DRN-3430312

Complaint

Mr B has complained about an overdraft which was provided to him by Bank of Scotland plc (trading as "Halifax") on his current account. He's said that he had a gambling problem which would have been apparent to Halifax had it carried out proportionate checks. And in these circumstances, it was unfair to lend to him at all, let alone increase the limit on his overdraft to £5,000.

Background

Mr B's complaint was reviewed by one of our investigators. She didn't think it was unfair for Halifax to have provided Mr B with an overdraft in the first place. However, she also thought that Halifax ought to have realised that Mr B's overdraft had become unsustainable for him by the time his overdraft was due to be reviewed in August 2017.

Our investigator additionally thought that Halifax acted unfairly because Mr B had explained he was struggling with a gambling addiction in November 2017, yet Halifax still allowed him to use his overdraft. She thought this meant that Halifax needed to be refund any gambling transactions which were made using Mr B's overdraft up to a maximum of the overdrawn balance, minus any refunded interest, fees and charges added from August 2017 onwards.

Both parties agreed that the interest, fees and charges added from August 2017 onwards needed to be refunded. But Halifax thought this was sufficient to put things right for anything that might have gone wrong as a result of it failing to withdraw Mr B's overdraft in August 2017. And as Mr B didn't accept Halifax's alternative offer of settlement the complaint was passed to an ombudsman for a final decision.

The regulatory framework

I think that it would be helpful for me to start this decision by setting out the regulatory framework and other relevant publications that I think are important to my determination of Mr B's complaint.

Halifax provided Mr B with his overdraft while it was regulated by the Financial Conduct Authority ("FCA"). So Halifax was subject to the FCA's rules in respect of consumer credit activities when it lent to Mr B.

- *the FCA Principles for Business ("PRIN")*

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

PRIN 1.1.1G, says

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

The Principles themselves are set out in PRIN 2.1.1R. And the most relevant principles here are PRIN 2.1.1 R (2) which says:

A firm must conduct its business with due skill, care and diligence.

And PRIN 2.1.1 R (6) which says:

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

- *the Consumer Credit sourcebook ("CONC")*

This sets out the rules which apply to firms specifically when carrying out credit related regulated activities. Bearing in mind the complaint before me, I think the most relevant sections of CONC here are CONC 1 which sets out guidance in relation to financial difficulties; CONC 5 which sets out a firm's obligations in relation to responsible lending; CONC 6 which sets out a firm's obligations after a consumer has entered into a regulated agreement; and finally CONC 7 sets out the rules and guidance in relation to Arrears, default and recovery (including repossessions).

CONC 1.3G provides guidance on financial difficulty. It says:

"In CONC (unless otherwise stated in or in relation to a rule), the following matters, among others, of which a firm is aware or ought reasonably to be aware, may indicate that a customer is in financial difficulties:

(1) consecutively failing to meet minimum repayments in relation to a credit card or store card;

(2) adverse accurate entries on a credit file, which are not in dispute;

(3) outstanding county court judgments for non-payment of debt;

(4) inability to meet repayments out of disposable income or at all, for example, where there is evidence of non-payment of essential bills (such as, utility bills), the customer having to borrow further to repay existing debts, or the customer only being able to meet repayments of debts by the disposal of assets or security;

(5) consecutively failing to meet repayments when due;

(6) agreement to a debt management plan or other debt solution;

(7) evidence of discussions with a firm (including a not-for-profit debt advice body) with a view to entering into a debt management plan or other debt solution or to seeking debt counselling"

It's clear there is a high degree of alignment between the rules set out in CONC 5, CONC 6 and CONC 7 and the standards set out by the previous regulator of Consumer Credit – the Office of Fair Trading ("OFT"). As is evident from the following extracts, the FCA's CONC rules specifically note and refer back to sections of the OFT's *Irresponsible Lending Guidance* on many occasions.

CONC 5 sets out a firm's obligations in relation to responsible lending. These rules were updated in November 2018, but I refer below to the rules as they were at the time the lending decisions in question were made.

CONC 5.2.1R(2) sets out what a lender needs to do before agreeing to provide a consumer with credit, including entering into an agreement of this type. It says a firm must consider:

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

*[**Note**: paragraph 4.1 of ILG]*

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

*[**Note**: paragraph 4.3 of ILG]*

CONC also includes guidance about 'proportionality of assessments'.

