assessments should be based on what is **known** at the time the assessment is undertaken ...*

4.14 ***If a creditor takes expenditure** into account in assessing affordability, such considerations might reasonably take into account regular household expenditure and relatively fixed outgoings (monthly rental payments for example). As in the case of income, such an assessment should be based on what is **known** at the time the assessment is undertaken and should take reasonable account, to the extent that it is possible (and proportionate) to do so, of the varying nature of certain items of expenditure over the anticipated repayment period....*

4.15 *In our view, creditors who do not require **documentary evidence** of income and/or expenditure as part of their assessment of affordability, but rather*

accept information provided by the borrower without any supporting evidence ... should ensure that whatever means and sources of information they employ are sufficient to make an appropriate assessment. We do not consider self-certification of income would generally be sufficient in respect of significant long term credit agreements, particularly those secured on property. It may be appropriate for the creditor to use affordability calculators which assume a reasonable level of domestic outgoings on day to day expenditure.

4.16 *Whilst the OFT accepts, as a general principle from a proportionality perspective, that the level of scrutiny required for small sum and/or short-term credit may be somewhat less than for large sum and/or long-term credit, we consider that creditors should also take account of the fact that the risk of the credit being unsustainable would be directly related to the amount of the credit granted (and associated interest/charges etc.) relative to the borrower's financial situation.*

22. Paragraphs 4.19 to 4.31 set out examples of practices the OFT considered may, depending on the exact circumstances, amount to irresponsible lending. Paragraphs 4.19-4.21 relate to the affordability assessment.

4.19 *Failing to establish and implement clear and effective policies and procedures for the reasonable assessment of affordability.*

4.20 *Failing to undertake a reasonable assessment of affordability in an individual case or cases.*

4.21 *Failing to consider sufficient information to be able to reasonably assess affordability, prior to granting credit...*

*This **could** (but not necessarily) include, for example:*

Failing to take proper account of relevant information contained in databases when these are referenced. Relevant information could include, for example, information on credit reference files such as notices of correction.

***Where applicable, appropriate and proportionate**, failing to verify details of current income and/or expenditure by, for example, checking hard copies of payslip/contract of employment (when a borrower is in employment), accountant's letters (when a borrower is self-employed) or benefit statements (when a borrower is not in employment).*

23. The Guidance notes that section 55B CCA requires that a creditworthiness assessment is made, and goes on to give further examples of irresponsible lending. Those of potential relevance are:

4.22 *Failing to undertake an assessment of creditworthiness of a borrower on the basis of sufficient information obtained from the borrower where this is appropriate, and a credit reference agency where this is necessary, before a regulated consumer credit agreement ... is made with the borrower,*

4.23 *Failing to take reasonable steps to assess (on the basis of information that the creditor is aware of at the time the credit is granted) whether a prospective borrower is likely to be able to meet repayments in a sustainable manner.*

*The actual assessment undertaken should be subject to **proportionality** considerations in each case.*

4.25 *Granting an application for credit in the absence of having undertaken **any** assessment of affordability ...*

4.26 *Granting an application for credit when, on the basis of an affordability assessment, it is known, or reasonably ought to be suspected, that the credit is likely to be unsustainable.*

4.29 *Failing to take adequate steps, so far as is reasonable and practicable, to ensure that information on a credit application relevant to an assessment of affordability is complete and correct. This includes all/any information supplied by the borrower.*

4.31 *Accepting an application for credit under circumstances in which it is known, or reasonably ought to be suspected, that the borrower has not been truthful in completing the application for credit with regards to the information supplied relevant to inform an assessment of affordability.*

The concepts of lending only when repayments are sustainable, and the proportionality of the affordability and creditworthiness assessments are of particular relevance to many of the issues which arise in the FSMA claims for breach of CONC. The point to draw from OFT 1107 is that these matters were being articulated at this point, well before CONC came into force. Mr Clark noted that they were reflected in the Lending Code for Small Cash Advances published on 25 July 2012 by the Consumer Finance Association, of which the Defendant was a member.

24. OFT 1107 also dealt with the question of refinancing by the same lender (“rollovers”). In Chapter 6 the list of deceptive and/or unfair practices at paragraph 6.25 includes this:

Repeatedly refinancing (or “rolling over”) a borrower’s existing credit commitment for a short-term credit product in a way that is unsustainable or otherwise harmful.

In a text box underneath that paragraph, the OFT explained its thinking:

The OFT considers that this would include a creditor allowing a borrower to sequentially enter into a number of separate agreements for short-term loan products, one after another, where the overall effect is to increase the borrower’s indebtedness in an unsustainable manner...

The general purpose of short term loans, such as “payday loans”, is to provide borrowers with a cash advance until their next pay day and they are usually about 30 days, or just over, in duration. However, in certain circumstances, the borrower can elect to “renew” the loan for a fee and delay payment for a further agreed period of time.

The purpose of payday loans is to act as a short-term solution to temporary cash flow problems experienced by consumers. They are not appropriate for supporting sustained borrowing over longer periods, for which other products are likely to be more suitable.

25. Four of the Claimants took out loans during the first regulatory period; Mr Kaye, Mr Wheatley, Mr Fraser and Mr Edwards. They claim that the relationship between them and the Defendant arising from those loans was unfair to them because of the inadequacies of the affordability and creditworthiness assessments. Mr Clark submits that the Guidance in OFT 1107 should be regarded as relevant in determining the question of the fairness of the relationship between these Claimants and the Defendant during that first period. The Guidance was substantially reflected in the rules which subsequently came into force.
26. On 3 October 2013 the Financial Conduct Authority (“FCA”) published a Consultation paper entitled “Detailed proposals for the FCA regime for consumer credit” (“CP13/10”); see AB3/41. Chapter 6 dealt with proposed rules. The foreword to Chapter 6 noted that the high cost short term sector had an estimated 2 million customers in 2011-12 and that 28% of loans were “rolled over”; see also para 6.20 at AB3/page 830. The consequences of rolling over loans for overall levels of debt when interest rates are high are illustrated graphically by the example shown in para 6.23 on page 833. The proposals in the report had two aims. One was to ensure that firms only lent to borrowers who could afford it, and the second to increase the awareness of borrowers of the costs and risks of borrowing unaffordably. At para 6.22 the report adopted a classification of “payday consumer”. High risk borrowers were described in the following way:

... finances finely balanced and credit dependent, payday critical to managing credit flow and commitments. These users correspond most closely to the profile of those most likely to become enmeshed in long-term mainstream credit debt traps. Critically dependant on cycling credit to make ends meet (payday lending playing a role in this). Large proportion of these unlikely to have other credit options – 45% can no longer borrow elsewhere.

I note the reference to “cycling credit”.

27. The proposals included a cap on rollovers. Following consultation on these proposals, in February 2014 the FCA published Policy Statement 14/3 “Detailed rules for the FCA regime for consumer credit”; AB3/42. Roll-overs were to be limited to two. Mr Clark drew attention to para 5.72; AB3/page 868, where the report referred to support from some firms for “real time data sharing”. The FCA agreed that better data sharing would be good for consumers. It would allow lending decisions to be based on more up to date information and support more effective affordability assessments, which in turn would enable lenders to make better informed and more accurate lending decisions. The FCA expressed its strong encouragement for action by the industry to improve data sharing.
28. On 1 April 2014 the licensing regime overseen by the OFT was replaced by a system of authorisation by the FCA. Section 55B of the CCA was repealed. Its place was taken by rules made by the FCA pursuant to FSMA, and in particular the Consumer Credit Sourcebook (“COONC”). This “Second Regulatory Period” ran to 1 January 2015.

29. The Defendant received the required authorisation from the FCA to lend pursuant to regulated credit agreements as from 1 April 2014, and as an authorised lender was bound by the rules made by the FCA pursuant to section 137A of FSMA 2000. Those comprised both the specialist rules in respect of consumer credit set out in the Consumer Credit Sourcebook, and the high-level rules found in the FCA’s Principles for Businesses (“PRIN”).
30. The relevant principles in PRIN 2.1.1R; AB3/38, are Principle 2 which requires that a firm must conduct its business with due skill, care and diligence, and Principle 6 which requires that a firm must pay due regard to the interests of its customers and treat them fairly. Breach of the rules in PRIN does not give rise to a cause of action.

The Principles are a general statement of the fundamental obligations of firms under the regulatory system ... they... reflect the statutory objectives.

see paragraph 1.12 of the FCA Guidance.

31. Those statutory objectives included the operational objective of consumer protection as defined in section 1C of FSMA [AB5/3].

1C The consumer protection objective

- (1) *The consumer protection objective is: securing an appropriate degree of protection for consumers.*
- (2) *In considering what degree of protection for consumers may be appropriate, the FCA must have regard to—*
- (a) *the differing degrees of risk involved in different kinds of investment or other transaction;*
 - (b) *the differing degrees of experience and expertise that different consumers may have;*
 - (c) *the needs that consumers may have for the timely provision of information and advice that is accurate and fit for purpose;*
 - (d) *the general principle that consumers should take responsibility for their decisions;*
 - (e) *the general principle that those providing regulated financial services should be expected to provide consumers with a level of care that is appropriate having regard to the degree of risk involved in relation to the investment or other transaction and the capabilities of the consumers in question;*
 - (f) *the differing expectations that consumers may have in relation to different kinds of investment or other transaction;*
 - (g) *any information which the consumer financial education body has provided to the FCA in the exercise of the consumer financial education function;*

(h) *any information which the scheme operator of the ombudsman scheme has provided to the FCA pursuant to section 232A.*

32. It is not for the court to enforce this objective, but for the FCA to do so – here – by means of the CONC rules. The judgment as to the “appropriate degree” of protection for consumers is a matter for the FCA to determine. But it is of assistance to understand the objectives of the FCA when interpreting the CONC rules. Mr Clark would emphasise section 1C(2)(b) and (e) – the need for the consideration of differing degrees of protection for consumers depending upon their experience and expertise and the general principle that those providing regulated financial services should be expected to provide consumers with a level of care that is appropriate, having regard to the degree of risk involved, and the capabilities of the consumer in question. 1C(2)(c) and (d) are also of relevance – the provision of information and advice, and the general principle that consumers should take responsibility for their own decisions. Ms Bala would emphasise the latter. Mr Clark submits that in addition to the relevance of these principles to the FSMA claim, the obligations thus imposed on the Defendant to secure appropriate protection for consumers should inform the Court’s decision regarding the fairness of the relevant relationships. It is to be noted that the guidance given in CONC is substantially derived from OFT 1107 paragraphs 4.29, 4.2, 4.1, 4.10, 4.6, 4.3 and 4.4.

33. The other significant change made in the second regulatory period was the provision that a breach of the CONC rules gave rise to a cause of action. Section 138D(1) of FSMA provided as follows:

A contravention by an authorised person of a rule made by the FCA is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty.

34. The Claimants’ case is that they suffered loss as a result of Defendant’s contravention of the CONC rules and that they have a claim for breach of statutory duty. The principal attack is upon the Defendant’s failure to take account of patterns of repeat borrowing in the course of conducting a creditworthiness assessment. There are also failures to take account of certain matters which indicated that taking on the loan would have an adverse impact on the customer’s financial situation. Section 138D(1) provides that a claimant must have suffered loss as a result of the contravention. The usual requirements of causation apply, so that for a claim to succeed a claimant will have to prove that the loss was caused both in fact and as a matter of law by the contravention. The first issue however is whether the claimants can establish a contravention of the rules.

35. CONC 5.2.1(1) is the general obligation derived from s.55B(1) of the CCA requiring a firm to undertake a creditworthiness assessment before making a regulated credit agreement. CONC 5.2.1(2) provides that:

A firm carrying out [a creditworthiness assessment] must consider:

(a) *the potential for the commitments under the regulated credit agreement to adversely impact the customers 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

(b) *the ability of the customers to make repayments as they fall due over the life of the regulated credit agreement ...*

36. The way in which this rule is framed recognises that there is more to the question of adverse impact on the customer's financial situation than his or her ability to make repayments as they fall due over the life of the loan. If that were all there was to the question there would be no need to separate out (a) and (b). That approach is borne out by the terms of CONC 5.3.1(1). Further, whilst the rule at CONC 5.2.1(2) refers to "the" regulated credit agreement (in other words the agreement for the particular loan the customer has applied for) the impact of the commitments involved in taking out that loan can only be properly assessed by reference to the customer's other financial commitments. The customer's existing borrowing is of obvious relevance. But the Claimants' case is that the inquiry should be wider than that and look at "repeat borrowing".
37. The Particulars of Claim in all 12 cases follow a similar scheme. They identify a number of matters which are said to be present at the time of some or all of the credit applications made by various of the Claimants which are said to be indicative of the fact that the customer was in financial difficulty. These are:
- (a) *borrowing to repay existing loans;*
 - (b) *requiring further borrowing shortly after repaying a loan ...*
 - (c) *obtaining a succession of loans leading to a generally increasing level of borrowing, and a high level of borrowing compared to disposable income ...*
 - (d) *consecutively failing to meet repayments when due in respect of existing loans*
 - (e) *defaults in respect of loans, as evidenced by ... arrears ...*
 - (f) *bank overdrafts ...*
 - (g) *adverse accurate entries on a credit file, which were not in dispute;*
 - (h) *inability to meet repayments out of disposable income or at all, for example evidence of non-payment of essential bills (such as utility bills) ... [missed mobile phone payments being one example]*
 - (i) [the number of agreements entered into with other HCST lenders].

Not all are alleged in every case, but the Claimants' case is that factors (a)-(c) and (i) in particular tend to suggest that the customer is using HCST credit to refinance his or her borrowing and "cycle credit". This leads to a "debt spiral" and has an adverse impact on the customer's financial situation. The relevance of the information can be seen in two ways: (i) individual loans which may be affordable when taken in isolation may be

unsustainable when seen as part of a pattern of sustained or increasing levels of borrowing; and (ii) repeated or successive (or sequential) borrowing is something which should be taken into account when considering the potential for adverse impact on the customer's financial situation as required by CONC 5.2.1(2)(a); (the "adverse impact" exercise).

38. The allegation is that the Defendant knew or ought to have known about these matters in the individual case by making the relevant inquiries of the Claimant or obtaining a credit report from a credit reference agency where that was necessary. The Defendant also had relevant information available as a result of its previous dealings with these customers. So for example, it would have had information about when it lent a customer money, how much it lent, and when repayment was made. It may also have data about the level of income and expenditure a customer provided on earlier loan applications. The Claimants' evidence as to the presence of the factors indicating their financial difficulty at the relevant time comes primarily from credit reports obtained by the Claimants' solicitors after the event (on or about 31 October 2018). The information within these reports is then summarised in a "Table B" prepared for each Claimant. The Defendant's case is that, for a number of reasons, not all of this information would have been available to it at the relevant time.
39. The Defendant's response varies from individual to individual, but in broad terms it is to the effect that:
- (a) the Claimants are required to prove that he or she borrowed in order to repay the Defendant or any other lender. In any event such conduct is commonplace and not necessarily an indication of financial hardship;
 - (b) whilst the period between redemption of one loan and the entry into another may have been short in some instances, that is not of itself an indication of financial hardship;
 - (c) some of the Claimants were required to prove that loans successively increased in size over time;
 - (d) the Claimants were required to prove that they accurately declared their income and expenditure, and that if they did not they should be held responsible for their own negligence or dishonesty;
 - (e) other debts (for example bank overdrafts) or missed payments are not necessarily an indication of financial difficulty;
 - (f) the Defendant used CRA data to check for defaults on credit from third parties to the extent this was recorded in the data the CRAs provided to the Defendant;
 - (g) its creditworthiness assessment took account of defaults and had other rules which took account of late or missed payments, and multiple live payday loans.

Further, the overarching point the Defendant makes is that the formulation of its creditworthiness assessment was "*reasonable and proportionate to the type of lending it advanced and the customers it served*".

40. It is right to note at this stage that in a number of the sample cases, there were examples of matters which it would not be reasonable to expect the Defendant to have discovered in the course of a CONC compliant creditworthiness assessment. Firstly the extent of certain items of "discretionary expenditure", and the reasons for the level of that expenditure. Mr Kuschel's case provides one example. He was a primary school

teacher. His declared net income was over £1,500 per month. He took out 24 HCST loans with Sunny and some 84 with other lenders, 60 of which were within the period of his borrowing with Sunny. He did not default until late in the relationship, when his financial issues were such that he went into an IVA. The overall number and regularity of loans might suggest a pattern of borrowing and a dependence on HCST credit with the potential to adversely affect his financial situation. Indeed Mr Kuschel's financial position deteriorated over time. But he had a good income to expenditure ratio, repaid all his Sunny loans early (save for loans 22-24), and never went into arrears (save on his last loan). The Defendant sought information about Mr Kuschel's expenses and received what was reasonably reliable information in relation to the questions it posed. What it could not reasonably be expected to discover was that Mr Kuschel had significant problems with drink, drugs and the use of expensive websites, and that a fair amount of his borrowing was a consequence of those matters.

41. The second common problem was the failure of claimants to return accurate answers to questions about their income and expenditure, despite the fact the application form requires customers to confirm that the information is true and accurate. There are examples of income levels being exaggerated, and in one case (Rebecca Adams) simply made up, and there are many examples of outgoings being underestimated, sometimes by a substantial amount. The question of the customer's responsibility for conduct of that kind is relevant to the FSMA and the CCA claims.
42. With that I turn to the provisions relating to the creditworthiness assessment itself. CONC 5.2.1(3) provides that:

*A creditworthiness assessment must be based on **sufficient information** obtained from:*

- (a) the customer, where appropriate; and*
- (b) a credit reference agency, where necessary.*

[my emphasis]

The obligation on the lender is to make an assessment based on "sufficient information". That term appears to refer back to the matters which must be considered when carrying out the assessment identified at CONC 5.2.2(a) and (b). In other words there must be sufficient information to make the assessment.

43. CONC 5.2.3 G makes provision for the extent and scope of the assessment:

The extent and scope of the creditworthiness assessment ... 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.*

44. The terms of this provision are of considerable importance. It is guidance rather than a rule, but it informs the answer to the question of whether certain of the rules relating to creditworthiness assessments have been broken. The Defendant refers in particular to factors (1) (2) and (3). These are small (in absolute terms) unsecured loans being made for short periods of time, usually repaid well before the end of the term. As to (3) the Claimants submit that the cost of the loan is high, in that interest payments are substantial as a proportion of the sum lent, although the Defendant would argue that it compares favourably with the cost of some unarranged bank overdrafts.
45. Factors (4) (5) and (6) are also of importance. As to (4), the Claimants would argue that an applicant for HCST credit is likely to be someone who is unable to borrow from banks and other such lenders, and likely to be in a poor financial position. That is not necessarily so, but the greater the use of these sorts of loans the easier it is to reach that conclusion. As to (5), both credit history and indications of current or past financial difficulties are of considerable interest to a lender both when considering its own interests and when considering the potential for loan commitments to have adverse impact on the customer. As was said on a number occasions, it is not in the Defendant's interests to lend to those who are unable to afford the repayments. The same sort of issues arise in relation to the customer's existing financial commitments, including other consumer credit commitments. The Defendant's lending process involved the consideration of information relevant to factors (4)-(6). The real criticism here relates to whether it sought enough information (particularly from CRAs), and the use it made of the information that was available to it when undertaking the creditworthiness assessment.
46. CONC 5.2.4 G expressly recognises that to consider all of the factors set out in CONC 5.2.3G in all cases is likely to be disproportionate. Sub-paragraph (2) provides that:

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.