CONC 5.2.3G says:

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

(1) the type of credit;

(2) the amount of the credit;

(3) the cost of the credit;

(4) the financial position of the customer at the time of seeking the credit;

(5) the customer's credit history, including any indications that the customer is experiencing or has experienced financial difficulties;

(6) the customer's existing financial commitments including any repayments due in respect of other credit agreements, consumer hire agreements, regulated mortgage contracts, payments for rent, council tax, electricity, gas, telecommunications, water and other major outgoings known to the firm;

(7) any future financial commitments of the customer;

(8) any future changes in circumstances which could be reasonably expected to have a significant financial adverse impact on the customer;

(9) the vulnerability of the customer, in particular where the firm understands the customer has some form of mental capacity limitation or reasonably suspects this to be so because the customer displays indications of some form of mental capacity limitation (see CONC 2.10).

*[**Note**: paragraph 4.10 of ILG]*

CONC 5.2.4G(2) says: *A firm should consider what is appropriate in any particular circumstances dependent on, for example, the type and amount of credit being sought and the potential risks to the customer. The risk of credit not being sustainable directly relates to the amount of credit granted and the total charge for credit relative to the customer's financial situation.*

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

CONC 5.3 contains further guidance on what a lender should bear in mind when thinking about affordability. CONC 5.3.1G(1) says: *In making the creditworthiness assessment or the assessment required by CONC 5.2.2R (1), a firm should take into account more than assessing the customer's ability to repay the credit.*

*[**Note**: paragraph 4.2 of ILG]*

CONC 5.3.1G(2) then says: *The creditworthiness assessment and the assessment required by CONC 5.2.2R (1) should include the firm taking reasonable steps to assess the customer's ability to meet repayments under a regulated credit agreement in a sustainable manner without the customer incurring financial difficulties or experiencing significant adverse consequences.*

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

CONC 5.3.1G(6) goes on to say:

For the purposes of CONC "sustainable" means the repayments under the regulated credit agreement can be made by the customer:

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

*[**Note**: paragraph 4.3 and 4.4 of ILG]*

In respect of the need to double-check information disclosed by applicants, CONC 5.3.1G(4) states: *(a) it is not generally sufficient for a firm to rely solely for its assessment of the customer's income and expenditure on a statement of those matters made by the customer.*

And CONC 5.3.7R says that: *A firm must not accept an application for credit under a regulated credit agreement where the firm knows or ought reasonably to suspect that the customer has not been truthful in completing the application in relation to information supplied by the customer relevant to the creditworthiness assessment or the assessment required by CONC 5.2.2R (1).*

*[**Note**: paragraph 4.31 of ILG]*

As explained, CONC 6 sets out a firm's post-contractual obligations.

CONC 6.7.2 R states:

“A firm must monitor a customer's repayment record and take appropriate action where there are signs of actual or possible repayment difficulties.”

[**Note**: paragraph 6.2 of *ILG*]

CONC 6.7.3 G states:

The action referred to in *CONC 6.7.2 R* should generally include:

> *(1) notifying the customer of the risk of escalating debt, additional interest or charges and of potential financial difficulties; and*

[**Note**: paragraph 6.16 of *ILG*]

> *(2) providing contact details for not-for-profit debt advice bodies.*

[**Note**: paragraph 6.2 (box) of *ILG*]

CONC also provides guidance to lenders about how to deal with consumers in arrears, this time making reference to the Office of Fair Trading's Debt Collection Guidance (DCG).

CONC 7.3.2G states:

When dealing with customers in default or in arrears difficulties a firm should pay due regard to its obligations under Principle 6 (Customers’ interests) to treat its customers fairly.

*[**Note**: paragraphs 7.12 of ILG and 2.2 of DCG]*

CONC 7.3.4R states that:

A firm must treat customers in default or in arrears difficulties with forbearance and due consideration.