The Defendant submits that the last sentence of this provision assists, for even with interest added in, the total amounts involved in these loans was not great when considered alongside the customer's financial situation. All were (or said they were) in regular employment, many had houses, and all had shown that they were in a position to repay loans made previously. The Claimants response to that would be to emphasise the cumulative effect of these loans, rather than to look at them in isolation.

47. Sub-paragraph 3 of CONC 5.2.4 provides that:

A firm should consider the types and sources of information to use in its creditworthiness assessment ... 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;*
- (f) information provided by the customer.*

Here the Defendant used a variety of sources of information. There is criticism of the extent of the CRA data obtained, particularly given the known limitations of the data prior to the revision of the back reporting provisions in July 2017 (which were effective in November 2017). There is also criticism of the relative lack of use of the data the Defendant had in relation to its loans of its own, and the failure to use CRA data to carry out any meaningful verification of the information provided by the customer.

48. CONC 5.3 deals with the conduct of business in relation to creditworthiness and affordability. CONC 5.3.1 G provides that:

- (1) In making the creditworthiness assessment ... a firm should take into account more than assessing the customer's ability to repay the credit.*
- (2) The creditworthiness assessment ... 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.*
- (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.*

- (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.*
- (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, ... and*
 - (c) *out of income and savings without having to realise security or assets; and*

“unsustainable” has the opposite meaning.

Sub paragraph (1) confirms the approach to the adverse impact exercise (CONC 5.2.1(2)(a)). Sub paragraphs (2) and (6) are also of assistance. I note the reference to “reasonable commitments” in (6)(a)(i), which has a relevance to the discretionary expenditure issue, and to the use and assessment of information provided. The terms of (6)(c) tend to support the Claimants’ case that repeat borrowing is relevant to the creditworthiness assessment if it suggests borrowing to repay borrowing.

49. The next rule of significance is 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).

The effect of a breach of CONC 5.3.2 R is an interesting aspect of the Claimants’ case. Mr Clark put the allegation in its simplest form in the course of his closing submissions. He did not submit that a further check of a particular kind should have been carried out in an individual case, but rather that loans should not have been granted at all in the

absence of the clear and effective policies and procedures necessary to make a reasonable creditworthiness assessment. His submission was that if there were no clear and effective policies and procedures, then there could be no reasonable creditworthiness assessment, and if there were no reasonable creditworthiness assessment, a loan should not be made. In other words, the entire process was flawed.

50. The argument is attractive in its simplicity, but it is important to recognise its limitations. Section 138D requires that for a contravention to be actionable the Claimant must suffer a loss as a result. The systemic flaw would mean that the process failed in the individual case to identify applications for loans which if granted would have the potential to make an adverse impact. But the breach is only actionable if it caused loss – so for example where the loan in fact added to the borrower’s overall indebtedness. Put another way, the loss is caused because the creditworthiness assessment undertaken failed to consider the potential for **that** loan to have an adverse impact on that borrower’s financial situation. It cannot be said that every loan made where there is no such clear and effective policy and procedure will cause loss to a borrower. Indeed some loans made in those circumstances may help in resolving an immediate and pressing financial problem.
51. Finally, there is the issue of whether the information customers provided to the Defendant on their on-line application form was true and complete. Ms Bala cross examined each of the Claimants about the accuracy and honesty of the information they provided. Most of the Claimants said that they had filled in the form honestly, but Ms Bala demonstrated that in some cases there were some significant differences between the true position and what was on the form. Comparing the figures for income and expenditure provided on one application with the figures provided on another also demonstrated a tendency for some to exaggerate income and downplay expenditure. In some cases expenditure was estimated at zero, when that was not the case.
52. The point cuts both ways. On the one hand the customer is asked to provide this information and to do so honestly and accurately. The customer knows (or ought to know) what their financial situation is, and that the Defendant will rely upon the information they provide. On the other hand, CONC 5.3.7R provides that there comes a point when the Defendant should not rely upon that information when it knows or ought reasonably to suspect that the customer has not been truthful.
53. The relevant provisions of CONC are as follows:
- (i) 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.*
- (ii) 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).

(iii) CONC 5.3.8 G:

An example of where a firm ought reasonably to suspect that the customer has not been truthful may be that the information supplied by the customer concerning income or employment status is clearly inconsistent with other available information

54. In some instances the Defendant ought to have suspected that information the Claimants provided was not true. There were two situations where this occurred. The first was in relation to information provided as to existing credit commitments. The Defendant undertook a CRA search in relation to this aspect of the customer's expenditure, and in a significant number of cases the results demonstrated a far higher level of expenditure than the customer had given. In conducting its creditworthiness assessment the Defendant used the CRA figure where higher rather than the customer's figure. But what it did not do was consider whether the discrepancy in the individual case gave rise to a reasonable suspicion that the customer had not been truthful. The second was where customers entered zero for certain items of expenditure, when that could not have been the case, or was inconsistent with earlier information provided by customers on previous applications to the Defendant for loans.
55. On 2 January 2015 there were changes in the rules. CONC 5A introduced a price cap. The provisions in respect of creditworthiness assessments were unchanged. This is the third regulatory period. CONC 5A.2.2 R provides that:

A firm must not enter into an agreement for high-cost short-term credit that provides for the payment by the borrower of one or more charges that, alone or in combination with any other charge under the agreement or a connected agreement, exceed or are capable of exceeding the amount of credit provided under the agreement.

In other words a costs cap of 100%.

56. The background to the FCA's decision to impose a cap and a cap at this level is of relevance to the question of the fairness of the relationships between the Defendant and its borrowers prior to 2 January 2015. On 18 February 2014 section 137C(1A) had imposed a duty on the FCA to make rules with a view to securing an appropriate degree of protection for borrowers against excessive charges. That was against a background of well documented concern about the level of charges across the sector. Paragraph 4.6 of CP14/10 outlined the FCA's approach to identifying excessive charges. As before, so with charges; the issue was what was an unacceptable risk of harm to consumers. Mr Clark referred to this passage, which sets out the FCA's concerns:

4.6 ... *Charges contribute to borrowers' worsening financial situation ... HCSTC borrowers are often in a difficult and deteriorating financial situation when they apply for credit. Many borrowers are paying a high price for a loan that may*

be of limited benefit, or may make their situation worse. Borrowers in default often find the costs escalating to unmanageable levels.

This is an important expression of the dangers of borrowing.

57. The FCA had to balance those concerns and the interests of the consumer with the need to maintain a viable HCST lending sector and the availability of funds. And as Ms Bala points out generally in the context of the unfair relationship provisions, one of the statutory factors set out at section 1C of FSMA for the FCA to take into account in considering the appropriate degree of consumer protection was the general principle that consumers should take responsibility for their decisions; see section 1C(2)(d). That reflects the “very general proposition” expressed by Lady Hale in *OFT v Abbey National plc* [2009] UKSC 6 @ [93] that:

... consumer law in this country aims to give the consumer an informed choice rather than to protect the consumer from making an unwise choice.

58. Against that background the FCA set about gathering data on 99% of the market, and very detailed data on 89%. That allowed it to model the impact of price caps on firms and their lending decisions at a “granular level”. It concluded that an initial costs cap of 0.8% per day of principal struck the right balance. Approximately 11% of consumers lost access to HCST credit at that level of cap. At paragraph 5.16 the FCA set out its conclusion.

5.16 We conclude from the results of our consumer analysis that loss of access will benefit those borrowers who currently only just qualify for HCSTC (i.e. those borrowers with the lowest credit scores). These consumers have a high risk of late or non-payment (on average, greater than 40%) and an increased risk of other negative outcomes (defaulting on non-HCSTC and exceeding overdraft limits). For those with higher credit scores, the costs and benefits of using HCSTC becomes increasingly finely balanced to the point where the risk of negative outcomes diminishes to the extent that these borrowers will benefit from continuing to access credit at a lower price.

59. That market wide analysis is particularly useful in identifying the borrowers who are at particular risk when they use HCST credit. It is not surprising to find that those with the lowest credit scores are likely to be the worst affected.

60. CP14/10 made reference to debt spirals not simply in the context of the justification for a price cap. The paper also considered repeat borrowing, and considered whether to bring repeat borrowing from the same firm under the total costs cap. It decided not to, but I set out below the relevant paragraphs of CP 14/10 in full, for they identify the concerns of the FCA at that time and the essentially pragmatic reasons why it was the rules did not go further. The FCA’s views at this time are material to the consideration of the Defendant’s lending decision, the need to identify repeat borrowing, the use of CRA information and real time data sharing.

5.72 Our analysis shows significant levels of repeat borrowing. On average, borrowers take out around six HCSTC loans per year from any firm. Firms suggest that borrowers use HCSTC as an ongoing financial service to meet

emergency needs, temporary income shortfalls and occasional expenditure. However, our evidence shows that people use HCSTC for regular, predictable expenditure and do so repeatedly. Borrowers take out a further loan in a relatively short period after they have paid off the first (for example 52% of loans are provided within 14 days of another being paid off). Furthermore, the majority of borrowers, within six months of taking out their first loan, will have unpaid debt on HCSTC. We are therefore concerned that repeat borrowing could indicate patterns of dependency on HCSTC that is harmful to the borrower – repeatedly paying high prices to access loans in order to make up shortfalls in their income. Therefore, we have considered whether it is appropriate to bring repeat borrowing (loans made by the same firm) under the total cost cap.

5.73 *In order to be effective, the total cost cap would need to be calculated from the principal of the first loan. This would be a significant constraint on lending, particularly as the new principal could be higher. It would also add considerable complexity to the price cap. If the total cost cap was calculated with reference to the total amount borrowed, it would not have any effect because the total cost cap would be reset for the new loan because the previous loan had been paid off (this is different from refinancing where there will be an amount outstanding under the original loan duration which is included in the total cost cap for the refinanced loan). For these reasons, we are not proposing to apply the total cost cap cumulatively to repeat loans. We also looked at some alternatives for dealing with repeat borrowing:*

- Capping the number of times a borrower can borrow from the same firm in a given period. This would be a very stringent measure and we are not proposing it at this time. Generally repeat loans are more profitable for firms than loans to first time customers, so this could lead to greater risks of firm exit and potential closure of the HCSTC market. Consumers could also simply use another lender.*
- Capping the number of times a borrower can borrow from any firm in a given period. This is a common solution in many US states, but again would be a very stringent measure.*

5.74 *Our conclusion is that the most appropriate way to use the price cap to deal with repeat borrowing is by applying the price cap in the same way as for a first loan. This will bring down the costs of borrowing for repeat borrowers. Other tools can be used to deal with detriment caused by repeat borrowing, particularly robust supervision of affordability requirements. Our affordability rules are an important constraint on preventing borrowers becoming trapped in debt cycles of repeat borrowing and we will take supervisory action to ensure that firms are making responsible assessments of the sustainability of borrowing in the event of repeat borrowing.*

5.75 *We are also considering if we need to change our rules to deal with inappropriate repeat lending which could be used to game our refinancing/rollover cap rules. If a loan is paid back and then a new loan is taken out, our rules do not define this as refinancing and the refinancing cap*

does not apply. We understand that some firms are repeat lending within periods as short as 20 minutes after the first loan has been paid off – this could be causing detrimental cycles of dependency on repeat borrowing that we need to address.

- 5.76 We will be particularly alert to firms using repeat borrowing to avoid the effects of the total cost cap and will challenge firms with high levels of repeat lending to demonstrate how they identify borrowers whose repeat borrowing behaviour suggests problems with affordability. We will question firms about changes in the number and frequency of repeat loans after the introduction of the price cap and we will not hesitate to take action if we see that firms are using repeat lending as a way to minimise the impact of our price capping requirements.*
- 5.77 We also see the benefit of real-time data sharing to enable firms to carry out more accurate affordability assessments and to prevent consumers from taking on multiple loans which they cannot afford to repay. Currently firms cannot be sure that they have an up-to-date picture of a consumer’s outstanding HCSTC commitments even if they are using a CRA check. There has been progress, but the industry must do more. We expect the vast majority of firms to participate in real-time data sharing by November and to share data with more than one CRA. By vast majority we mean more than 90% of the current market. If we do not see sufficient progress by November, or CRA coverage does not improve, we will consult on the introduction of data sharing requirements.*

The Defendant’s lending decision

61. The Defendant’s process was automated, and had three “components”:

- (i) an affordability assessment (Component 1);
- (ii) a creditworthiness assessment (Component 2); and
- (iii) a commercial risk evaluation (Component 3) .

Components 1 and 2 were (or came to be) reflections of the requirements of CONC but Component 3 was said to be a purely commercial test which turned on the Defendant’s risk appetite at the time. Whilst numbered 1, 2 and 3, these assessments were all undertaken within minutes in the course of the on-line application. To the extent that it matters, the order in which they were made was 2, then 3 and then 1. The reality was that if 2 and 3 were passed, the application would pass 1. The assessments used the same customer information. The use of CRA data is a little more complex.

62. The Defendant’s evidence about the process and how it was designed and developed over time comes from the following witnesses.

- (i) Karen Taylor, the Defendant’s General Counsel. She dealt with the application process and other matters. She made two witness statements, the first on 30 July 2019 [GB A/page 105] and the second on 19 December 2019 [GB A/page 182].

- (ii) John Bartley, the Defendant's Director of Data Science. He dealt with the more technical aspects of the process. He made 4 "general" witness statements, the first on 30 July 2019 [GB A/page 1], the second on 17 October 2019 [GB A/page 47]; the third on 19 December 2019 [GB A/page 100]; and the fourth on 21 February 2020 [GB B1/page 273]. He also made a series of witness statements in relation to the particular circumstances of each of the Claimants, to which he exhibited data sheets and other important information about the loans.
- (iii) Nicholas Isaacs, a Senior Credit Risk Director with the Defendant, who made a statement on 6 June 2019 [GB A/page 188].

Ms Taylor and Mr Bartley attended to give oral evidence. I also had statements from Mr Whitton and Mr Kurtz, respectively the Defendant's and Claimants' solicitors. They produced and explained documents (and the like) and there was no need to call either.

- 63. I deal firstly with how the process looked to the "customer" and the information it obtained from them. It changed over time to reflect the changes in the regulatory regime, but has remained similar. Ms Taylor dealt with this. She identified three periods – (1) June 2013 to September 2014; (2) October to December 2014; and (3) January 2015 and following. Ms Taylor joined the Defendant in November 2016 but was involved in an advisory capacity prior to that time. Much of her knowledge of the process prior to her direct involvement came from Mr Isaacs, who had started with the Defendant in January 2017. Ms Taylor's evidence was that Mr Isaacs got his information from his team. The lack of first-hand knowledge on her part means that I have particular regard to the contemporaneous documents that I had.
- 64. The Defendant has a website: "sunny.co.uk" which opens with a homepage. Initially Sunny offered a line of credit product and an instalment loan. Ms Taylor exhibits the homepages for the line of credit product as it evolved from March 2013 to December 2014 (when it was withdrawn) at GB A/pages 118-120. The homepage gives a representative APR (on page 118 it was 2073.5%) and has a device (a slider) which allows the borrower to put in the amount they want to borrow and the period of the loan, and which then gives them the cost of repayment. Ms Taylor also exhibits the homepages which followed for instalment loans at pages 121-124.
- 65. As an example the homepage for July 2015 to March 2016 at page 122 has the following heading:

Welcome to Sunny loans
Fast, flexible loans, with no fees

There are two products, *Sunny Now* and *Sunny Plus* (a longer term loan with which I am not concerned). Under the *Sunny Now* banner there is this:

£100-£950
24% per month for 6 months
Repay early and pay less interest
Cash in your account within 15 minutes of approval

Easy online application process

Then there is a button

APPLY NOW

Below that:

Representative Example; Loan amount £400 repayable over 6 months. Total amount repayable £752.24 in 6 payments of £125.38. Interest 292% p.a. fixed Representative 1295% APR

The loan term is 6 months but you can repay early at any time

Then there is a section which begins with the words - ***Why we're different***. The three reasons given are - *Fast borrowing, Flexible repayments, No Fees*.

66. The Defendant's website highlighted the speed of its process, and as I have already noted, many of the Claimants gave evidence to the effect that they were attracted by that, and by the fact that the money was available quickly. The Defendant's website would recognise the IP address of existing customers, and so would be able to offer them the previous rate of interest they had been charged, and pre-populate certain fields.
67. There are five steps to the lending process. The first requires the applicant to input personal information, such as their name, date of birth, address, telephone numbers and email address. An applicant must be over 18 and resident in the UK, and if those criteria are not met the application will not proceed.
68. Step two involves the applicant providing information as to their income and monthly outgoings. In period (1) this was simply income and housing costs. In period (2) the information required was income and six areas of expenditure. The six areas reflected the types of expenditure identified by CONC 5.2.3(6). They were:
 - Mortgage/rent
 - Other credit commitments
 - Transport
 - Utilities
 - Food
 - Other regular outgoings

The process was not designed to catch discretionary expenditure. It relied on information from the applicant in relation to income and these six areas of expenditure, and cross referred the information about mortgages and credit commitments with information obtained from credit reference agencies. I deal with how this information was used below.

69. Mr Isaacs exhibits an example of the "step 2" page the applicant completed from June 2013 to September 2014 (Period 1) at GB A/page 206. After details of address, the

form asks for duration of loan, residential status, monthly housing cost (defined as “your own monthly rent, mortgage or board contribution”) monthly pay after tax, and how you are paid. There is then a “tick” box with the words “*I confirm my annual income is approximately £[] (before tax i.e. gross income) and £[] (after tax i.e. net income)*”. The annual figures for gross and net appear to be generated from the details of monthly pay after tax inserted by the applicant. Initially this box was pre-ticked automatically, and the applicant had to untick if they disagreed. Below that was a box for monthly household income after tax.

70. The step 2 page for Household Expenses for the period October- December 2014 (Period 2) is at page 207. It includes this:

As part of our commitment to responsible lending, it is important for us to understand your regular outgoings when we assess your application.

Please only include your own personal contributions and responsibilities if you share the cost of the expenses with other individuals in your household.

Each of the six expenses has a drop down box which give brackets of expenditure, including an “other” option. The example at 207 gives the following values:

| | |
|-----------------------------------|----------------------|
| <i>Mortgage/rent</i> | <i>Other - £1000</i> |
| <i>Transport</i> | <i>£101-£200</i> |
| <i>Monthly credit commitments</i> | <i>£301-£400</i> |
| <i>Utilities/Bills</i> | <i>£0</i> |
| <i>Food</i> | <i>£251-£350</i> |
| <i>Other regular outgoings</i> | <i>Other - £100</i> |

I note that the bands are relatively broad, there is provision for a zero expense, and that the applicant can input a manual sum if they choose the “other” option. Below that information are two tick boxes.

Please tick here to confirm you have provided accurate financial information
Please tick here to confirm that you have considered potential future income and outgoings in determining your ability to repay

Those boxes were pre-ticked for existing customers but not for new ones.

71. Mr Clark challenged the use of the pre-ticked boxes and the way in which the Defendant posed the question as to future income and outgoings. Whatever the Defendant’s view, I regard the process of requiring an applicant to untick a box if they do not agree as undesirable and unsatisfactory. Ticking a box is a relatively quick process. To “pre-tick” a box suggests that the Defendant was paying too much attention to the speed of the process. The practice was subsequently changed.
72. Mr Clark also raised the issue of future changes in an ability to pay. For example where existing credit commitments were as entered in the drop down box, but the subsequent month’s would be more. The process allowed for the current figure, but made no provision for entering the higher sum that would be due the month following. What was the applicant supposed to do? Ms Taylor suggested that the period of the loans offered by the Defendant (up to 6 months) meant that this was not

so much of a problem, but it is apparent that this application process does not take account of increased credit commitments during the life of the Defendant's loan.

73. The third version of the step 2 page is at page 208. Ms Taylor's evidence was that this was for the period from the beginning of 2015 to 2018. Under *Monthly Household Expenses* it has the same 6 inputs.

Mortgage/rent

YOUR contribution to your rent, mortgage or board costs

Utilities Bills

YOUR contribution towards your gas, electricity, water and other services you may use regularly

Transport

Fuel costs, public transport, car insurance

Food

YOUR contribution towards essential groceries and household items

Credit commitments (not including Sunny repayments)

YOUR credit card, loan or finance commitments (not including any loans with us)

Other regular outgoings

For example, childcare or child maintenance payments, regular healthcare costs, memberships or commitments

74. For an existing customer these figures would be "pre-populated" with the figures the applicant gave the last time they were granted a loan. There is nothing to say that an applicant should change the figures, but if an applicant clicks on a figure a drop down box appears giving a series of brackets to choose from. The boxes on page 208 show the complete range. All make provision for a zero entry and an "Other" so that a manual entry can be made. Three (*Mortgage/rent*, *Transport*, and *Credit commitments not including Sunny repayments*) have a second bracket of £1-£100 and then go up in brackets of £100, two (*Utilities Bills* and *Food*) have a second bracket of £1-£150 and then go up in £100 brackets, and *Other regular outgoings* goes up in £50 brackets. Again there is a tick box for the applicant in the following terms:

I confirm that I have provided accurate financial information and considered the potential future income and outgoings in determining my ability to repay.

This was not pre-ticked for new or existing customers. The Defendant's lending process would take the midpoint of the relevant bracket and feed that into the assessments it made.

75. As is apparent, the brackets for expenditure are relatively broad. One attraction of that approach is that it is quicker and easier for a customer to estimate their expenditure than to identify and enter exact figures. There is also some sense in this approach. Precise figures may well add very little. Commitments will vary from one month to

the next without necessarily moving from one bracket to another, and a broad estimate may well be sufficient in many cases. What is required is a reasonably accurate figure. The danger is that customers may consistently (and honestly) underestimate their outgoings, or they may deliberately understate them in the hope of improving their chances of getting a loan. Using broad brackets and taking a mid-point runs the risk of the estimate being well out. Mr Bartley drew attention to the 80% buffer incorporated into the assessment process (see below). But he accepted that there might be cases where consistent underestimation would not be compensated for by the buffer. He might also have referred to the fact that the figures for mortgage and credit commitments are obtained from a CRA, and are used if higher than the customers estimate.

76. In about June 2018 the Defendant changed the system it used to assess expenditure. It took the figures it obtained for mortgage and credit commitments from the CRAs as it had before, but instead of using the customer's figures for the other four areas of expenditure, it took the higher of £350 per month, 16% of income or the actual figures provided by the customer. The £350 figure came from the ONS, and the 16% from an analysis of its own data.
77. Step three required the applicant to give details of their bank account and the debit card to be used to repay the loan. Step four involved the Defendant's automated assessments for creditworthiness, credit risk and affordability. The applicant sees a screen for an average of 5-10 seconds whilst that is done. Step five requires the applicant to read the pre-contractual documentation and the loan documentation, and to sign the loan agreement. Ms Taylor describes the screen at paragraph 12 of her witness statement at GB A/page 107. It is designed to comply with the requirements of CONC for the provision of an "Adequate Explanation". The relevant page changed over time; examples are shown at pages 125-132. The borrower had the option of printing out the documents if they wanted to. Ms Taylor thought the example at page 132 was from March 2016.
78. One aspect of the process which Ms Taylor confirmed, was that after the application had passed the assessments, the screen showed the applicant the maximum loan they could have. Ms Taylor's evidence was that this was only so that the customer could choose to borrow more if they wanted to, and that the loan amount defaulted to the sum applied for. The screen also shows a schedule of repayments. The customer should also be shown the key points of the contract, but that appears to have been omitted in the period from 2013-2015 (it is done on page 132). The customer is then shown three separate documents (pre-contractual information and the loan documents). These documents are long. None of the Claimants who gave evidence read them, but each has to be accepted before the loan can be made. The webpage is set up so that the relevant buttons can be clicked without scrolling down the documents, and the "Accept" button is then enabled. When that is clicked the customer has electronically signed the loan agreement.
79. Ms Taylor confirmed that even prior to the total cost cap of 100% introduced by the FCA on 2 January 2015, the Defendant always had a self-imposed cost cap of 150% of the amount of credit. She outlined the approach of the Defendant to borrowers who default. It is important to note that no complaint is made about the Defendant's conduct or procedures in that regard. The basic approach was to suspend the loan to

give the borrower time, then to put them on a repayment plan, and to give them information about debt counselling services. I read some transcripts of telephone calls with some of the Claimants when they defaulted. The Defendant's conduct in that regard appeared to me to be entirely proper.

80. Before I turn to the more technical aspects of the process, I refer to some of the issues Mr Clark raised with Ms Taylor about the way this aspect of the process was designed. Firstly he asked how the process took account of any future financial commitments of the customer, and their vulnerability; see CONC 5.2.3(7) and (9). Her evidence was that the creditworthiness rules looked at arrears, defaults, IVAs and that type of information to give an indication of the customer's financial health. Vulnerability she took to be an issue of capacity. Capacity is an element of CONC 5.2.3(9). The terms of the rule draw particular attention to "mental capacity limitation", but vulnerability is not limited by that reference. The Defendant's approach changed in 2019 and recognised that fact. Under Personal Circumstances the applicant is now asked to confirm that:

... I am not receiving treatment for any medical conditions such as a long term illness depression anxiety stress or experiencing any other circumstances which may make me more vulnerable at present

81. Mr Clark raised two further matters with Ms Taylor. The first was the reliance on the information provided by the customer without further checks as to the accuracy of that information other than as to mortgage and credit commitments, and whether that was a "sufficient information" for the purposes of a creditworthiness assessment. Ms Taylor agreed that there were no other checks, but suggested that it was reasonable and proportionate to rely upon the information provided by the customer.
82. In closing Mr Clark put this in context. It was not so much that further checks should have been made. He recognised that even with open banking it would not be easy. The point was that given that much of the information the customer provides in this deliberately quick process is not checked, it is all the more important to look at the accuracy of the verifiable information. The prime example is a comparison of the information the customer provides as to their credit commitments, and the like information obtained from the CRAs. In a lot of cases the figures obtained from the CRAs are well in excess of the figures given by the customer. It would be unreasonable to read too much into some discrepancy. The customer may not know the precise figure, and the process asks for brackets and takes midpoints. But there comes a point when a discrepancy cannot have an honest explanation, or at least the Defendant ... *ought reasonably to suspect that the applicant has not been truthful in completing the application in relation to information supplied by the customer relevant to the creditworthiness assessment* for the purposes of CONC 5.3.7 R.
83. As I have already noted, the way the Defendant's lending process dealt with a discrepancy between the customer's figure for credit commitments if the CRA check revealed a different figure was to rely upon the CRA figure. That is, so far as it goes, a reasonable response. But as I understood the evidence given by Ms Taylor and Mr Bartley, the process did not consider whether that discrepancy might indicate that the customer was not being truthful. Mr Clark readily accepted that it was not easy to say where a line might be drawn. There may be honest reasons for even a substantial

discrepancy. In closing he suggested that 20% might be an appropriate figure and that above that there was cause for reasonable suspicion. Mr Clark chose 20% because that was the figure the Defendant used as a buffer in its process. But his real point was that the system did nothing more with the CRA information when it provided perhaps the only way of testing the truthfulness of the information the customer was providing.

84. The second example of information provided by the customer which may put the Defendant on notice that the customer was not being truthful was a zero entry for multiple items of expenditure. My note of the key parts of the cross examination of Ms Taylor on this point is as follows;

Q: If I apply for a loan and I provide an income figure – and put zeros for each category of expenditure, you will change credit commitments and mortgage figures if I have a mortgage, but with that amendment my application will be successful.

A: That was the case, but we did a review and identified customers who did that and from the ONS [Office of National Statistics] and internal data, applied a figure or percentage of income, and where the figures didn't meet that [...] some redress would be provided if the loan would have otherwise been unaffordable

...
Q: You agree that a person who apparently has no expenditure on mortgage, food transport, utilities and other outgoings is such a rare beast you ought to suspect the information was inaccurate

A: Yes and we did something about it

Q: When

A: The beginning of 2018 I think

Q: What you did was an analysis – you identified the customers who had provided a complete row of zeros

A: Yes

Q: and on the basis you ought not to grant loans, gave redress

A: Yes

Q: None of the Claimants here

A: Correct

Q: No one here puts a row of zeros

A: Correct

Q: [But it's] still the case that to have no expenditure on food or expenses other than the specified categories is a matter which calls into question the accuracy of the information

A: No, because everyone's circumstances are different. You may not have a food bill if you are living with parents so it's just the extreme situation where we ought to suspect and ... acknowledge we should have done something about it

Q: So except in a case of a row of zeros you ought not to have reasonably suspected that someone who puts zeros for 5 of 6 is not providing truthful and complete information

A: You ask them to do so and expect them to do so

85. The issue was not explored in evidence in any detail, but whilst the Defendant's system can pre-populate fields for existing customers, there is no cross referencing between loans, or applications, to identify big discrepancies in the information a customer is providing. As I say, some degree of discrepancy is to be expected, and at times there might be major changes in a customer's life which would readily explain big differences in the information they gave on a prior loan application and the information they were giving on the loan application in question. But it is unclear why the Defendant makes no use of information which is available to it to assist in identifying cases where there is a reasonable suspicion that a customer is not being truthful when providing information.

86. In 2018 the Defendant undertook an analysis of customer behaviour which identified a cohort of customers who used its product in a similar way to an overdraft; see para 3 of Mr Bartley's third witness statement GB1/page 101. This involved regular or very regular borrowing. In her second witness statement Ms Taylor deals with the use of payday loans by some customers in a manner similar to an overdraft. Ms Taylor makes a number of points as to the potential advantages of HCST credit over an unauthorised overdraft: (i) given the fees for the latter, the cost may well be less, (ii) assessments are carried out before HCST credit is advanced, (iii) the customer knows the exact cost of his HCST credit, and (iv) a loan must be paid down to zero at the end of its term. Ms Taylor also considers the issue of the repeated use of HCST credit [GB A/page 185]. She refers to paragraph 8.15 of the FCA Consultation paper from November 2016 [AB5/page 207/1] where the FCA says that: :

... the data we have collected does not show a clear detriment from repeat and multiple borrowing...

This was in the context of the FCA asking for "further input". But Mr Clark demonstrated that this paper is not dealing with the complaints these Claimants make. The analysis was based on immediate arrears, not the issues involved in a debt spiral.

87. Ms Taylor also refers to the concept of Debt to Income (DTI) ratios, which was explored by the FCA in the paper it published in July 2017 (Occasional Paper 28). Both she and Mr Bartley refer to this analysis in an attempt to show that the lending decisions it made in respect of the Claimants were reasonable, and that it's system

worked. Given the nature of the attack on its practices, I can understand why the Defendant refers to this material. But the issue for me is not whether HCST credit is desirable, or (as a matter of policy) when and in what circumstances it should be available. Those are matters for the FCA, who have made rules to regulate the market. The issue for me is whether those rules have been breached, and if they have whether a particular Claimant has suffered a loss and should have a remedy. DTI ratios were not used by the Defendant as part of their system for making lending decisions, and are not of direct relevance.

88. Mr Bartley's evidence was an opportunity to examine the more technical aspects of those systems. Mr Bartley joined the Defendant in January 2017, and in June 2019 was promoted to Director of Data Science. He had direct knowledge of the Defendant's systems and policies since 2017. The basis for his evidence of the position prior to that came from the documents he had access to and information from the credit team.
89. Before I turn to a discussion of the 3 stages of the Defendant's lending process, it is convenient to set out the nature of the allegations of breach which the Claimants rely upon. It is the creditworthiness assessment which is the target of the allegations, for it is that stage of the process which must comply with the rules which give rise to the FSMA claim. But the process should also be considered, for it may be that aspects of component 1 or 3 mitigate a criticism of component 2 such that the process taken as a whole might be reasonable and proportionate.
90. In closing Mr Clark took as his starting point the Particulars of Breach common to the claims. That is indeed a good place to start. I set out the pleaded allegations in full.

In making the assessments of the Claimant, the Defendant breached the requirements of CONC 5.2

- (1) failed to consider whether the commitments under the proposed credit agreements would impact adversely upon the Claimant's financial situation because of [his/her] propensity to borrow repeatedly at high cost, so that the proposed loans would sustain [his/her] previous borrowing at high cost, they would increase [his/her] overall indebtedness, and he would be likely to borrow at high cost to repay them, thereby further increasing such indebtedness.*
- (2) failed to construct the Procedure to take account of the potential for the proposed commitments to impact adversely on the Claimant's situation in such way*
- (3) failed to undertake assessments proportionate to and dependent on the Claimant's financial position, so that, despite the contents of the credit reports, in particular the evidence of his/her] previous repeated high-cost short-term borrowing, it failed to make any further enquiries to determine whether the proposed loans would be likely to be used to facilitate sustained borrowing at high cost and would be repaid through further borrowing;*
- (4) failed to base its assessments on sufficient information obtained from the Claimant, in particular information regarding his repeated borrowing and about his intended method of repayment of the proposed loans, and upon second and subsequent loan applications, on information on credit files for the*

- Claimant compiled by several credit reference agencies, which latter information was necessary in order to obtain a [complete] record of the Claimant's financial position*
- (5) *constructed component 1 of the Procedure so that, between March 2014 and September 2014, it failed to base its assessment on any information obtained from the Claimant regarding his actual or anticipated expenditure, and so that it failed to obtain any information from him regarding the same, except his monthly housing costs*
 - (6) *failed to ask the Claimant about those future borrowings and repayments that had been considered by him in determining his ability to repay the loans, and therefore, failed to ensure the information on the Claimant's credit applications relevant to the assessment was complete;*
 - (7) *constructed component 3 of the Procedure so that, upon the Claimant's first loan application his previous pattern of repeated borrowing had the effect that the Defendant considered him less of a credit risk and, therefore, was more likely to lend to him.*
 - (8) *constructed component 2 of the Procedure, so that the eligibility criterion in rule 288 relating to the number of current short-term loans failed to take account of the existence of high-cost short-term loans other than loans repayable within 1 month*
 - (9) *in the premises failed to establish and implement effective policies and procedures to make a reasonable creditworthiness assessment.*

The Affordability Assessment

91. Component 1 was the affordability assessment. As I have noted, despite its label, it came at the end of the lending decision, and had little practical effect on the outcome. In Period 1 this involved taking the amount requested by the customer and comparing that to the customer's stated net income. If the loan requested exceeded 70% of the income figure, it would be refused. The limitations of such a measure of affordability are obvious. Mr Clark put to Mr Bartley that this was ineffective. Mr Bartley's evidence was that this was in line with the industry standard at the time, and was not "completely ineffective".
92. In Period 2 the Defendant began to calculate a monthly disposable income ("MDI"). This was a more sophisticated calculation. It began with declared income, but then deducted expenditure. It obtained details of credit commitments from a CRA and made adjustments for the monthly payments on fixed term credit, and the total minimum payments for other forms of credit. It then took 80% of the MDI, providing a 20% "buffer". It applied the resulting figure and divided it by a multiplier derived from the interest rate. This was designed to represent how much interest would be required for every £50 of capital. The system multiplied that by 50 and rounded down to the nearest £50. This gave an affordable credit limit. By way of example, the calculation for a customer with an MDI of £250 applying for a loan with an interest rate of 29% per month (which gave a multiplier of 20.13) would be as follows

$$£250 \times 0.8 = £200$$

$$£200 \text{ divided by } 20.13 \times 50 = £496.77 - \text{rounded down to } £450$$

93. From October 2014 the Defendant sought to verify a customer's income on a first application by using a tool developed by Call Credit (now TransUnion) called "The Affordability Checker" or "TAC". TAC was not fool-proof, but this was obviously a good idea. It looked at current accounts to check income, and gauged the source and stability of income. It either validated income or not. It was not another source of data as such, but it is an example of the Defendant using outside information to verify information provided by a customer (here income).
94. The Claimants criticise the Defendant for not making greater use of CRA data or data from more than one CRA, particularly in relation to subsequent applications for a loan. Mr Bartley's position was that what the Defendant did was a reasonable and proportionate check. The use of data from two or three CRAs would be well beyond the industry norm. Its use was to be balanced with the need for internal rules, and if the Defendant's rules were applied to data from all the CRAs, the process would be "*unwieldy and lead to poor customer outcomes*".
95. It is fair to say that the Defendant's "Creditworthiness and Affordability" policy in GB C2/page 740 was not entirely consistent with the evidence Mr Bartley had given about the interrelationship of the various components of the process. Mr Clark asked Mr Bartley a number of questions about how that document differed from his (and Mr Bartley's) understanding of how the process worked. I am satisfied that Mr Bartley's evidence about these matters is accurate. He was a man who obviously understood and enjoyed his subject. But the fact that there were differences between the policy document and what actually happened suggests that the Defendant has failed to adopt clear and effective policies in relation to its creditworthiness assessment.
96. Whilst a little out of order, the point of significance is that in places the document elides components 2 and 3, when their focus is rather different. In particular the creditworthiness assessment must consider the potential for adverse impact on the borrower's financial situation, whereas the credit risk assessment is very much a commercial risk decision for the lender. The information relevant to both may well overlap, but the focus is different. The elision of these two components is a further indication of a failure on the part of the Defendant to give sufficient emphasis to the risks to the customer of further lending. Whilst I accept that there was no benefit to the Defendant in lending to someone who would not be able to repay the loan, the regulations required a consideration that went beyond that commercially driven approach.

The Creditworthiness Assessment

97. Whilst nominally Component 2, the creditworthiness assessment was the first stage of the lending decision. The affordability assessment gave a maximum credit limit, but the Defendant's case was that if a customer was not creditworthy, it would not lend. Mr Bartley explains this part of the process at paragraph 38 and following of his first witness statement [GB A/page 10]. It works by taking the data the customer provides, undertaking certain checks with CRAs, and then applying a number of internal binary "yes/no" rules. If the customer passes the process moves on to the next rule. If it fails the application is not approved. Throughout of process of disclosure and trial, the Defendant's case was that component 3 (the credit risk assessment) did not form part of the creditworthiness assessment.