*[**Note**: paragraphs 7.3 and 7.4 of ILG and 2.2 of DCG]*

CONC 7.3.5G lists some examples of forbearance and due consideration and states:

Examples of treating a customer with forbearance would include the firm doing one or more of the following, as may be relevant in the circumstances:

> (1) *considering suspending, reducing, waiving or cancelling any further interest or charges (for example, when a* customer *provides evidence of financial difficulties and is unable to meet* repayments *as they fall due or is only able to make token* repayments*, where in either case the level of debt would continue to rise if interest and charges continue to be applied);*

*[**Note**: paragraph 7.4 (box) of ILG]*

> (2) *allowing deferment of payment of arrears:*
>
> > (a) *where immediate payment of arrears may increase the customer's repayments to an unsustainable level; or*
> >
> > (b) *provided that doing so does not make the term for the repayments unreasonably excessive;*

(3) *accepting token payments for a reasonable period of time in order to allow a customer to recover from an unexpected income shock, from a customer who demonstrates that meeting the customer's existing debts would mean not being able to meet the customer's priority debts or other essential living expenses (such as in relation to a mortgage, rent, council tax, food bills and utility bills).*

Other relevant publications

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

Halifax was a subscriber to the Lending Standard Board's Lending Code and currently subscribes to the Standards of Lending Practice which replaced it in July 2016.

The Lending Code

Section 4 of the Lending Code is concerned with Credit Assessments. It says:

Personal customers

50. Before lending any money, granting or increasing an overdraft or other borrowing, subscribers should assess whether the customer will be able to repay it in a sustainable manner. They should do this by considering information from CRAs, including existing financial commitments where provided, as well as the following, as appropriate:

- *The type and amount of credit being sought;*
- *How the customer has handled their finances in the past;*
- *Internal credit scoring techniques (if used by the subscriber);*
- *The customer's declared income;*
- *Why the customer wants to borrow the money and for how long; and*
- *Any security provided.*

51. Subscribers should take a view on which of the above factors it is appropriate to consider in any particular circumstance dependent on, for example, the type and amount of credit being sought and the potential risks to the borrower.

52. Assessment may also include other checks that have not been listed above.

53. The requirement to consider information from CRAs does not apply in specialist customer segments such as private banking where use of CRA data may not be appropriate.

54. Where income is one of the factors considered when assessing ability to repay a personal loan and the loan is agreed only if the income of another person is taken into account, normally the loan should be provided on a joint and several basis. However there may be circumstances when it is appropriate to provide a loan on a sole basis.

55. Subscribers should ensure they are familiar with the requirements of the Code Sponsors' Guide to Credit Scoring and the explanations that need to be given to customers if credit scoring is used.

56. If a lending application is declined following credit assessment, the subscriber should explain the main reason why if asked by the customer. If the decline is as a result of *information obtained from a CRA search, the subscriber should provide the customer with contact details for the CRA.*

Section 9 of the Lending Code is concerned with Financial Difficulties. It says:

178. Subscribers should be sympathetic and positive when considering a customer's financial difficulties. Although there is an onus on customers to try to help themselves, the first step, when a subscriber becomes aware of a customer's financial difficulties, should be to try to contact the customer to discuss the matter. This applies to both personal and micro-enterprise customers.

179. Personal customers should be considered to be in financial difficulty when income is insufficient to cover reasonable living expenses and meet financial commitments as they become due. This may result from a change in lifestyle, often accompanied by a fall in disposable income and/or increased expenditure, such as:

- *loss of employment;*
- *disability;*
- *serious illness;*
- *relationship breakdown;*
- *death of a partner;*
- *starting a lower paid job;*
- *parental/carer leave;*
- *starting full-time education; and*
- *imprisonment*

180. Financial difficulties may become evident to a subscriber from one or more of the following events:

- *Items repeatedly being returned unpaid due to lack of available funds;*
- *Failing to meet loan repayments or other commitments;*
- *Discontinuation of regular credits;*
- *Notification of some form of insolvency or court proceedings;*
- ***Regular requests for increased borrowing or repeated rescheduling of debts;*** [my emphasis]
- *Making frequent cash withdrawals on a credit card at a non-promotional rate of interest; and*
- *Repeatedly exceeding a credit card or overdraft limit without agreement.*
- *The customer informing the subscriber that they are, or at risk of being in financial difficulties.*

182. If a subscriber becomes aware via their existing systems or from external data feeds (e.g. CRAs) or from information provided by the customer that the customer may be at risk of being in financial difficulties, the subscriber should contact the customer in order to:

- *outline their approach to financial difficulties;*
- *encourage the customer to contact the subscriber if the customer is worried about their position;*
- *offer the customer appropriate and timely options where possible to help reduce the risk of deterioration in the customer's financial well- being; and*
- *provide signposts to sources of free, independent money advice.*

The subscriber's contact with a customer identified as being at risk of being in financial difficulties should be through the normal channel of communication with the customer concerned, such as letter, telephone, email or text.