98. The Defendant used different “strategies” (collections of rules) for new and existing customers. These evolved over time, generally speaking becoming more sophisticated. Some of those rules are simple. For example rule 9 declined an application if the applicant was under 18 or over 78. Some were more complex and relied on information from CRAs; so for example rule 152 (Teletrack) declined an application where the individual held an account which was more than 30 days past due, where the account included bankruptcy or IVA, where there was evidence of top up loans or where the customer was reported to be dead.
99. The Defendant used a number of CRAs to obtain data for use in this assessment: Teletrack, Experian, Equifax and CallCredit (now called TransUnion). The Defendant used data from two CRAs when considering an application for a first loan (CallCredit and Experian) and one (usually Experian) for subsequent loans. Users of CRA data were obliged to supply data back to those CRAs in relation to their own customers (“back reporting”). This process allows lenders to share data about outstanding balances, account status, payment status and (if relevant) regular payments in respect of loans, utilities, overdrafts, mortgages and other credit accounts. It is something the FCA has been encouraging for many years.
100. The Defendant suggested that there were limitations to the efficacy of back reporting. Firstly, the data held by one CRA will only include information back reported by its customers, so the credit files kept by different CRAs are often different. Secondly, the practice in the industry is to back report monthly. That means that there can be a time delay in reporting transactions. Mr Bartley gave the example of a customer taking out a loan on the 30th of the month from a lender who back reported on the 28th of the month. The loan would not be reported until the 28th of the next month, and (assuming payments were due monthly) any repayment or default would not be reported until the 28th of the month following that. But even if CRAs do not provide data in real time, the use of this data is plainly an important part of the assessment. The information may not be complete, but it will give the lender a generally reliable source of information about the customer’s credit commitments.
101. A customer’s credit file will include information about home credit, advances against income, hire purchase, mail order, pay day loans (properly so called) unsecured loans, and (since late 2017) short term loans. Mr Bartley’s evidence is that prior to mid to late 2017 “payday loans” was a term used by the CRAs for loans repaid within the month. The Sunny loans were repaid over a longer period than that, and so were not classified by the CRAs’ as payday loans. They were reported as unsecured loans or advances against income. That changed in November 2017 following the CRAs re-designation of these loans as “short term loans”. Mr Bartley says that from then the Defendant back reported its loans accordingly to Experian, TransUnion and Equifax, and since that time these loans have been taken into account by the Defendant in the creditworthiness assessment. However, prior to that date the Defendant’s assessment did not take into account loans which were reported as unsecured loans or advance against income unless they had been classified by Experian as payday loans; see para 23 of his 2nd witness statement [GB A/page 53]. Consequently loans of this sort, including the Defendant’s loans, were not caught by the CRA checks the Defendant undertook. That is something of a gap in the relevant information, and a central feature of the Claimants’ attack on the process.

102. As I have outlined above, the Claimants' primary case is that repeat borrowing could indicate a pattern of dependency on HCST credit that could be harmful to a borrower. The submission is that a significant quantity of repeat borrowing, particularly concurrent borrowing and borrowing shortly after the repayment of previous loans, and/or an increasing level of indebtedness were factors that, either in and of themselves or in combination with other financial difficulties, indicated the potential for an adverse financial impact from the commitments under the proposed credit agreements. Consequently the existence of repeat borrowing should be taken into account in the creditworthiness assessment; see paragraph 35 of the Claimants' skeleton argument.
103. In the course of her closing submissions Ms Bala helpfully summarised the position of the sample Claimants in relation to repeat borrowing from the Defendant, dividing them into 3 groups.

| Claimant | Sunny Loans | Over time |
|-----------------|--------------------|-------------------|
| Kerrigan | 51 | 2 years 1 month |
| Hiscox | 54 | 2 years 11 months |
| Adams | 34 | 3 years 2 months |
| Fraser | 33 | 4 years 6 months |
| Weymouth | 30 | 3 years 3 months |
| Kuschel | 24 | 2 years 1 month |
| Cullen | 19 | |
| Wheatley | 19 | |
| Edwards | 18 | |
| Campion | 5 | |
| Kaye | 12 | 3 years |
| Williams | 7 | |

104. I agree with Mr Clark's submission that a history of repeat HCST borrowing is relevant to the creditworthiness assessment under CONC 5.2.1(2)(a) R. That is not simply a matter of common sense, although common sense is a useful cross check. It was an issue the FCA had been referring to for some time, and was a concern which lay behind the framing of the rule. The Defendant is entitled to say that these are small loans repayable over a short period, and that the FCA recognises both in its rules and in published papers that it is for a lender to design a system proportionate to the circumstances. But the lack of emphasis on repeat borrowing and the potential for the effects on a borrower is striking. The system is really concerned with whether the borrower will repay. Mr Clark's favourite example of that was an internal rule the consequence of which was that the more loans a customer had taken out with the Defendant (and repaid) the better the credit risk and the more likely the Defendant was to lend. That reflected the FCA's observation in CP 14/10 that repeat borrowing was more profitable for firms. Moreover, the internal rules in component 2 which related to the number of loans a borrower had taken out only looked at the number of active loans a borrower had, and (for most of the relevant periods) ran on what the Defendant knew was incomplete information.

105. The Defendant's process had rules which were apparently aimed at weeding out applications where the applicant already had a number of short term loans. For new customers from 10 February 2015 an application was declined if the customer had more than 2 active short term loans (rule 295) "*BSBNumActiveSTLAccounts*". This took information from CallCredit, but because of the CRA's designation of payday loans, these were not taken into account. For existing customers the only CRA contacted was Experian. Here the Defendant's rules provided for a limit of 3 short term loans (rule 288) rising to 4 from 26 January 2017 (rule 408). But this was only effective to catch short term loans which lasted more than a month after the CRA's re-designation. Consequently even loans with the Defendant were excluded from the operation of the rule. The Claimants say that the rules were inadequate of themselves, and that the process failed to consider relevant information. It took account of default, but no account of repeat and multiple borrowings.
106. The Claimants' case is that given the importance of the issue, the Defendant should have considered other data. Firstly inquiries should have been made of two CRAs for new **and** existing customers. The Defendant's decision to use only one for existing customers is a self-imposed limitation on the assessment. It also meant that data was only back reported to one CRA, restricting the sharing of data in circumstances where the FCA had encouraged lenders to share more; see for example Consultation Paper 14/10 [GBB2/page 497] at para 7.24/30, and in PS 14/16 in the table below para 5.15.
107. Secondly it was suggested that the concern the Defendant raised as to time delays was not the whole story. For new customers the Defendant used bureau summary block data ("BSB") from CallCredit or Delphi new business data from Experian ("DNB"). However for existing customers, it used Delphi for Customer Management data ("DCM"). DCM relies on back reporting, so there are time delays with the consequent issues as to accuracy. That was compounded by the Defendant's practice of using the latest DCM it had received when the customer applied for a loan within 90 days of a previous loan being granted. I am conscious that the standard here is subject to issues of proportionality, and I take the view that the decision to back-report monthly was a reasonable one. It represents the industry standard. The point the Claimant makes is that it was open to the Defendant to overcome that problem on loans for existing customers by obtaining the sort of data it had for new customers.
108. The third suggestion was that the Defendant could have used real time data from MODA from CallCredit. Having heard Mr Bartley cross examined on that point I was satisfied that whilst it would obviously have been better to use real time data, and the FCA were pushing the market to make changes in CP 14/10, the Defendant's decision at the time not to use MODA was a reasonable one. The position now may very well be different.
109. Finally the Defendant could and should have asked the applicants for more details. That is something which would have been hard to do in the context of this sort of quick on-line application. It might be argued that this is the defendant relying upon the limitations of its own system. But as a general proposition, an automated system is likely to be the proportionate approach for loans of this sort. That involved a request for details of other credit commitments, but did not engage with the issue directly; for

example by asking how many HCST loans the customer had taken out in the previous x months, or how many were outstanding at the time of the application.

110. The Defendant's response to the Claimants' primary case may be summarised in this way:
- (i) whilst repeat borrowing might indicate financial hardship in conjunction with other matters, those other matters were not present in these cases;
 - (ii) whilst there was a period in which it did not consider information directly concerning these short term loans (other than true payday loans), that was because of the system the CRAs had for back-reporting. Other information gave it a reasonable view of the customer's financial position; and
 - (iii) the extent and scope of the creditworthiness assessment required by CONC 5.2.1R(1) was to be dependent upon and proportionate to one or more of the list of factors set out under CONC 5.2.3. Given the type of lending and its customers, it was.
111. The first line of argument goes so far. But it does not address the apparent failure of the Defendant's creditworthiness assessment to consider whether an application is being made by a someone with a history of repeat borrowing. The Defendant may not have access to sufficient CRA data to enable it to obtain a full picture of that history. But it has its own data, and could (for example) interrogate its own database to see if this applicant had applied for Sunny loans in the recent past, and whether the amount of borrowing was increasing. The precise nature of such a check is not so much the point; it is the absence of any such check. It did obtain some indication of the extent of current borrowing both from the information it obtained as to the level of current credit commitments from the borrower, and the information it obtained about those matters from CRAs. But again this appears to have focussed upon ability to pay rather than the potential for adverse effect on the customer.
112. The presence of "other matters" may be of significance in the individual case, although it is not entirely clear what those other matters are. But a pattern of repeat HCST borrowing is a warning sign. It is accepted HCST credit is not suitable for sustained borrowing over a longer period. The rates are high, and so taking on these loans has the potential to add to the level of a customer's debt. The OFT recognised that before the rules in CONC were in force, and refinancing or rolling over loans was an unfair practice for that reason. But even without rolling over a loan, it was apparent from the evidence I heard that money would be borrowed from one source to pay off another. Borrowers were well aware that if they defaulted on their loans, they would not be able to borrow from that lender in the future. So they would pay off their loans on time to make sure they could borrow again. Paying off a loan did not mean that they no longer needed to borrow. In some cases quite the opposite. There was also evidence of loans being taken out shortly after an earlier loan was paid off. The need to continually borrow at these rates is (at the least) an indication of financial difficulty, particularly when the customers overall level of borrowing is not reducing or is increasing. The size of the individual loans may not be great, it is their cumulative effect that is of concern. That is particularly so in a market where the lender must know that they are dealing with customers who find it difficult to borrow

money from banks and the like, and may well be borrowing from a number of HCST lenders at the same time. As I indicate above, I am satisfied that repeat borrowing is a relevant matter for the purposes of the inquiry pursuant to CONC 5.2.1(2)(a).

113. The second line of argument provides the basis for the third. There were a series of rules that provided relevant information. Ms Bala referred to the following rules which related to new customers:
- (i) Rule 293: This ran from February 2015 onwards and an application was declined if the credit file showed a 'DF' marker entered within the preceding three months.
 - (ii) Rule 152: 'Teletrack (30 days overdue). This ran from 2013 until September 2015 and an application was declined where applicant had any account back-reported to Teletrack as being 30 days or more overdue.
 - (iii) Rule 333: 'MODA' (2 overdue payments)'. This ran from December 2015 and an application was declined where the customer had two or more overdue payments visible in 'MODA' data from 'CallCredit';
 - (iv) Rules 241 and 242: 'MidTermDLQ' and 'MidTermStruggle': 5 November 2013 – 29 October 2014;
 - (v) Rule 275: 'Highly Over Indebted': decline if CallCredit's 'Over Indebtedness index' is marked 'out of bounds'.
 - (vi) Rule 319: 'Bad Quid Customer': from December 2015: decline if customer had arrears on the 'Quid' product of D's predecessor ThinkFinance (UK) Ltd.
 - (vii) Rules relating specifically to 'Payday Loans': 240, 243, 244, 278 and 294. These were not all used simultaneously.
114. For existing customers, there was less reliance on CRA data because the Defendant had (and was entitled to rely upon) its own loan information in relation to the customer; see CONC 5.2.4 G (3)(a). In addition to rules 288 and 408, rule 289 provided for an application to be declined if the Experian credit file showed a 'DF' marker entered within the preceding four months. The rules which drew on information about arrears on loans with the Defendant were:
- (i) A rule which sat ahead of the risk engine by which an application was declined if the customer had ever gone 45 days into arrears on a Sunny loan; see Bartley; 1st witness statement para 73.
 - (ii) Rule 299: decline if customer has gone 15 days into arrears within the preceding two months.
 - (iii) Internal restriction: customer is unable to apply if currently in arrears with any of the Defendant's loans.
115. I have already noted the failure to use the Defendant's own data to look for repeat borrowers, and the lack of any CRA based search which captured these HCST loans until the recategorization of loans in July 2017. Mr Clark makes the point that more CRA data was available, and that the Defendant's limit to its CRA search was "self-

imposed”. I formed the clear impression that the Defendant’s consideration of the effect of borrowing on the customer focussed on the customer’s ability to pay (and their history of payment), and that the Defendant’s real interest was in lending to those who would pay it back. That is entirely understandable from a commercial point of view, and I recognise that there is value in the consideration of past conduct as an indicator of future conduct. But it fails to deal properly with the requirements of the rule.

116. The real issue here is whether the extent and scope of the Defendant’s assessment was proportionate. CONC 5.2.3 refers to the “given case”, and strictly the question is to be posed in relation to each claim individually. But the Defendant’s process is designed to apply to every application for a Sunny loan. The amount of the loan, and the period of repayment may vary within the limits set by the Defendant. The position of individual customers will also be different. But it would be unreal to look at the proportionality of a system designed to cater for the whole field of applications on the basis of one isolated loan. Neither party suggested that I do so, and the similarity of the CONC 5.2.3 factors which would arise in each case makes such a course unnecessary.

117. The provisions of CONC to which I have referred provide the starting point for this issue. Ms Bala also took me to a number of other FCA documents. In particular, in July 2018 the FCA issued Policy Statement PS18/19 “Assessing creditworthiness in consumer credit” [AB5/239/1]. This accompanied a series of revisions to CONC, including the deletion of CONC 5.2 and the insertion of CONC 5.2A which came into force on 1 November 2018. The scope, extent and proportionality of assessment are dealt with in the new rules at CONC 5.2A.20R (1)-(25). Chapter 1 is the summary section. The difference between creditworthiness and affordability is of relevance:

1.7 Creditworthiness comprises credit risk (to the firm) and affordability (for the borrower). Most firms have a strong commercial incentive to assess credit risk, including the probability of default, but may have less incentive to assess the risk that the credit will impact negatively on the customer’s wider financial situation in particular where these customers will still be profitable for the firm.

1.8 We want to protect consumers from the harm that can arise when they are granted credit that is predictably unaffordable at the point it is taken out. At the same time we want consumers to be able to access credit where it is affordable.

The summary recognises that both affordability and credit risk assessments have material probabilistic components, and that creditworthiness assessment is “not an exact science”.

1.17 In following our new rules and guidance, firms should use their judgement to decide what is appropriate in the circumstances. There may be multiple ways in which firms can comply with our rules, and we want firms to have a reasonable degree of flexibility according to the nature of the product and customer base, provided that they can demonstrate the basis for their decisions, if challenged.

1.22 Our approach is principled-based, rather than prescriptive, with a strong emphasis on proportionality. Lenders must assess affordability on the basis of sufficient information but we do not prescribe in detail what this should comprise or whether and how information should be verified. The extent of an assessment, and the types and sources of information used, should depend on

and be proportionate to relevant factors, and in particular the costs and risks of the credit in the individual case.

The FCA's statement of its approach in 2018 reflects the earlier thinking behind CONC and the FCA's approach to the regulation of these assessments.

118. The Defendant's process has evolved over time, but the essential point for the defence is that whilst the Defendant has learned from its experience, the scope and extent of the system, and in particular the creditworthiness assessment, has always been proportionate to the amount of the credit involved. Here the loans are for between £100 and £950. The relative size and term of the loan means that there is a limit to the loss the customer might suffer. The bigger the loan then generally the more that is to be expected of an assessment such as this. CONC 5.2.4 (2) includes this:

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.

119. I can see that there is an argument that it would not be proportionate to use more CRA data prior to the resolution of the back reporting issue in November 2017. That is in part because of cost and in part because of the limitations of the data the Defendant identified. The back reporting issue was not something the Defendant could resolve on its own. Reliance upon a collective failure in the industry not to move more quickly on the issue is not an attractive argument, but that was the reality at the time. I also have in mind that Mr Bartley said that the increased reliance on CRA data the Claimants argued for was not the industry standard at the time. I found Mr Bartley generally a reliable witness. That matter goes to proportionality, but is plainly not decisive. Mr Bartley also gave evidence to the effect that taken overall the additional data would not produce "better outcomes" and lead to a more complicated process. Precisely why that was would be a difficult matter to explore further, but I take that part of his evidence into account as well on the issue of proportionality. No doubt there would be cases where having the additional CRA data would have made the causative difference, but the proportionality of the system has to be considered in wider terms and on the basis of the position at the time. The FCA's calls for the use of more data in CP 4/10 is a powerful factor in the Claimants favour here, but I have concluded that on balance the absence of the use of further CRA data can be justified on the basis of proportionality.
120. The more difficult question for the Defendant was why it did not use the data it had about loans it had previously made to customers in undertaking its creditworthiness assessment. No reason was put forward for that omission or for the lack of some form of rule which used this data to reflect the potential for financial risk to the customer of further borrowing from the Defendant. Given the concerns expressed by the FCA about repeat borrowing, for example in Chapter 5 of CP 14/10, I found that surprising. The Defendant's creditworthiness assessment did take account of other credit commitments (and used material from CRAs to quantify that). But the rules employed used this in the context of assessing whether the loan was within the customer's ability to repay, rather than looking for patterns of lending or repeat borrowing.
121. The material the Defendant had about these loans was relevant to the creditworthiness assessment. The table Ms Bala referred to in closing (see below) shows that at least 5

of the sample claimants had significant numbers of loans from the Defendant over relatively short periods. All had loans from other lenders in addition to the loans from the Defendant, so that whilst this “in house” information may not be complete, it provides the Defendant with a picture which is almost certainly likely to be worse in reality.

122. With the benefit of the wider picture available from the credit reference checks Mr Clark produced schedules of the running number of loans each sample claimant took out with all providers over the 12 months preceding each of the Defendant’s loans. Whilst designed to fix the Defendant with liability for failing to use CRA data, the schedules show that had further information been obtained, a more worrying picture would have emerged in many if not most of the samples. Rarely does a Claimant’s running total of loans taken out in the last 12 months fall into single figures. Mr Hiscox’s running total climbs steadily to 35, most of which were Sunny loans. When Mr Kuschel took out loan 8 with the Defendant, he had taken out 24 loans in the previous 12 months. The figures for Ms Kerrigan’s borrowing are the starkest example of borrowing which was spiralling out of control. She took out 51 loans with the Defendant. By loan 14 she had a running total of 30 loans in the previous 12 months, and that number rose steadily so that by loan 50 she had a 12 month tally of 119. One extreme example does not prove Mr Clark’s point, but the overall pattern revealed by this analysis, and the number of Sunny loans it involves, does.
123. The issue about the classification of HCST lending prior to July 2017 is one the Defendant may rely upon in the consideration of the proportionality of its system in relation to the loans a customer had taken out from other lenders. But there was no such obstacle to it using the data it had about the lending it had made. It was relevant, accurate, available (indeed it was used to an extent in the credit risk assessment) and it involved no additional payment to a CRA. To quote the words of the rule, this was ... *information of which the firm is aware at the time the regulated credit agreement is to be made*; see CONC 5.2.1(2)(b) R

Component 3

124. The Defendant’s case throughout was that Component 3 played no part in its creditworthiness assessment, and given that the Claimants’ case has increasingly focussed the creditworthiness check and repeat borrowing, it does not have the relevance to the issues between the parties which might once have been the case. I deal with it briefly. It is best explained in a letter from the Defendant’s solicitors of 30 July 2019 exhibited to the witness statement of Mr Isaacs. It was adopted by Mr Bartley. Component 3 is only relevant to the decision to make the first loan to a customer. After that Mr Bartley says that the Defendant will use observed behaviour to determine commercial risk rather than Component 3. That observed behaviour is simply whether or not the customer has fallen into arrears (missed a payment) by more than 45 days. If they have, any subsequent loan is rejected even if affordability and creditworthiness assessments are satisfied.
125. Component 3 is a risk model which the Defendant developed over time. Prior to March 2015 Risk Score Model 3 was in use, and from March 2015 to November 2017 Risk Score Model 5. Model 4 was never used. The current risk model is Risk Score 7 which was introduced in December 2017.

126. The risk score model works by taking a number of variables and giving them weightings using bandings derived from an algorithm (a “logistic recession model”). The number of variables has increased over time. Risk Score Model 5 used 12 variables whereas Risk Score model 7 uses 98. In the course of the process of disclosure the Defendant’s solicitors provided a worked example how Risk Score Model 5 worked for Mrs Cullen, a copy of which is exhibited to Mr Barclay’s 1st witness statement [GB A page 40]. The information was obtained from the applicant, and from data from one or two credit reference agencies. If it was one it was Callcredit, and if it was two it was Callcredit and Experian.
127. An example of the type of information obtained from the CRAs is variable 6. That considers the number of credit accounts closed in the last 24 months. Perhaps counter intuitively the higher the number of closed accounts the higher the component score. That is because this component is about the commercial risk of making the loan, and a closed account is an indication that money was being repaid. Variable 7 is another example. This looks at the number of times an applicant has been granted credit in the past. Numerous successful applications suggest that the applicant has been considered as an acceptable risk by other lenders, hence the greater the likelihood that the Defendant will be repaid. To the same end, late payments on credit accounts were heavily penalised, and the greater the number of applications for a bank overdraft in the last 3 months weighted to reflect the higher risk of default.

Liability on the FSMA Claim

128. It is apparent from the evidence that the Defendant did not take the fact or pattern of repeat borrowing into account when considering the potential for an adverse effect on the Claimant’s financial situation. If there was a default on a loan with the Defendant, that would lead to a refusal of subsequent applications. But the process did not really look beyond that. There was no attempt to consider whether there was a pattern of borrowing which indicated a cycle of debt, or whether the timing of loans (for example paying off of one loan very shortly before the application for another) indicated a reliance or increasing reliance on HCST credit. In simple terms there was no consideration of the longer term impact of the borrowing on the customer.
129. The fact that the Defendant did not use the information it had about previous Sunny loans, and constructed its creditworthiness assessment without consideration of the risks presented by repeat loans satisfies me that it breached the requirements of CONC 5.2.1. The same breach can be analysed as a failure to base its creditworthiness assessment on sufficient information per CONC 5.2.1(3), a failure to establish and implement clear and effective policies and procedures to make a reasonable **creditworthiness assessment** or a reasonable assessment as required by **CONC 5.2.2R (1)**, and in the context of OFT 1107, a failure to take reasonable steps to assess whether a prospective borrower is likely to be able to meet repayments in a sustainable manner.
130. I also find that there were individual breaches of the requirements of CONC 5.3.7R. It would not be reasonable to expect the Defendant to spot something like Ms Adams’ dishonesty in making up an income. But the failure to consider matters such as the input of multiple zeros for outgoings on an application, and the failure to cross check

the information a customer provided about the level of other credit commitments against the equivalent information obtained from a CRA, are both matters which breach the requirements of CONC in the particular case. The former requires the Defendant to use its own systems to analyse the data it is receiving on the instant application. It might also be argued that checking this data against previous applications made in the recent past would be necessary to comply with the guidance to take “adequate steps”, but I was not asked to make a finding about that. The latter is a good example of a matter that falls within the guidance at CONC 5.3.8G.

131. It also became apparent that, until relatively recently, the Defendants rules did not take account of County Court Judgments (“CCJs”). This is directly relevant to the claims by Kaye and Edwards, but it also relevant to the wider issues Mr Clark raises as to whether the lending process complied with the requirements of CONC. Mr Bartley said that a CCJ was not necessarily predictive of a “poor customer outcome”. The CCJ could be for a small sum of money (the example was a parking ticket). It could, but the inability to pay even a small sum to avoid a judgment is a classic indicator of someone in financial hardship.

Causation on the FSMA claim

132. Given breaches of that nature, I turn to causation on the FSMA claim. This is a claim for breach of statutory duty. To succeed a claimant has to show that on the balance of probabilities damage was caused, both in fact and as a matter of law, by the Defendant’s breach of duty. It is in effect the same test as applies in the law of negligence. The issue of causation is to be considered on the facts of each individual claim. If a breach has no causal link to the loss the claim fails. Strictly that exercise has to be done in relation to each loan, although in practice it is likely that once a point is reached where the adverse consequences exercise should have prevented a loan from being made, it would be a relatively easy matter for the Claimant to establish causation on the same basis in relation to subsequent loans. There may be cases where it could be shown that the “pattern of borrowing” had ended because of the lapse of time or some other factor. But having been satisfied of a pattern by loan x, if lending continued without any significant gap, I doubt that a Court would require much persuading that there were further breaches of CONC causing loss.
133. In the course of his closing submissions, Mr Clark considered the approach where the breach was (what he termed) “systemic”. The argument arises from the breaches in the Particulars of Breach at (2) and the failure to have and to implement clear and effective policies and procedures. It was not that a further check of a particular kind should be done in a particular case. Mr Clark would submit that the Claimants do not need to identify what that check should be. Rather that, in the absence of the clear and effective policies and procedures required by CONC 5.3.2 R, loan applications should not be granted at all. The argument is that without clear and effective policies and procedures the lender cannot make a reasonable assessment of creditworthiness for the purposes of CONC, and without a compliant creditworthiness assessment the lender cannot enter into a credit agreement. Consequently none of the loans should have been made. In those circumstances the Claimants would have claims for the repayment of interest, and potentially for damages for the other losses they allege were caused by this lending.

134. The argument is attractive in its simplicity, and provides the Claimants with something of a short cut through the causation exercise. But in my view it fails to reflect the terms of section 138D(1). The sub-section provides as follows:

A contravention by an authorised person of a rule made by the FCA is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty.

A failure to comply with the requirements of CONC for the making of a creditworthiness assessment does not make the assessment void, nor does it affect the legal validity of the loan as such. It enables the FCA and the Ombudsman to exercise certain powers, and in the context of the civil law the breach of a rule gives rise to a claim for breach of statutory duty. For a breach to be actionable a person must suffer loss “as a result” of the breach.

135. A loan made following a non-compliant creditworthiness assessment may not cause a loss. It may not adversely affect the Claimant’s financial situation. It may even assist him or her by providing the short term finance needed to deal with a short term financial crisis. There may be cases where, without the Defendant’s loan, the borrower would end up in a worse financial position. So whilst there may be (in every case) a breach of the clear and effective policy and procedure rule, it cannot be said in every case that it will have caused the Claimant a loss. Whilst it would simplify the claims considerably, and might be a means by which the rule were effectively enforced, the requirement of the cause of action is that the breach causes a loss. That is consistent with the general approach to breach of statutory duty, and I see no proper basis to depart from that approach here.
136. The Defendant raised one fundamental argument on causation from the outset. It was to the effect that the Claimants would be unable to establish loss as a result of its lending even if that were in breach of the CONC rules in relation to the adverse consequences exercise. That was because as a matter of fact any loss would have been suffered anyway. If the Defendant refused an application because it had a CONC compliant creditworthiness assessment, the likelihood was that the applicant would simply apply to another HCST lender and get a loan. In other words as a matter of fact any loss caused by its non-compliant lending would have occurred anyway. Any breach on the part of the Defendant arising from its lending decision would not be causative of the interest payments or the detrimental effect on credit rating because the borrower would have obtained another loan which would have had the same effect.
137. Ms Bala established the evidential basis for that argument by asking each of the Claimants in cross examination what they would have done if their Sunny loan application had been refused. She suggested that they would have applied to another HCST lender. All of them used or had used other lenders, and whilst there was a variety of response from “of course” to something less certain, I am satisfied on the balance of probabilities that that is what they would have done. One claimant said that it was only Sunny who would lend to him, but that is a different question. Mr Clark did not seriously argue that the Claimants would not have applied elsewhere. The issue is determined on the balance of probabilities, because it is a question of what the claimant would have done.

138. The next question is, what would the other HCST lender have done? Mr Clark referred me to *Wright v Cambridge Medical Group* [2011] EWCA Civ 669. The Claimant in that case was admitted to hospital and developed an infection which was not diagnosed prior to her discharge. Her mother phoned the GP who negligently failed to arrange for her daughter to be seen. If she had been seen the GP accepted that he would have referred her to hospital. Two days later she was seen and immediately referred to hospital. She was not treated appropriately in hospital. Had she been she would have made a good recovery, but in the event she was left with some permanent injury. The claim was against the GP for the late referral, and not against the hospital. Negligence was admitted but the GP denied liability for the permanent injury. At first instance the claim failed on the basis that had the Claimant been admitted two days sooner she would not have been treated properly and so she would have suffered the permanent injury in any event.

139. Mr Clark referred me in particular to the following passage in the judgment of Lord Neuberger MR:

61. *Accordingly, it seems to me that, in a case where a doctor has negligently failed to refer his patient to a hospital, and, as a consequence, she has lost the opportunity to be treated as she should have been by a hospital, the doctor cannot escape liability by establishing that the hospital would have negligently failed to treat the patient appropriately, even if he had promptly referred her. Even if the doctor established this, it would not enable him to escape liability, because, by negligently failing to refer the patient promptly, he deprived her of the opportunity to be treated properly by the hospital, and, if they had not treated her properly, that opportunity would be reflected by the fact that she would have been able to recover damages from them.*

But for the GP's negligence the Claimant would have had the opportunity of proper treatment by the hospital. She succeeded because either she would have been properly treated or she would have been able to sue the hospital. Mr Clark submits that this sort of approach is applicable to the facts here.

140. Ms Bala draws attention to the fact that the second actor may not be acting wrongfully in lending (the lending being the cause of loss and the equivalent to the injury the Claimant suffered in *Wright*) and that consequently this was not a case analogous to *Wright*. That is correct, but the first question for me is whether some other lender would have lent. Because that is the hypothetical act of a third person, the matter is not to be determined on the "all or nothing" balance of probabilities approach. The court has to assess the chance that the third party would have acted in such a manner as would have avoided the harm done to the Claimant. So here the question is what percentage of HCST lenders would have lent?

141. The starting point for that issue is that the court should presume that other HCST lenders comply with CONC. That may not be the case, but that is the right place to start. There is some assistance on that point in the judgment of Lord Neuberger MR in *Wright* @ [75]:

It is true that the burden of establishing causation in a negligence claim is, in principle, as with every other ingredient of the claim, on the claimant. However, once the claimant established that (i) she could and should have been referred to the Hospital on 15 April, and (ii) she would not have suffered the damage now complained of had she been so referred and been treated competently at the Hospital, she had the benefit of a presumption that she would have been competently treated thereafter. In the absence of evidence to the contrary, the court will assume that professional and other service providers would have or have performed their functions competently. Of course, provided that I am wrong in my view that this presumption is effectively irrebuttable as a matter of law in a case such as this, that presumption can be discharged by evidence, but it is, as it were, the right starting point.

142. In that case competent treatment would have avoided the injury. But it is at this point that the analogy breaks down. For even assuming that the other HCST lender had a CONC compliant process, the information available to it may well be different, and it may come to an unimpeachable decision to lend. In those circumstances the loss would still be incurred.
143. That conclusion can be tested in this way. The principal basis of the Defendant's liability as I have found it, is a failure to use its own data about the borrowing it has made. What if an application was made for what would have been the Claimant's 12th loan from Defendant, and the court found that was a step too far? If the Defendant had refused the loan, the Claimant would have gone to another lender. It might be a firm the Claimant had never used before, and who had no reason to know that he was a repeat borrower. They lend but without breaching CONC. There is no claim against the second actor. And it does not stop there. If the second lender refused, would the Claimant go to a third and a fourth lender?. Would they lend, and if so would they be in breach? Causation is ultimately a matter for common sense; see *Galoo Ltd v Bright Graham Murray* [1995] 1 AER 16. It would be unduly onerous to expect the parties to an individual FSMA claim to have to deal with the multitude of issues thrown up by this analysis. The application of common sense may be the way through that. If the court is satisfied that there has been some substantial loss, it will have to make the best assessment it can.
144. In those circumstances the Claimant is left with a claim for loss discounted by the chance that the further lenders would grant them a loan in circumstances which did not give rise to another CONC claim. It is for the claimant to establish that the chance lost is real and substantial rather than negligible. I note the useful summary in Clerk and Lindsell on Torts 22nd ed para 2-80, but I did not hear argument on the question of how the quantification of the chance is to be approached in the circumstances of the individual claims.
145. The position would be simpler if all lenders were obliged to use real time data from all the relevant CRAs to carry out creditworthiness assessments. Unhappily that was not the case when most of the loans the subject of this litigation were made. Given the difficulties of the exercise and the fact of the administration of the Defendant, I have not attempted to work through the causation exercise on the facts of each claim. The more pressing need is to hand down a judgment dealing setting out the general nature of the decision.

146. The one other factual matter to raise in relation to causation is the effect of the conduct of an applicant. The Defendant raised the issue of Mrs Adams dishonesty in making up an income in relation to her CCA claim, and I return to it later in this judgment in that context. But it may also be relevant to causation in relation to the FSMA claim if it can be characterised as an intervening act; see generally Clerk and Lindsell para 2-107. Does the dishonesty in fabricating an income obliterate the wrongdoing of the Defendant? One objection may be that it pre-dates the Defendant's wrong and so does not intervene between the breach of duty and loss.

Loss on the FSMA claim

147. The obvious monetary loss is the additional interest a Claimant would pay as a result of taking a non-compliant loan. That is an uncontroversial head of damages.
148. Mr Clark pursued claims for general damages for loss of credit rating. The essential basis of the claim is sound enough. If a Claimant is a repeat borrower, it is reasonably foreseeable that non-compliant lending will have the potential to cause further financial difficulties. Unpaid loans and the like adversely affect a debtor's credit rating. None of the Claimants is in a position to show actual damage, but Mr Clark submits that damage is to be presumed. He relies firstly on the following passage in McGregor on Damages 20th ed at para 10-010:

Contract, on the other hand, having less concern with matters involving interference with the claimant's relationships with other people generally, provides few situations in which the court is ready to presume damage. The one clear case is that damages may be given for the general pecuniary loss by injury to credit and reputation caused by the defendants failure to pay the claimant's cheques or honour his drafts, a pecuniary loss which is difficult to estimate at all accurately The clearest explanation of the rule appears in Lord Birkenhead's speech in Wilson v United Counties Bank [1920] AC 102 @ 112 where he said that " the ration decidendi in such cases is that the refusal to meet the cheque, under such circumstances, is so obviously injurious to the credit of a trader that the latter can recover, without the allegation of special damage, reasonable compensation for the injury done to his credit".

149. The most helpful recent English authority is *Kpohraror v Woolwich Building Society* [1996] 4 AER 119, where Evans LJ (giving the leading judgment in the Court of Appeal) says this @ 124a-c:

It is abundantly clear, in my judgment, that history has changed the social factors which moulded the rule in the nineteenth century. It is not only a tradesman of whom it can be said that the refusal to meet his cheque is 'so obviously injurious to [his] credit' that he should 'recover, without allegation of special damage, reasonable compensation for the injury done to his credit' (see [1920] AC 102 at 112, [1918-19] All ER Rep 1035 at 1037 per Lord Birkenhead LC). The credit rating of individuals is as important for their personal transactions, including mortgages and hire-purchase as well as banking facilities, as it is for those who are engaged in trade, and it is notorious that central registers are now kept. I would have no hesitation in holding that what

is in effect a presumption of some damage arises in every case, in so far as this is a presumption of fact."

150. I was also referred to the Scottish case of *Durkin v DSG Retail Ltd and HFS Bank plc*, a decision of Sheriff Tierney reported in 2008 in the Goode Consumer Credit Reports [2008] GCCG 3651. In that case HFC advised the Credit Reference Agencies of Mr Durkin's alleged default on a credit agreement he had taken out for the purchase of a laptop. He had rejected the laptop, and was entitled to do so, and consequently brought a claim against HFC for making a negligent misrepresentation that he was in default of his payment obligations to them. The Sheriff says this at [117]:

Had there been no finding of specific loss in this case, I would have no hesitation in finding that an award of damages for the mere injury to credit was appropriate. In modern society credit plays a very big part in the conduct of the daily lives of a significant portion of the population. The financial services industry is constantly advertising loans, credit cards, store cards, mortgages, consolidation accounts etc. To have one's credit worthiness impugned so that one is at risk of being unable to obtain credit on the grounds that he is not credit worthy is, if anything, a more significant matter for the individual than it would have been at the time of King over a hundred years ago.

The award was of £8,000 general damages, although it is fair to say that Mr Durkin's credit position prior to the representation was somewhat healthier than the credit ratings of any of the sample claimants. The case went to the Supreme Court, but not on the issue of the availability and assessment of this head of damage, which the Bank did not challenge.

151. Ms Bala also referred me to *Turner v RBS*; Court of Appeal transcript 30 June 2000 and to *Grace v Black Horse* [2014] EWCA Civ 1413. In *Turner* a Bank was not liable for substantial damages for giving references (allegedly without consent and in breach of confidence) because they were accurate; see Chadwick LJ @ [40]. In *Grace* a claim was made for damages for breach of statutory duty pursuant to section 13 of the Data Protection Act 1998. The bank registered a default on a hire purchase agreement which was irredeemably unenforceable. The question was – was that a breach of the 1998 Act; see [34]. The answer was – Mr Grace could not be accurately described as a defaulter if his liability arose under such an agreement. Briggs LJ, giving the leading judgment, did not find the matter an easy one to resolve, but in doing so I note that at [41] he acknowledged that a default registration with a CRA

... is a stigma, with potentially serious consequences for the consumer's credit rating

152. Ms Bala submitted that the authorities established only that there was liability for a wrongful act of reporting. She submitted that it was a defence to show that the information reported back to the CRAs was accurate. If this was a claim based upon negligent misstatement, as it was in *Durkin*, or the DPA as it was in *Grace*, I can see how that argument might arise, so long as the statement was accurate at the time. If Mr Durkin had in fact been in default there could be no basis for the claim of negligent misstatement against the bank. But here it is not a question of whether or not the information was accurate at the time. The claim does arise from the back reporting

itself. The claimants say that their loss of credit rating is one of the losses they suffered as a result of the Defendants breach of CONC. If they establish that their loan applications should not have been accepted, and they would not have obtained the money elsewhere, then they would not have defaulted on these loans and their credit rating would not have been adversely affected. The same logic applies to other entries which had an adverse effect back reported as a result of loans which should not have been made.