183. Signs or indicators that a personal customer may be at risk of being in financial difficulties may include:

- *regular unarranged overdrafts or excesses on agreed overdraft facilities;*
- *high or increasing numbers of unarranged overdraft charges being incurred by the customer, particularly where the total charges are high compared to the customer's monthly income (where known);*
- *regular returned items or refused authorisations in respect of Point of Sale or ATM transactions;*
- ***frequent requests for increased overdraft limits;*** [my emphasis]
- *hardcore borrowing* or increasing dependence on unauthorised overdrafts developing;*
- *change in account behaviour such as significantly reduced credit turnover;*
- *missed or overdue payments in respect of products held by the customer; and*
- *deteriorating trend in third party data e.g. CRA data.*

This list is not intended to be exhaustive, nor are the above necessarily indicators that a customer may be at risk of being in financial difficulties. Subscribers should consider what other information they have available that might indicate that a customer is or is not at risk of experiencing financial difficulties.

* Hardcore borrowing is defined in the glossary of the code. It is defined as:

Hardcore borrowing refers to the position where a customer's current account overdraft remains persistently overdrawn for more than a month without returning to credit during that period.

<u>The Standards of Lending Practice</u>

The standards relating to assessing the affordability of credit are set out in the *'Product Sale'* section of the Standards of Lending Practice. The relevant section says:

"5. Before providing any form of credit, granting or increasing an overdraft or other borrowing, Firms should assess, from the information available to the Firm at the time, whether the customer will be able to repay it in a sustainable manner without the customer incurring financial difficulty or experiencing significant adverse consequences. [CONC 5]"

There is also a section on *'Money Management'* and paragraph 3 of this section says:

"3. Firms should monitor customers' credit card and overdraft limits to ensure that the customer is not exhibiting signs of financial stress and where relevant, offer appropriate support."

Information Halifax itself provided

Halifax's Reward Current Account getting started guide, in use from May 2016, had the following description of an overdraft:

"An overdraft is a type of borrowing facility. It lets you borrow money through your current account in the short term. Think of it as a temporary back-up to tide you over until pay day.

As long as you're careful, using your overdraft facility can be a perfectly reasonable way to manage your money."

I also think that it would be useful for me to set out some of the information contained in Halifax's Bank account terms and conditions ("the BATC"). I have referred to a copy, which is dated November 2014. But it's my understanding that this hasn't changed too much over the years.

Section 8 of the BATC covers overdrafts. Conditions 8.1 to 8.5 cover 'Planned overdrafts' which essentially are overdrafts that are agreed in advance and is the type of overdraft that Mr B had.

Condition 8.2 states:

"If we agree to a planned overdraft, we will decide your overdraft limit and tell you what it is. We will also tell you when we will review it. At that time we will review your planned overdraft and decide whether or not to continue to provide it at the same limit, and inform you of our decision by letter. We may also change your planned overdraft if condition 8.3 applies".

And condition 8.3 goes on to state:

"We may change your overdraft limit at any time but we will usually only reduce your overdraft limit or withdraw your planned overdraft where:

(a) you have failed to fund your account regularly;
(b) you are in breach of a condition relating to use of the overdraft;
(c) your circumstances have changed for the worse;
(d) we reasonably believe that the risks of lending to you have increased;
(e) we reasonably believe that the reduction or withdrawal of the overdraft facility is necessary to prevent you from incurring a debt which you will be unable to repay; or
(f) you have not regularly used the full amount of your planned overdraft facility within the last 12 months."

My findings

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

Having taken into account the relevant rules, guidance and good industry practice. I think there are three overarching questions, which I need to consider in order to decide what is fair and reasonable in all the circumstances of Mr B's complaint. These questions are:

- Did Halifax carry out reasonable and proportionate checks to satisfy itself that Mr B would be able to repay what he borrowed in a sustainable way at the time of each lending decision in question (in other words - each time it increased the overdraft limit)?
    - If so, did it make a fair lending decision?
    - If not, what would reasonable and proportionate checks more likely than not have shown?