153. In those circumstances I agree with Mr Clark's submission that this is a recoverable loss, that loss may be presumed, and that general damages are an appropriate remedy. Some evidence of the extent to which the claimant's credit rating was affected by the relevant entries needs to be available so that the court can be satisfied there was some significant change, and so that it may assess the appropriate level of award. Inevitably that will be a broad brush exercise. Mr Clark did that in the course of his closing submissions, although the scores available significantly post-dated the last of the Defendant's loans, and so may well have improved since the relevant time. He submitted that the £8,000 awarded in *Durkin* was a benchmark and that the figure needed to be updated. I am bound to say I regard that sort of figure as above the likely level of awards in these sorts of cases. The obvious difference between the reported authorities such as *Durkin* and the facts here is that the credit ratings of these Claimants were already somewhat tarnished. It will vary from case to case, but general damages are unlikely to be anywhere near the £10,000 Mr Clark contended for.
154. Whilst the FSMA claim is plainly the place to start with claims such as this, the application of the principles of causation and the working out of loss may make the unfair relationship claim a more attractive vehicle for these claims. However, before I come to the CCA claims, it is convenient to deal with the claim in negligence for general damages for psychiatric injury brought (here) by Mr Kuschel.

The Negligence claim

155. Christopher Kuschel was born in July 1987 and is now 32. He went to University and took a PGCE. That led him into teaching. He had some money problems when he was at University. His evidence was that he applied for a personal loan and perhaps some credit cards, but was rejected because of his credit rating. The schedule at B38 and the credit report at C1/9 record his current account overdraft with the Nationwide. There were arrears or missed payments in January, March and October 2014. The schedule also indicates that he missed payments with Orange in the period from 2013 to 2016. He also had a problem with cocaine use and alcohol, which appears to have begun whilst he was at University, and continued throughout the period in question. He gave his evidence well. He was open, frank and realistic. He did not try to hide what must have been some painful and embarrassing issues.
156. Mr Kuschel took out 112 high cost short term loans in the period from 8 February 2014 to 8 November 2017. Of those 24 were with Sunny over the period from 13 September 2015 to 30 September 2017. All were entered into after CONC 5A came into effect, and all prior to November 2017 when the Defendant changed the back reporting status of its own loans. They were all fixed term loans for a period of 6 months and were for sums ranging from £50 to £800, with the majority being for £100

or £150. All were repaid within the period of the loan, save for loans 22 and 23, which were open when Mr Kuschel went into an IVA on 8 November 2017.

157. In addition to FSMA and CCA claims, Mr Kuschel brings a claim for damages in negligence for the psychiatric injury he suffered as a result of the Defendant's negligence. Mr Kuschel readily accepts that he had problems well before he started taking out loans, but his claim relates to the aggravation of his pre-existing depressive condition. Dr Isaac is a Consultant Psychiatrist and was instructed as a single joint expert. His report of 20 November 2019 and the answers to the written questions he was asked by the Claimants are in bundle D. Dr Isaac's diagnosis is at paragraph 71 of his report:

Mr Kuschel has a long history of major depressive disorder, recurrent, mild, without psychotic features, now in good partial remission (DSM5 296.35; ICD10 F33.41).

158. The first relevant medical record is in 2005, when Mr Kuschel reported panic attacks. He attended his GP in 2010 when he was treated with anti-depressants, and then again in early 2012 when he was again prescribed medication. In January 2013 he returned to his GP and his medication was changed. He continued taking it through 2013. By 2014 he had qualified as a teacher. In September 2014 the GP tried changing the medication again, and Dr Isaac's report summarises the position over 2014 and 2015. There was a good early response to the medication (and to changes in medication) and he describes Mr Kuschel's depression as intermittent. There is no evidence that it was ever severe.
159. Dr Isaac's opinion is that Mr Kuschel's condition did not materially deteriorate in line with his borrowing behaviour, but he identifies a period towards the end of 2017 when "money worries" form part of a list of contemporaneous stressors. He was referred for counselling for anxiety in June 2017; D64, a GP re-started him on an anti-depressant in August 2017, and in January 2018 he reports that his depression is worse. The note is at D29 and reads as follows:

depression worse, split up with girlfriend 4m ago, money worries, works as a teacher finds v stressful.

He did not admit to the GP more than an occasional drink with friends, and said that he was not taking drugs other than diazepam. In his evidence, he frankly volunteered that he had used cocaine and alcohol over a prolonged period.

160. As I say, Mr Kuschel readily accepted that his problems with money and his depression pre-date his use of high cost short term loans. Nor is it the case that these loans are the sole cause of the aggravation of his problems. The issues of debt, depression, and substance abuse are inter-connected. In his evidence Mr Kuschel spoke of bingeing on alcohol and cocaine, and using expensive websites as an escape from his depression. In funding that behaviour he would use whatever money he could obtain, some of which came from lenders such as the Defendant. That expenditure, and the consequent high cost of borrowing exacerbated his money troubles, which in turn increased his levels of anxiety, and so on. Mr Kuschel

accepted that he never told the Defendant about his depression, even when he spoke to a member of their staff.

161. Dr Isaac's evidence is that financial struggles are well recognised to worsen mood [D12], and that Mr Kuschel's debts no doubt played an important part in his anxiety [D22]. The height of his evidence for the Claimant's case is this [D23]:

8.(1) Mr Kuschel's repeated borrowing probably played an important part, even the single most important part, in his worsened depression, but not the sole part.

I take this to be a reference to the period at the end of 2017 when there was a deterioration, and there was some objective evidence that money troubles played a part. The Defendant would emphasise Dr Isaac's evidence that there were other factors in play, variously loss of relationship, a stressful job and potential isolation in a new city (Bristol), and that [D13]:

... Mr Kuschel's condition did not materially deteriorate in line with his borrowing behaviour"

162. I accept that the anxiety caused by debt was a significant cause of Mr Kuschel's continuing depression, and it does appear that the period from the Summer of 2017 was a particularly difficult time. Matters came to a head in November 2017 when Mr Kuschel went into an IVA.
163. The pleaded FSMA claim included a claim for personal injury for breach of CONC 5.2R; see para 12 of the Re-Amended Particulars of Claim. The Defendant's case was that CONC 5.2 does not contemplate the risk of psychiatric harm to borrowers, and that the explicit purpose of the rule is to ensure that a firm considers the potential for the proposed credit agreement to adversely impact the customer's **financial** situation (my emphasis). Having considered Ms Bala's skeleton argument, the Claimants decided not to pursue that aspect of the claim, and in opening Mr Clark limited the claim for psychiatric injury to one in negligence. Mr Kuschel's case is that the Defendant was subject to a duty to take reasonable care in undertaking the creditworthiness assessments (and in taking the lending decision which followed on from that assessment) not to cause him psychiatric injury. His case is that the Defendant breached that duty, and as a result Mr Kuschel suffered an aggravation of his previously diagnosed clinical depression.

The existence of a duty of care in negligence

164. Mr Clark accepts that there is no decided case in which someone in Mr Kuschel's position has recovered damages for psychiatric injury in negligence. His starting point is the well-known passage in the judgment of Lord Bridge on *Caparo v Dickman* [1990] 2 AC 605 @ 617-618:

What emerges is that, in addition to the foreseeability of damage, necessary ingredients in this situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the Court

considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other.

Mr Clark develops his argument at paragraphs 47-57 of his skeleton argument.

165. The court's approach to establishing a duty of care in negligence, and the "3 stage" *Caparo* test were considered and explained by Lord Reed giving the judgment of the majority in *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4 @ [21]-[30]. I set out below the three particularly relevant paragraphs of that part of the judgment.

[21] *The proposition that there is a Caparo test which applies to all claims in the modern law of negligence, and that in consequence the court will only impose a duty of care where it considers it fair, just and reasonable to do so on the particular facts, is mistaken. As Lord Toulson pointed out in his landmark judgment in Michael v Chief Constable of South Wales Police (Refuge and others intervening) [2015] UKSC 2; ... para 106, "that understanding of the case mistakes the whole point of Caparo, which was to repudiate the idea that there is a single test which can be applied in all cases in order to determine whether a duty of care exists, and instead to adopt an approach based, in the manner characteristic of the common law, on precedent, and on the development of the law incrementally and by analogy with established authorities."*

[25] *Lord Bridge immediately went on to adopt an incremental approach, based on the use of established authorities to provide guidance as to how novel questions should be decided:*

"I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes. We must now, I think, recognise the wisdom of the words of Brennan J in the High Court of Australia in Sutherland Shire Council v Heyman (1985) 60 ALR 1, 43-44, where he said:

'It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories ...'" (p 618)

It was that approach, and not a supposed tripartite test, which Lord Bridge then proceeded to apply to the facts before him.

[29] *Properly understood, Caparo thus achieves a balance between legal certainty and justice. In the ordinary run of cases, courts consider what has been decided previously and follow the precedents (unless it is necessary to consider whether*

the precedents should be departed from). In cases where the question whether a duty of care arises has not previously been decided, the courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. They will also weigh up the reasons for and against imposing liability, in order to decide whether the existence of a duty of care would be just and reasonable. In the present case, however, the court is not required to consider an extension of the law of negligence.

See also *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50 @ per Lord Lloyd-Jones @ [15].

166. Consequently the first step is to consider the existing authorities on the existence and non-existence of a duty of care in a situation such as this, and to see whether there are analogies which may be drawn. On the face of it, this is a claim for pure psychiatric injury. The aggravation of Mr Kuschel’s depression is not the consequence of a physical injury, nor is it the consequence of damage to property. There is no physical or temporal proximity to some terrible event, or close relationship with a primary victim of a tortious act. His injury arises from decisions to lend him money. That led to a worsening of his debt problem, and that aggravated his depression. There is no decided case where the court has found that such a duty of care exists in that sort of situation or anything analogous to it.
167. There are cases where claimants have recovered damages for psychiatric injury as a result of occupational stress. But that is in the context of the well-established duty of an employer to provide an employee with a reasonably safe system of work. There would be no question but that an employee could recover for physical injury, and there is no logical reason why psychiatric injury should be excluded from the scope of that duty.
168. Mr Clark refers to *Butchart v. Home Office* [2006] EWCA Civ 239, where the Court of Appeal considered a claim for damages for psychiatric injury suffered by the claimant while a prisoner arising from the experience of the suicide of his cellmate. Once again this was a case where there was a well-recognised duty of care owed by the Home Office to prisoners in its charge. The issue was the scope of that duty, and in particular whether it included a duty to take reasonable steps to avoid prisoners suffering psychiatric harm. The argument was that the Home Office knew or ought to have known that the claimant was a prisoner vulnerable to psychiatric harm. If it did then it was:

... inevitable that the duty of care which the defendant owed to the claimant included a duty to take reasonable steps to minimise the risk of psychiatric harm.

per Latham LJ @ [20]. Similarly in *Sutherland v Hatton* [2002] EWCA Civ 76, the existence of a duty of care could be “*taken for granted*”; per Hale LJ [19]. The issue was the definition of the duty, or setting the standard of care in order to decide whether it had been broken; see [23].

169. The relationship between this claimant and the alleged tortfeasor was a financial one. Whilst Mr Clark would characterise this claim as concerning psychiatric harm, that harm is consequent upon the financial loss caused by the Defendant's negligence. The better analogy here is with a claim for financial loss. It is also relevant to note that the courts have taken a more restrictive approach to the imposition of a duty of care in relation to pure financial loss claims than in relation to cases of physical damage. There is a helpful summary of the reasons for that in Clerk and Lindsell on Torts 22nd ed at para 8-97.
170. Mr Clark submits that in carrying out a statutory duty (here the creditworthiness assessment) a defendant may bring about a relationship which gives rise to a duty of care at common law. He relies on the decision in *Green v BBS (FCA intervening)* [2013] EWCA Civ 1197. That was a case where a bank had mis-sold the claimant an interest rate swap in breach of the FCAs Conduct of Business rules ("COB"). Section 150 of FSMA made that breach actionable, but the FSMA claim was abandoned. A claim in negligence was made. It was said that where the bank had failed to comply with its statutory duty and such a failure was likely to give rise to damage to the counterparty, a duty of care arose at common law which was co-extensive or concurrent to that imposed by statute; see [20].
171. The passage Mr Clark particularly relies upon is from the judgment of Tomlinson LJ @ [29], with whom Hallett and Richards LJJ agreed.

The existence of a statutory duty may give rise to a common law duty of care in circumstances where breach of the statutory duty is not actionable in private law. The more usual case is where in performance of a statutory duty a party, usually but not always a public authority, brings about a relationship between itself and another person such as is recognised to give rise to a duty of care owed to that person. Again, the duties are not co-extensive and the duty at common law does not arise by reason of the imposition of the statutory duty but arises out of the relationship so created.

The passage reflects the fact that in certain circumstances the duty "may" arise, but that is as far as it goes. It is the relationship between the parties which is of greater importance.

172. *Green* is of real relevance here because it is a decision about the extent of a duty of care in the context of a financial relationship regulated by the FCA. The trial judge (HHJ Waksman QC, as he then was) "assumed uncontroversially" that the bank owed the claimants a common law duty to take care when making statements in relation to which it knew or ought to have known the claimants would rely upon its skill and judgment (a *Hedley Byrne* duty). He held that such a duty was not co-extensive with the statutory duty and did not require the giving of information (which the COB rules positively required) but was limited to a duty not to misstate; see [17]. Had the bank undertaken an advisory duty then there would have been a common law duty to act with skill and care, the extent of which would normally include compliance with the relevant regulatory rules; see [18]. But that was not the position in *Green*, and the claimants attempts to extend the *Hedley Byrne* duty incrementally failed both before the trial Judge and before the Court of Appeal; see [21]-[22]. The point Ms Bala

makes is that even if there were some duty owed by the Defendant to Mr Kuschel, the content would not even be co-extensive with the obligations of CONC.

173. The duty to take care not to inflict psychiatric harm contended for in this case goes beyond the obligations of CONC. *Green* illustrates just how far away Mr Kuschel's case is from decided authority. There would be nothing incremental about the extension of the law to cover the duty contended for. In contrast with the sorts of cases where a duty has been found in financial relationships:
- (i) there is no advice given, nor is it suggested that the Defendant made some actionable representation or (mis)statement;
 - (ii) there is no holding out of expertise or the like;
 - (iii) there is no misstatement; and
 - (iv) nor is there an assumption of responsibility of a duty of care not to make a loan which causes psychiatric harm.
174. The lending process is designed to attract customers, and (it might be said that) the Defendant would understand that it was attracting customers who were unable to borrow elsewhere and who would, at times, be in desperate need of money. In that sense there may be an inequality in the relationship. But that is not sufficient. Nor can it properly be said that Mr Kuschel is relying upon some implicit representation that this loan is affordable for him and/or that he is creditworthy. He is being lent money when it may be that he should not have been.
175. Mr Clark accepted that this is a novel case, but submitted that this was not a significant extension of the law of negligence. I do not agree. There is neither the closeness of relationship nor the reliance upon advice or representation that are seen in cases where the courts have found that a duty of care exists in the context of the provision of some sort of financial service. Ms Bala's analysis is that this is a claim for psychiatric injury resulting from (what would otherwise be) pure economic loss and is (as she puts it) "*beyond the outermost reaches of the law of tort*". The lack of analogous cases, and the gap between the decided cases and the circumstances of this one suggests that this is not a case where an extension of the law is required.
176. Mr Clark relies on *Caparo*. As to the first requirement, it is Mr Kuschel's case that psychiatric injury was reasonably foreseeable if he was lent money which he could not afford to repay (I summarise). Mr Clark puts the argument on two bases. Firstly (as I would accept) a lender may reasonably foresee that a borrower may suffer anxiety and distress if they were unable to keep up their loan repayments, and so went further into debt. Mr Clark takes that as a starting point and submits that for the purposes of the test of reasonable foreseeability, anxiety and distress are the same type of damage as psychiatric injury. He submits that if anxiety and distress are reasonably foreseeable, that is sufficient to ground a duty in relation to psychiatric harm. Here he relies on the decision of the Court of Appeal in *Essa v Laing Ltd* [2004] EWCA Civ 2. The issue in *Essa* was not whether a duty of care arose, but the extent to which a claimant in a claim for damages under sections 56 and 57 of the Race Relations Act 1976 could recover loss which went beyond that which was reasonably foreseeable. It would be wrong for

me to finally determine the point in the circumstances of this case, but my view is that in the eyes of the law there is a significant difference between anxiety and distress on the one hand, and psychiatric injury on the other. Whilst the latter may form the basis of a claim in negligence, the former (of itself) will not. Damages for distress may be recoverable in certain circumstances, but such claims are either an incident of claims in relation to other loss, or a recognised exception. I very much doubt that showing that anxiety and distress are reasonably foreseeable will suffice.

177. Secondly, the Defendant ought to have known of a correlation between debt and mental health conditions, and that debt may be causative of the onset or aggravation of such conditions. Mr Clark made reference to the FCA's treatment of the issue in CP13/10, CP14/10 and PS14/16. Here it is said that the Defendant is to be taken to have known of Mr Kuschel's pre-existing clinical depression because it was obliged to consider the customer's vulnerability as part of the creditworthiness assessment. Mr Clark submits that there should be a direct question to the effect – do you have or have you ever suffered from a psychiatric condition. The Defendant suggests that it cannot ask such a question because it would breach the terms of the Equality Act. Without going into detail, I prefer the Claimant's position on the Equality Act issue. Mr Kuschel is not disabled, and the sort of question Mr Clark proposes would be a proportionate means of achieving a legitimate aim so long as the Defendant's response to the answer was a genuine weighing of the borrowers' interests, and not a blanket refusal to lend. I accept that vulnerability goes beyond mental capacity, and for the purposes of this argument I would be prepared to assume that there should have been a simple question about vulnerability such as the Defendant now includes within its lending process. I assume for the sake of the argument Mr Kuschel would have answered that question truthfully.
178. Secondly proximity. I have already referred to the nature of the relationship between these parties. It is not one of trust and confidence, but more akin to a commercial relationship. Statutory duties arise, and as I note above, Tomlinson LJ in *Green* recognises that a relationship may arise from which a duty can be spelt out.
179. I am not persuaded that the arguments as to foreseeability or proximity are sufficiently strong to justify an extension of the common law in this area. But it is the application of the third stage of the *Caparo* test which provides the clearest answer to the question. The core of Mr Kuschel's case here is that in the absence of a remedy via regulation, there is a gap, and that given the limited scope of the duty contended for and the significant benefit to borrowers who suffer psychiatric injury as a result of this negligence, it is fair just and reasonable to impose a duty.
180. The reliance upon the absence of provision for awards for damages for psychiatric injury in a claim pursuant to section 138D of FSMA is misplaced.

The existence of the action for breach of statutory duty consequent on contravention of a rule does not compel the finding of such a [co-extensive common-law] duty – indeed ... it rather tells against it.

see Richards LJ in *Green* @ [30]. It may be that there are areas in the common law where developments in analogous or related areas have left an obvious inconsistency – where there is no reason of logic or policy why a duty should not be imposed. But here the surrounding common law landscape does not provide that sort of assistance. There

is no gap in the common law. The only “gap” is because the statutory regime has left one. That must have been deliberate.

181. It is not suggested (as I understand it) that there should be a duty owed by every lender to every borrower not to cause them psychiatric injury by lending them money they may be unable to repay. That would impose an unduly onerous obligation on a party to a commercial relationship and really would be beyond the outer reaches of the law of negligence. What I am asked to do is fill a deliberate gap in the statutory regime. That is in the nature of a bootstraps argument, for the statutory regime has been put there to provide protection and regulation beyond that contemplated by the common law. Nor even is this a situation where I am asked to find that there is a common law duty co-extensive with the statutory duty. What is being sought is a finding of a common law duty which goes beyond the statutory duty. It would not be fair just and reasonable to in effect extend the scope of the regulation by recognising the duty of care contended for.
182. In summary, I am not persuaded that the arguments as to reasonable foreseeability and proximity justify an extension of the law to cover the claim Mr Kuschel makes. If I am wrong about that, it would not be fair just and reasonable to impose such a duty. Given that such a development in this area would build on the existing regulatory regime, it is a pre-eminently a matter for the regulator (certainly at the present time). The FCA is considering whether a general duty of care should be imposed by statute; see FS19/2. It is apparent that unsustainable lending to vulnerable people can cause them harm which goes beyond the financial, but the FCA is better placed to evaluate and balance the competing public interests at play here.
183. Mr Kuschel’s claim in negligence for personal injury is dismissed. It is unnecessary to deal with issues of breach or causation, both of which are tied to the nature and extent of the duty

The Unfair relationship claims

184. The third section of this judgment deals with the CCA claim. The law here is reasonably well developed, although it has not before been applied in a factual situation such as this. The relevant terms of sections 140A-C are set out at paragraphs [10-11] above. As will be apparent, whilst I have been able to consider the majority of the issues of principle which arise, and reach conclusions on the question of unfairness, the question of remedy in the individual cases is not one which I have determined. Given the administration of the Defendant and the need for this judgment to be handed down I have decided it is better to provide a judgment which deals with those matters, and work through other matters if and when it is necessary to do so.
185. The leading authority on these provisions is the decision of the Supreme Court in *Plevin v. Paragon Personal Finance Limited* [2014] UKSC 621. In that case Mrs Plevin bought a PPI policy in relation to a loan she took out. 71% of the premium she paid was commission, which was shared between the broker and the lender. The FSA’s Insurance Conduct of Business Rules (ICOB) did not require disclosure of commission to a consumer, and at first instance the unfair relationship claim failed. The Recorder was bound by the Court of Appeal’s decision in *Harrison v Black Horse Ltd* [2011] EWCA Civ 1128. The Supreme Court overruled *Harrison*. Lord

Sumption concluded that any reasonable person who was told that more than two thirds of the premium was going to intermediaries would be bound to question whether the insurance was value for money and whether it was a sensible transaction to enter into, and that the commission was so large that the relationship could not be regarded as fair if the customer was kept in ignorance of it. The case was remitted to the County Court (where Mr Clark represented Mrs Plevin). HHJ Platts stressed that his decision was based on the peculiar facts of the case, and gave relief from paying the commission (in round figures £4,500) rather than the entire premium, for Mrs Plevin had had the benefit of the insurance cover.

186. These claims are different from *Plevin* on their facts, not least because I have concluded that there were breaches of the relevant regulatory framework. But the guidance provided by the Supreme Court is of considerable importance. Lord Sumption gave a judgment with which the other members of the Court agreed. In the following two paragraphs he considers the nature of the jurisdiction.

[10] *Section 140A is deliberately framed in wide terms with very little in the way of guidance about the criteria for its application, such as is to be found in other provisions of the Act conferring discretionary powers on the courts. It is not possible to state a precise or universal test for its application, which must depend on the court's judgment of all the relevant facts. Some general points may, however, be made. First, what must be unfair is the relationship between the debtor and the creditor. In a case like the present one, where the terms themselves are not intrinsically unfair, this will often be because the relationship is so one-sided as substantially to limit the debtor's ability to choose. Secondly, although the court is concerned with hardship to the debtor, subsection 140A(2) envisages that matters relating to the creditor or the debtor may also be relevant. There may be features of the transaction which operate harshly against the debtor but it does not necessarily follow that the relationship is unfair. These features may be required in order to protect what the court regards as a legitimate interest of the creditor. Thirdly, the alleged unfairness must arise from one of the three categories of cause listed at sub paras (a) to (c). Fourthly, the great majority of relationships between commercial lenders and private borrowers are probably characterised by large differences of financial knowledge and expertise. It is an inherently unequal relationship. But it cannot have been Parliament's intention that the generality of such relationships should be liable to be reopened for that reason alone.*

...

[17] *The view which a court takes of the fairness or unfairness of a debtor-creditor relationship may legitimately be influenced by the standard of commercial conduct reasonably to be expected of the creditor. The ICOB rules are some evidence of what that standard is. But they cannot be determinative of the question posed by section 140A, because they are doing different things. The fundamental difference is that the ICOB rules impose obligations on insurers and insurance intermediaries. Section 140A, by comparison, does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with the question whether*

*the creditor's relationship with the debtor was unfair. It may be unfair for a variety of reasons, which do not have to involve a breach of duty. There are other differences, which flow from this. The ICOB rules impose a minimum standard of conduct applicable in a wide range of situations, enforceable by action and sounding in damages. Section 140A introduces a broader test of fairness applied to the particular debtor-creditor relationship, which may lead to the transaction being reopened as a matter of judicial discretion. The standard of conduct required of practitioners by the ICOB rules is laid down in advance by the Financial Services Authority (now the Financial Conduct Authority), whereas the standard of fairness in a debtor-creditor relationship is a matter for the court, on which it must make its own assessment. Most of the ICOB rules, including those relating to the disclosure of commission, impose hard-edged requirements, whereas the question of fairness involves a large element of forensic judgment. It follows that the question whether the debtor-creditor relationship is fair cannot be the same as the question whether the creditor has complied with the ICOB rules, and the facts which may be relevant to answer it are manifestly different. **An altogether wider range of considerations may be relevant to the fairness of the relationship, most of which would not be relevant to the application of the rules. They include the characteristics of the borrower, her sophistication or vulnerability, the facts which she could reasonably be expected to know or assume, the range of choices available to her, and the degree to which the creditor was or should have been aware of these matters.***

[my emphasis]

187. The first issue is whether the relationship was unfair. As Ms Bala points out in her skeleton argument on the subject, the concept of unfairness is not an unfamiliar one. Lord Hoffmann described it as “*deliberately imprecise*” in the context of the unfair prejudice provisions of the Companies Act 1985; see *O’Neill v Phillips* [1999] BCC 600, and in *Plevin @* [10] Lord Sumption draws attention to the wide terms in which the section is framed. But it is a concept which must be applied judicially and upon rational principles. In *O’Neill* the approach of the court focussed upon the operation of settled equitable principles (as opposed to something less principled) to restrain the exercise of legal rights. Here the underlying regulatory framework occupies a similar position.
188. The result in *Plevin* makes it plain that non-compliance with the relevant rules is not the question. The question of the fairness of the relationship is a decision for the court in the individual case having taken account of the “...*wider range of considerations*” Lord Sumption refers to. But given the nature of the unfairness alleged in these cases, the rules are plainly of considerable relevance. They reflect the well-considered policies of the statutory body with responsibility for regulating the area, and are drafted with a view to meeting the objectives set out in section 1C of FSMA. They are designed to secure ... *an appropriate degree of protection for consumers.*
189. It is no part of the Claimants case that the rules are inadequate or that there is some gap in them, nor does the Defendant say that they are overly onerous or work some unfairness on the Defendant. Indeed, just as Mr Clark relies upon the lack of expertise and experience of the Claimants, Ms Bala draws attention to section 1C(2)(d) of

FSMA and the principle that consumers should take responsibility for their decisions, and reminds me of the judgment of Lady Hale in *OFT v Abbey National plc* [2009] UKSC 6 at [93]:

As a very general proposition, consumer law in this country aims to give the consumer an informed choice rather than to protect the consumer from making an unwise choice.

190. The court is not bound to adopt the line drawn by the FCA in its drafting of CONC in this sort of case, but where the rules take account of the need to balance relevant matters of policy, at the lowest it provides a starting point for the consideration of fairness, and at the highest it is a powerful factor in deciding whether the individual relationship is fair or not. Given the burden of proof, when the rules are breached in a substantive way, it is likely to be difficult for the Defendant to show that the relationship was fair.
191. One of the difficulties the Claimants face in a FSMA claim based upon failure to pay any or any adequate regard to the issue of repeat borrowing, is proving the causation of an identifiable loss. At one end of the spectrum there will be cases where it is apparent that a debtor is using a loan to refinance their borrowing. In those circumstances the claimant has a relatively simple claim for the return of the interest they have paid, and may be able to establish other consequential loss. At the other end of the spectrum are cases where the loan is being used as intended – to cover a short term crisis. But as the analysis of the various sample claims illustrates, there are many which occupy the ground between those two extremes.
192. The central matters of relevance in claims of this sort will be compliance with CONC, the terms of the agreements, and the conduct of the parties. For the sake of completeness I refer to the non-exhaustive list of relevant factors set out in the judgment of Hamblin J (as he then was) in *Deutsche Bank (Suisse) v Khan* [2013] EWHC 482 (Comm) at [346].

[346] *These authorities suggest that the matters likely to be of relevance include the following:*

(1) In relation to the fairness of the terms themselves:

- a. whether the term is commonplace and/or in the nature of the product in question (Rahman [277]);*
- b. whether there are sound commercial reasons for the term (Rahman [278]);*
- c. whether it represents a legitimate and proportionate attempt by the creditor to protect its position (Maple Leaf [288]);*
- d. to the extent that a term is solely for the benefit of the lender, whether it exists to protect him from a risk which the debtor does not face (Maple Leaf [289]);*
- e. the scale of the lending and whether it was commercial or quasi-commercial in nature (Rahman [275]) (a court is likely to be slower to find*

unfairness in high value lending arrangements between commercial parties than in credit agreements affecting consumers); and

f. the strength (or otherwise) of the debtors bargaining position (Rahman [275]);

g. whether the terms have been individually negotiated or are pro forma terms and, if so, whether they have been presented on a "take it or leave it" basis (Rahman [275]);

(2) In relation to the creditor's conduct before and at the time of formation:

a. whether the creditor applied any pressure on the borrowers to execute the agreement (if an agreement has been entered into with a sense of urgency it will be relevant to consider to what extent responsibility for this lay with the debtor, as distinct from the creditor) (Maple Leaf [274]);

b. whether the creditor understood and had reasonable grounds to believe that the borrower had experience of the relevant arrangements and had available to him the advice of solicitors (Maple Leaf [274]);

c. whether the creditor had any reason to think that the debtor had not read or understood the terms (Maple Leaf [274]); and

d. whether the debtor demurred at the time of formation over the terms he now suggests are unfair (this point has particular force if he did complain over other terms) (Maple Leaf [274]; Rahman [276]).

(3) In relation to the creditor's conduct following formation and leading up to enforcement:

a. whether any demand was prompted by an "improper motive" or was the consequence of an "arbitrary decision" (Paragon Mortgages [54(b)]);

b. whether the creditor has shown patience and, before leaping to enforcement, has taken steps in the hope of reaching some form of accommodation (for example by attending meetings, engaging in correspondence and/or inviting proposals) (Rahman [280-281]); and

c. whether the debtor has resisted attempts at accommodation by raising unfounded claims against the creditor (Rahman [280-281]).

Obviously not all of those matters apply to these HCST cases, but the list is a useful cross check.

193. As to terms, the principal area of challenge is the rate prior to the cost cap imposed by CONC 5A on 2 January 2015. The initial costs cap was 0.8% interest per day with a total costs cap of 100% of the principal. The rates being charged by the Defendant prior to its introduction were generally 0.97% per day with a cap of 150% of the amount of credit. That equates to 29% per month (the way the rate was represented to the applicant) or 348% pa (although the loan could only run for 6 months at the most) The Defendant did not compound interest, charge arrangement fees or impose default charges.
194. Ms Bala's submissions focus on a number of matters. Firstly she says that the rates being charged by the Defendant were "in kilter" with the rest of the industry. There was no evidence that they were not. Her submission is that I should look back at the

approach taken to extortionate credit bargains where the court generally used the market rate for similar loan products available to borrowers of that kind as a benchmark. In support of that approach she refers to the decision in *Shaw v Nine Regions* [2009] EWHC 3514. The report is of the appeal from the decision at trial. The interest rate was not the subject of the appeal, but it is apparent from the judgment of Roderick Evans J at [32] that the interest rate in question was 9.93% per month (an APR of 119%). There was no express finding as to the fairness of the rate, but the parties agreed that it was implicit in the judgment that the Recorder who heard the trial considered that it was fair. It appears that the Defendants evidence at trial was to the effect that this was comparable with other similar loans available, but obviously the rate was significantly less than the rates here.

195. In her written submissions on the issue Ms Bala also referred to *Chubb and Bruce v Dean and anor* [2013] EWHC 1282 Ch. Again there are some significant differences between that case and this. The borrowers in that case were said to be clearly intelligent, they were legally advised and Mr Dean was a barrister, albeit practising in a different area of law. The rate was the contractual rate and it was not “*hidden away in the small print*”. The borrowers were fully aware of the bargain they had made, and that appears to have been an important issue. At [26] HHJ David Cooke referred to the rate of 1.85% per month, or 3.1% when combined with a facility fee on a short term bridging loan as “*high*”. It was a “*stiff commercial bargain*” but where the parties knew the bargain they were making, it was not unfair. It would require a “*very much higher interest rate*” for him to reach that conclusion. The rates being considered in that case were, however, very much lower than the rates being considered here.
196. Secondly Ms Bala submits that I should not back date CONC. She draws attention to the general principle that legislation should not be retrospective in effect, and to the approach of the FCA to unarranged overdraft charges in PS19/16, which is to proceed prospectively. I agree that I should not simply back date the effect of CONC. The question is whether the relationships were unfair in 2014.
197. The Claimants accept that it does not follow from the FCA’s introduction of the price cap that the relationships arising from the agreements where these pre-cap rates were charged were unfair. But the lack of a price cap at the material time cannot be determinative. The question in each case is whether the relationship was unfair. I refer above to the FCA’s reasons for imposing the price cap (see the quote from paragraph 4.6 of CP14/10) and to the fact that it was the marginally eligible who were most at risk. It is where the Claimants are marginally eligible (as the FCA termed it) that the rate is of particular significance to fairness because of the potential for harm. I agree with Mr Clark’s approach to that aspect of the matter. The issue of rate is not black and white, but feeds into the overall question of fairness. The potential for harm requires the assessment of the circumstances of each borrower, and the extent to which that is visible to the lender, taking account of the information reasonably available to them at the time and the steps they took to ensure they were properly informed.
198. Given that I do not intend working through the issue of relief in the individual cases, it may assist if I summarise the factors that I have found relevant to unfairness when considering the interest rate (and any other charges).

- (i) First there is the absolute level of the rate. I do regard 29% per month as very high. I appreciate that this is a high risk market for lenders, and the overall return has to justify the overall risk of lending. But that is not an answer in the individual case.
- (ii) Secondly the relative rate. I agree with Ms Bala that the court should look at the market rate. This is to include charges so that the real costs rather than the headline interest rate is considered.
- (iii) Thirdly whether the borrower was “fully aware” of the rate. No HCST borrower is going to have the benefit of legal advice, but HHJ Cooke’s approach in *Chubb* reflects an important point. A rate which is high may not lead to an unfair relationship if the borrower knows or ought to know the bargain they are making, but the position may be different if they do not. Here it is relevant to look at how the rates are presented to the borrower in the course of the application process. The Defendant does quite a good job. The use of the tick box without the need to scroll down and the fact that none of the claimants read the terms is a worry. But the overall cost of this borrowing is made plain.
- (iv) Fourthly the potential for the borrower to suffer harm, particularly when that is something which was or ought to be known by the lender. Higher rates are likely to create a greater risk of harm for those who are marginally eligible. That in turn will affect the fairness of the relationship.

That is not an exhaustive list, and there may be other matters which arise in individual cases. The Claimants do not suggest that any unfairness arises from any of the other terms.

199. The second general area is the conduct of the parties’. This is to be considered in the context of the loans, and applies throughout the three periods. I found the following were relevant when considering these claims:

- (1) The scale of the individual lending is small and short term, but in cases where there is a significant degree of repeat borrowing, the relationship arising from the individual loan agreement is to be seen in the context of the cumulative lending. The reality is that the “relationship” continues.
- (2) The borrowing is by consumers. They were not financially sophisticated, and the Defendant is to be taken to have understood that would be the case. Equally, whilst none of them read the terms and conditions, none of them could have reasonably failed to understand that they were entering into a loan agreement requiring monthly payments of a certain sum.
- (3) The parties bargaining positions are obviously very different. The applicants for loans are likely to be people who are unable to obtain funds from more mainstream lenders, and may include those who are desperately in need of funds. That need may arise from a wide range of factors, but in the sample

claims include financing housing costs, paying off other loans, addictions and high levels of discretionary expenditure of various kinds. The lender is aware of the potential dangers to borrowers of the misuse of HCST lending, not least from the OFT and FCA publications. This sort of inequality is not something which of itself necessarily leads to the reopening of the relationship; see *Plevin @* [10], but is one of the reasons for the regulation of this area, and underscores the importance of compliance with CONC.

- (4) The terms of the loan are not individually negotiated. The claimant makes the decision as to whether or not they take out the loan, but has no opportunity to negotiate (although in the circumstances I recognise that would be impractical to individually negotiate loans as small as these, and that realistically an automated system is entirely appropriate). Consequently, rather than the issue of individual negotiation, it is relevant to look at the design of the system which takes the place of negotiation. There are two aspects to that.
 - (5) The first is the question of whether the decision making process complies with regulatory requirements. That is of considerable significance as already noted.
 - (6) The second is what was described in evidence as the “customer journey”. The process is and is designed to be quick, making it easy to borrow. The Defendant would say that it is simple to use, and that most importantly it tells the customer how much they are borrowing, at what rate, how much interest they will be paying, and what their monthly repayments are. The Claimants point to elements of the process which might be viewed by the cynic as encouraging further borrowing and which work against the provision of accurate financial information from the customer, and the customer’s assimilation of the terms of the agreement.
 - (i) the pre population of fields of income and expenditure;
 - (ii) the use of the tick box, particularly when that is pre ticked;
 - (iii) telling the customer the maximum level of loan available (when that exceeds the sum applied for);
 - (iv) reminders to customers who pay off their loan that they could borrow again;
 - (v) the considerable emphasis on the webpage on the speed and simplicity of the process.
200. One matter I raised in the course of evidence was why a product such as this was called “Sunny”. The Defendant’s witnesses did not seem to know. It seemed obvious enough. It is perfectly legitimate for a lender to brand themselves in this way, and there can be no doubt that everyone who applied for a loan knew that they were dealing with a payday lender who charged high rates of interest. But the use of that name, and the images of sunshine employed in the design of the webpage were not a coincidence. They were designed to create a warm and welcoming feel to a website where the user was undertaking the serious business of applying for a loan. That said, these are not cases where any overt pressure was applied to the customer. Sunny advertises, and presents the process as quick and easy, but no one suggested that they came under any pressure from the Defendant. I have already remarked on the Defendant’s generally sympathetic approach post default.

201. Ms Bala submits that where the thing done or not done by the creditor is or could be the subject of a separate claim, to succeed under section 140A the debtor would need to make out that separate claim before he or she could succeed under the CCA. She relies upon the decision of HHJ Waksman QC (as he then was) in *Carney v Rothschild* [2018] EWHC 958 (Comm) @ [50] where he says this:

It seems to me that generally speaking, and subject to the burden of proof which of course is on the creditor here, the same elements as are required by the cause of action should be shown when such matters are raised as constituting an unfair relationship. Otherwise there is a danger that the analysis of their significance or otherwise becomes blurred and uncertain.