- Bearing in mind the circumstances, at the time of each limit increase, was there a point where Halifax ought reasonably to have realised it was increasing Mr B's indebtedness in a way that was unsustainable or otherwise harmful and so shouldn't have provided further credit?

- Did Halifax act unfairly or unreasonably towards Mr B in some other way?

I'll consider each of these questions in turn.

Did Halifax carry out reasonable and proportionate checks to satisfy itself that Mr B would be able to repay what he borrowed in a sustainable way at the time of each lending decision in question (in other words - each time it increased the overdraft limit)?

The rules and regulations during the period in question required Halifax to carry out a reasonable and proportionate assessment of whether Mr B could afford to repay what he owed in a sustainable manner. This assessment is sometimes referred to as an "affordability assessment" or "affordability check".

The checks had to be "borrower" focused – so Halifax had to think about whether repaying the overdraft sustainably would cause difficulties or adverse consequences *for Mr B*. In practice this meant that Halifax had to ensure that repaying the overdraft wouldn't cause Mr B undue difficulty or adverse consequences. In other words, it wasn't enough for Halifax to simply think about the likelihood of it getting its money back, it had to consider the impact of any repayments on Mr B.

Checks also had to be "proportionate" to the specific circumstances of the application. In general, what constitutes a proportionate affordability check will be dependent upon a number of factors including – but not limited to – the particular circumstances of the consumer (e.g. their financial history, current situation and outlook, and any indications of vulnerability or financial difficulty) and the amount / type / cost of credit they are seeking.

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

- the *lower* a customer's income (reflecting that it could be more difficult to make any repayments to credit from a lower level of income);
- the *higher* the amount due to be repaid (reflecting that it could be more difficult to meet higher repayments from a particular level of income);
- the *longer* the period of time a borrower will be indebted for (reflecting the fact that the total cost of the credit is likely to be greater and the customer is required to make repayments for an extended period).

There may also be other factors which could influence how detailed a proportionate check should've been for a given application – including (but not limited to) any indications of borrower vulnerability and any foreseeable changes in future circumstances. I've kept all of this in mind when thinking about whether Halifax did what it needed to each time it increased his overdraft limit.

Halifax says that Mr B passed its affordability checks which were based on his income (and credits going into his account) and information from a credit reference agency. For each limit increase agreed, the proposed limit was deemed affordable. In Halifax's view the fact that further limit increases, which Mr B requested, weren't approved demonstrated this.

Mr B's overdraft was an open-end (running account) agreement (in other words, while Halifax committed to reviewing the facility each year there was no fixed end date) where there was an expectation that he'd repay what he borrowed plus the interest due within a reasonable period of time. CONC didn't set out what a reasonable period of time was. So I think it's important to note that a reasonable period of time will always be dependent on the circumstances of the individual case.

Halifax's final response to Mr B's complaint also said:

"When you apply for borrowing via Internet Banking, and choose not to discuss your finances with a member of staff, we assume that you have considered how much you want to borrow and how much you can afford to repay."

I've thought about what Halifax has said. But I'm not aware of anything in the rules and regulations, or the industry codes of practice, which state, or even infer, that lesser standards or a lesser duty of care applies to affordability assessments conducted for online applications. So to be clear and for the avoidance of doubt as the regulated firm here it was Halifax's responsibility to assess whether Mr B's overdraft and his limit increases were affordable, notwithstanding the fact this application was made online. I've gone on to consider what Halifax did before Mr B was provided with his overdraft in light of this.

The information I've been provided with suggests that Mr B first applied for an overdraft with Halifax on 4 August 2016. This application was successful and Mr B was provided with an overdraft with an agreed limit of £500.00. Mr B then made four applications to increase his overdraft limit over the following 48 hours. His limit was increased from £500 to £1,000.00, £1,000.00 to £2,000.00 and then £2,000.00 to £4,000.00 on 5 August 2016. Finally, Mr B's overdraft limit was then increased from £4,000.00 to £5,000.00 on 6 August 2016. What I've seen also suggests that Mr B made three further applications to increase his limit to £6,000.00, £5,500.00 and £5,200.00 on 6 August 2016 but these applications were all declined.