In the opening words of that passage HHJ Waksman QC recognises the potential for there being cases where the result of the direct claim for breach of a rule might be different to the result of the unfair relationship claim. He also identifies the difference in the burden of proof. In the subsequent paragraphs he refers to the fact that the direct claim might be limitation barred whereas the unfair relationship claim may succeed. The view HHJ Waksman QC expresses reflects the fact that where a debtor is relying upon the breach of a rule to show that the relationship is unfair, it is natural to ask whether the elements of any direct claim based upon the breach of that rule are made out. But the question is not simply where there is an actionable breach of a rule. The question is whether the relationship is unfair. So here, the Claimants may be able to demonstrate that there is a breach of the relevant regulation designed to provide them with an appropriate degree of protection, and a failure to carry out a compliant creditworthiness assessment. But they may not be able to prove a causal link between the breach and some identifiable loss. The direct claim is not made out, but the breach of CONC is plainly relevant to the fairness of the relationship. Section 140A(2) provides that the court **shall** have regard to all matters it thinks relevant.

202. Before turning to my concluding remarks, there is one further matter of conduct to consider. That was the conduct of Mrs Adams in providing deliberately false information in her online loan applications. That is plainly a factor of relevance to the question of whether the relationship between the creditor and the debtor arising out of the agreement is unfair to the debtor. It can be argued on Mrs Adams part that the failure of the Defendant to devise a system which paid proper regard to repeat borrowing gave rise to the opportunity for her to borrow. But had she provided honest information about her employment status and earnings (or lack of them) from the start, the Defendant would have refused her applications and no relationship would have arisen, fair or unfair.
203. In *Swift Advances v Okokenu* [2015] CTLC (HHJ Hand QC) a lender brought proceedings for possession on a charge which secured a fixed term loan of 15 years. The defence and counterclaim asserted that there was an unfair relationship. The essence of the defendant's argument was that he was 70 when he took out the loan, and would have been 85 if it had run its course. In those circumstances it was said that the relationship was unfair because the loan was not sustainable and the defendant should have known as much. The case predates the regulatory regime I am considering, and the procedures the creditor adopted to decide whether to make the loan were "entirely conventional" for the time. The relevance of the case is the

Judge's approach to the dishonesty of the borrower in providing information to the lender about his income. In his loan application the defendant confirmed that he was and would continue to work as a driving instructor beyond retirement age, and provided some documents which tended to support that contention. At trial he admitted that when he made those statements he was not working as a driving instructor and his ill health had meant he had had to give up his work as a mini cab driver. The Judge found him to be a most unsatisfactory witness. In his judgment at [42] HHJ Hand QC referred to *Plevin*, and to Lord Sumption's judgment at [10] where he refers to section 140A being framed in wide terms. He regarded the defendant's "mendacity" as one of the facts relevant to the issue of the unfairness of the relationship. As he noted:

... the conduct of either party in entering into the loan agreement will usually, if not always, be a relevant consideration.

204. In Mrs Adams case I concluded that her dishonest conduct was such that the unfair relationship claim should fail. That conclusion was largely a reflection of the seriousness of the dishonesty, and its central relevance to the existence of the parties relationship. She took out 34 loans for between £50 and £450 from February 2015 to January 2018. When she first took out a loan with the Defendant her former partner's wages were paid directly into her account, but that arrangement stopped in October 2015. She also had some income from benefits. This is my note of part of Ms Bala's cross examination:

Q: Each time you applied to Sunny you put that you were self- employed.

A: Can't remember what I put

Q: You applied to Sunny many times – on each occasion you said self- employed and you said "R Adams Cleaning" – ring any bells?

A: Might have done yes

Q: What's R Adams cleaning?

A: Just made it up to be honest –didn't think that was relevant because there was more money coming in so I'd pay it off regardless, so not an issue as to whether employed or self-employed. I didn't think loan go through

Q: You made it up

A: Because I needed the money

Q: That's honest, but this was false data

A: Not so much, it was still household income

Q: Your status

A: I thought they'd check and it wouldn't go through and they'd know I wasn't employed

Q: You may have thought that for loan 1, what about loans 2-34

A: I don't know how they went through

Q: Perhaps because you put self employed

A: But no one checked – had they checked - they shouldn't lend the money

Q: You shouldn't lie when completing an application

A: I was desperate for money so maybe I made a mistake and I shouldn't have done that.

205. On the first loan the Defendant would have done a check to see if regular payments were coming into Mrs Adams' bank account, but after that it did not. It relied on what Mrs Adams said (in effect) about the source of that income. Had she said that she was not employed but looked after her family at home the Defendant would not have lent. Mrs Adams knew that, which was why she made up a business name for herself. The fact that she then seeks to blame the Defendant for not checking that she was employed is an unattractive response. Being desperate for money and making a mistake is more understandable, but her conduct is a serious matter of concern.
206. This sort of deliberate dishonesty which has a direct effect on the existence of the relationship at all is to be contrasted with the optimistic (or even overly optimistic) estimation of income and expenditure by applicants which was often a feature of these applications. I was satisfied that most of these Claimants were doing their best to give honest answers most of the time, even if they turned out not to be accurate, sometimes by significant amounts. That sort of conduct is not mendacious (to use HHJ Hand QC's word) in the way that Mrs Adams approach to her applications is. Moreover it is to be seen in the light of the system the Defendant developed to collect this data. Whilst I accept that there is a tick box which indicates the applicants agreement to the statement that the data is true and accurate, the process encourages speed, defaults to using brackets for the financial data it collects, and requires no supporting documents. The way the different types of expenditure were described in some of the fields also gave rise to an understandable confusion in some cases. What expenditure was being asked for was not always clear, even to those in court reading the rubric, with the benefit of time, and without the pressure of needing to get a loan.
207. Ms Bala did not seek to criticise many of the Claimants who were giving reasonably accurate information, even if some of it was sometimes well off the mark. She was right to take that approach, because the Defendant cannot really expect more than that. To be fair I don't think it did. The use of brackets, mid points and so forth reflects the quick and broad nature of the assessment being carried out, and the buffer employed was designed to cater for this sort of problem. Where the Defendant can show that the applicant's provision of data was so far from the true position that it could not be described as a "reasonable estimate" that may amount to conduct which goes to the fairness of the relationship. But when considering the fairness of the relationship, the Defendant cannot complain about the sort of essentially honest errors which this rapid application process is bound to throw up.
208. As I have indicated, I do not intend to deal with individual claims in this judgment, but to set out my overall views. I have concluded that the defendant was in breach of CONC 5.2 in failing to take proper account of the potential for the commitments undertaken by these loans to have an adverse financial effect upon claimants. Mr Clark also points to what he termed the "systemic" failures to design and implement clear and effective policies and procedures. The purpose of these rules is informed by the consumer protection objective, and the lender is required to assess more than just the borrower's ability to repay the loan. The failure to consider the financial difficulties that repeat borrowing might cause has an effect on the fairness of the relationship between creditor and debtor, for the protection provided by a properly designed creditworthiness assessment is missing. So that where a borrower is making repeated applications for HCST credit from a lender, prima facie the failure to comply with the rules leads to an unfairness in the relationship.

209. In an unfair relationship claim, the onus is on the lender to prove fairness. Whilst it is likely that a breach of the rules in CONC will be sufficient to render the relationships unfair, there will be cases where the lender can show that the failure to comply with the rules does not have that effect. That will be for the lender to demonstrate. The table Ms Bala produced of the repeat borrowing of the claimants at [103] above is a useful illustration of the position in this case. It may be that the repeat borrowing of the bottom group of 3 was at a level where the Defendant might be able to show that the relationship was fair (or that if it was unfair no relief was justified). In my view, that would be difficult in relation to the middle group, and a very steep hill to climb in relation to the top group.
210. The breach of the rules is not the only matter which goes to unfairness, although it is plainly an important one. Some of these claimants were in a cycle of borrowing, and repeated short term borrowing at high rates often added to the financial pressures they faced. Although some held responsible jobs, and no doubt undertook them with ability, they were not people who could properly be described as financially sophisticated. The Defendant was not aware of any particular vulnerabilities, but can be taken to have understood that those who borrowed repeatedly from them were people who were likely to be in significant financial difficulties. Those matters are best seen as part of the picture, rather than as separate considerations.
211. Whilst some of the Claimants used their money unwisely (Mr Kuschel being a good example), and over-estimated their means, I would not regard that as conduct which affected the fairness of the relationship, nor should it deprive them of a remedy. The one exception to that is Mrs Adams.
212. I also regard the Defendant's pre-cap interest rate as excessive, essentially for the reasons identified by the FCA. I am conscious of the objection that this backdates the price cap, but the underlying issues of debt spiral and the effect of these rates on those who only marginally qualified for loans were known, and (perhaps more importantly) were affecting borrowers. Those who marginally qualified for loans have a good basis for an unfair relationship claim. Once again the interest rate is to be seen as part of the picture. The other important factor pre CONC is the failure of the creditworthiness assessment to follow the OFT 1007 Guidance (in the same way that the Defendant's system subsequently breached CONC).

“Causation” and Relief

213. Having considered which relationships are likely to be unfair, I turn to the question of relief. The terms of section 140A(1) CCA do not impose a requirement of “causation” in the sense that the debtor must show that a breach caused a loss for an award of substantial damages to be made. The focus is on the unfairness of the relationship, and the court's approach to the granting of relief is informed by that, rather than by a demonstration that a particular act caused a particular loss. Section 140A(1) provides only that the court **may** make an order **if** it determines that the relationship is unfair to the debtor. The order must be from the menu of orders provided for under section 140B in connection with the credit agreement, but otherwise there is very little in the way of guidance in the section. As Mr Justice Hildyard put it in his judgment in *McMullon v Secure the Bridge Limited* [2015] EWCA Civ 884 @ [13]:

Suffice it to say as to the powers of the court that considerable discretionary latitude is supplied.

214. That is not to say that the court is free to do anything. Having determined that the relationship is unfair to the debtor, the court will look to relieve that unfairness by making an order or orders under section 140B(1). Whilst HHJ Platts emphasised that his decision as to remedy in *Plevin* turned on the particular facts of that case and was no precedent, it is a helpful illustration of how the jurisdiction works on well known facts. There is a link between (i) the failings of the creditor which lead to the unfairness in the relationship, (ii) the unfairness itself, and (iii) the relief. It is not to be analysed in the sort of linear terms which arise when considering causation proper. The court is to have regard to all the relevant circumstances when determining whether the relationship is unfair, and the same sort of approach applies when considering what relief is required to remedy that unfairness. If the court decides to make an order, then it "*should reflect and be proportionate to the nature and degree of unfairness which the court has found*": *Patel v Patel* [2009] EWHC 3264 (QB) George Leggatt QC at [79]-[80]. It should not give the Claimant a windfall, but should approximate, as closely as possible, to the overall position which would have applied had the matters giving rise to the perceived unfairness not taken place: see also *Link Finance Limited v Wilson* [2014] EWHC 252 Ch at [77]; *Chubb & Bruce v Dean* [2013] EWHC 1282 (Ch) at [24]; *Nelmes v NRAM Pic* [2006] EWCA Civ 491 at [116].

215. HHJ Waksman QC touches on causation in his judgment in *Carney @* [51]:

Causation is perhaps less straightforward. In cases of wrong advice and misrepresentation it would be odd if any relief could be considered if they did not have at least some material impact on the debtor when deciding whether or not to enter the agreement. And thus in Plevin, whilst the unfairness was said to be the failure to disclose the commission, there was at least a finding that the debtor would have "certainly questioned this" the size of the commission being of "critical relevance" ... But in a case like the one before me, if in fact the debtors would have entered into the agreement in any event, this must surely count against a finding of unfair relationship under s140A. See also the case of Graves v CHL [2014] EWCA Civ 1297 at paragraph 22 of the judgment of Patten LJ where it was held ... that the impugned conduct of the LPA receiver was not causally relate to the loss complained of by Mr Graves.

216. The deliberate breadth of section 140 enables the court to approach the question of relief with an eye to the substance of the unfairness. If the relationship is unfair then it is likely that some relief will be granted to remedy that. It is here that one of the significant distinctions between an unfair relationship claim and a claim for breach of statutory duty becomes apparent. With respect to Mr Clark's argument on the breach of statutory duty claim, I took the view that it was not enough to show that there was a systemic breach of CONC in relation to the creditworthiness assessment to establish liability. There had to be a breach which led to loss. Given that the problem arises out of the defendant's failure to comply with its duties under CONC, the court would adopt a benevolent approach to the claimants' case; see for example *Keefe v Isle of*

Man Steam Packet Company [2010] EWCA Civ 686, but there are difficulties for the claimants in identifying which loans caused loss.

217. That particular difficulty does not arise (at least not as acutely) in a claim under section 140A. In *Plevin* the Supreme Court did not consider it necessary for the purposes of working out the remedy to identify the “tipping point” for the size of an appropriate commission. The same sort of approach may be taken to these claims. The claimant need not identify what a compliant creditworthiness assessment would look like and so identify precisely which of the loans should not have been made. The fact that the process was not compliant and that the claimants did not benefit from the safeguard of a compliant creditworthiness assessment is (so the argument runs) sufficient to render the relationship unfair and justify some relief.
218. The “tipping point” issue was not a matter explored in submissions. That is not in any way a criticism of Counsel, who argued the case with economy and conspicuous ability. The importance of the issue had not been apparent to me until I began to work through the arguments in the course of preparing this judgment. On the face of it, it has much to commend it. It involves the exercise of a discretion given to the court by statute. That enables the court to take a broader view and avoids the sort of problems which arise from a causation analysis. It is a more satisfactory way of resolving these claims. However, I express that view without having the benefit of argument in circumstances where I am not making final orders in the circumstances following the administration of the Defendant.
219. I have found the judgment of HHJ Keyser QC in *Brookman v Welcome Financial Services* of particular assistance in relation to the approach to the unfair relationship claim. The case was argued in the Mercantile Court but judgment was handed down in the County Court at Cardiff on 6 November 2015. Mr Clark appeared for the Claimants, and provided me with a transcript. So far as I know, the decision is not otherwise reported. It was a PPI case, so the facts are somewhat different. At paragraph 43.7 of his judgment HHJ Keyser QC emphasises that the important question was whether the relationship was unfair, not whether on the balance of probabilities the claimants would or would not have acted differently.
220. At paragraph 47 HHJ Keyser QC summarises his reasoning and conclusions regarding remedy:
- 47.1 *The court has a discretion, not a duty, to grant a remedy; see section 140A(1)(f); cf Plevin per Sumption JSC at [41]. However if the court is able by the grant of a remedy to relieve a debtor from unfairness, it is likely that it will seek to do so.*
- 47.2 *The court’s powers are wide...*
- 47.3 *In view of the nature of the determination that grounds the discretion, the purpose of the powers must be to relieve from unfairness, not to compensate the debtor or punish the creditor.*
- 47.4 *The unfairness in the present case consisted in the claimants assuming liability in respect of the PPI agreements with inadequate knowledge to*

have been able to make properly informed decisions. The consequence of the decisions that they made was that they had and retain liability in respect of the residual premiums and interest in that regard even after the PPI agreement were cancelled.

47.5 *There is no good reason for declining to grant a remedy in respect of the unfairness that I have found to exist. The powers in section 140B enable the court to relieve from the effects of the unfairness. ...*

47.6 *I reject Mr Popplewell's submission that the extent of the relief ought to be determined by the "tipping point"; that is, that any remedy ought to be designed to relieve the claimants from past and future liabilities in respect of commission over and above the level at which the defendant ought to have made disclosure of commission. First, that approach is at least in tension with the approach of the Supreme Court in Plevin; the Court remitted the case back to the County Court for consideration of remedy but, in making a finding of unfairness by reason of non-disclosure of commission, did not think it necessary to identify the "tipping point". Second, it is not the level of commission that is unfair in any relevant sense but the relationship arising out of the failure to disclose the commission. Third, the profit-share arrangements in the present case make it a matter of some difficulty to assess precisely the defendant's benefit from the PPI.*

47.7 *However, the statutory powers do not require that the remedy be fashioned so as to eliminate all onerous consequences of the transaction entered into in circumstances where the debtor's decision-making was impaired. It does not follow that, because the claimants incurred the liability for PPI in circumstances of unfairness, they must necessarily be relieved of all such liability.*

221. At 47.8 the Judge considered the relevant factors, including the actual cost of the PPI and the cost of cover, arriving at what appeared to be the same figure produced by the FCA formula for redress. At 47.9 he ordered the refund of all payments and the remission of existing liability above £1,500 and the payment of interest on net repayments.
222. In some cases there might be a reasonably direct correlation between the complaint and the remedy. So in *Plevin* the commission was repaid, but the true cost of the insurance was not, because Mrs Plevin had had the benefit of the cover. In the context of the claims made in these sample cases, the central complaint is that the Defendant should not have granted loans in circumstances where there was a failure to make a compliant creditworthiness assessments. If the lack of such an assessment rendered the relationship unfair then how is that unfairness remedied? The repayment of interest and any arrears of interest and charges in relation to that loan and subsequent loans (assuming the unfairness persists) is likely to be appropriate. The repayment of the money lent (*prima facie*) is not, because the claimants had the benefit of that money.
223. Mr Clark submits that the court can and should go further. Firstly he submits that I can order the repayment of capital under section 140B(1)(a) to recognise that the

claimants have suffered a loss to their credit rating. The argument in favour is that this is a loss which arises from the unfair relationship and needs to be remedied. The objection is, not that the claimant has not suffered a loss, but that such an order is about compensating for that loss rather than relieving the unfairness in relation to the credit agreement(s). He also submits that repayment of capital might be appropriate to reflect the distress and anxiety caused to Claimants as a consequence of the unfairness of the relationship. Those are matters which will benefit from further argument in the context of the facts of a particular case.

224. Secondly Mr Clark submits that any award of statutory interest should be at rates comparable with the rates the claimants were paying to the defendant. An award of interest is to compensate the payee for being kept out of his money and not as a punitive measure; see Warren J in *Reinhard v ONDRA* [2015] EWHC 2943 (Ch) @ [3]. Mr Clark picks up two arguments from that case. The first is that to achieve *restitutio in integrum* the court has to establish the rate at which a person in the position of the claimant would have had to pay to borrow the money; see [15]. That approach may apply in some commercial cases, but derives from a recognition that businesses use money to trade, and so to compensate them for being kept out of the money they would otherwise use to trade, you look to the cost of their borrowing. That is not the reality here. The second is to inquire - what would a claimant have done with the money had he or she been repaid on time? Mr Clark suggests that a claimant would have used it to pay off other high cost loans, and so saved interest charges at the same or similar rates. There may be more merit in that argument, but again it is best explored in the context of a particular case.

Handing Down

225. This Judgment concludes without reaching final conclusions in relation to the individual claims. That is in part because of the appointment of Administrators to the Defendant, in part because there are issues which have arisen in the course of preparing this judgment which need further exploration, and in part because of the pressing need to hand down a judgment which deals with as many of the general issues as I can. That is not an entirely satisfactory situation, but I have concluded that it is the best way forward.