Having considered the information provided, it seems to me that Halifax treated each of Mr B's applications in isolation with little regard to what had happened previously or whether the information being provided was consistent. For example, when Mr B initially applied for his overdraft his monthly income was recorded as £5,000.00 a month. He apparently paid no rent and had other monthly commitments of £600 a month. Yet for the first limit increase, which was only a day later, Mr B was then recorded as having a monthly income of £4,500.00, paying mortgage or rent of £500 a month and having other expenditure of £1,100.00.

Furthermore, in my view, Halifax's approach failed to take into account that some of the figures used were contradicted by what was showing on Mr B's statements. For example, the direct debits going out of Mr B's account for non-housing related expenditure clearly exceeded the amounts declared on the applications.

Equally, it's also concerning that Halifax accepted so many limit increases within such a short period of time, without appearing to take a closer look at Mr B's financial circumstances. I'm particularly mindful that this happened against a backdrop where the Lending Code (which I've referred to earlier in this decision) suggested that frequent requests for increased overdraft limit increases is in itself considered an indication that a borrower may be experiencing financial difficulty.

Halifax increased Mr B's overdraft to a level where it was ten times the initial amount. And this happened within the space of 48 hours. It's also worth noting that Mr B was using pretty much all of the additional funds each time his limit was increased. Although it hasn't directly said this, I can only assume that, like our investigator has suggested, Halifax didn't really do much more until Mr B asked for his limit to be increased above £5,000.00 because that's how much it was prepared to lend Mr B at the outset had he requested this.

I think that all of this led to Halifax failing to take into account the whole picture of its overall history with Mr B, in favour of a narrower focus on the first application and how much it might have been willing to lend at that stage.

As Halifax proceeded with these limit increases with what appeared to be, over-optimistic assessments even in the face of Mr B's indebtedness to it rapidly increasing, I'm satisfied that the checks Halifax carried out before increasing Mr B's overdraft limit weren't reasonable and proportionate.

Would reasonable and proportionate checks have shown Halifax that it shouldn't have provided Mr B with an overdraft and then increased Mr B's limit in the way that it did?

As reasonable and proportionate checks weren't carried out before Mr B's overdraft limit increases were provided, I can't say for sure what they would've shown. So I need to decide whether it is more likely than not that reasonable and proportionate checks would have told Halifax it shouldn't have provided the increases.

As Halifax had access to them, I consider it perfectly fair and reasonable to use Mr B's bank statements to form my view on what proportionate checks would more likely than not have shown Halifax. I have therefore done so and set out what I think Mr B's statements ought reasonably to have demonstrated to Halifax.

In terms of the information on Mr B's bank statements. I don't think it's unfair to say that he had a very good income. In fact, I'd even go as far as saying that Mr B's income declaration was conservative given that he regularly received more each month than the amount he declared. And when Mr B's committed expenditure – in other words, his payments to existing credit and normal living costs - is deducted from his monthly income, I think it's fair to say that Mr B had sufficient funds left over to be able to repay £5,000.00 within a reasonable period of time. Therefore, based on the information provided, I'm satisfied that further checks wouldn't have prevented Halifax from approving an overdraft limit of £5,000.00 for Mr B.

As I've explained, I do think that a pattern of Mr B applying for a limit increase, using all the funds and getting close to his limit before once again applying for further funds was emerging. But in reality this happened very quickly and over a matter of hours. And as it appears as though Halifax was prepared to lend Mr B £5,000.00 at the outset, I don't think there's enough here for me to make the finding that the overdraft limit increases approved shouldn't have been on affordability grounds.

That said, I do think there were some clear warning signs in relation to Mr B's overdraft usage - him having used all of his available credit very quickly. And I think that Halifax needed to monitor Mr B's ongoing indebtedness and also been mindful of any signs which indicated that his overdraft might have become unsustainable for him, when it next reviewed the facility.

However, for reasons I'll go on to explain in the next section of this decision, I don't think that Halifax did this. And this meant that it treated Mr B unfairly.

Did Halifax act unfairly or unreasonably towards Mr B in some other way?

Halifax will be aware that the provisions of CONC imposed an obligation to monitor Mr B's repayment record and offer assistance where it may have been apparent that he may have been experiencing financial difficulty.

But leaving aside Halifax's regulatory obligations, I'm also satisfied that Halifax additionally committed to reviewing the overdraft on Mr B's current account on an ongoing basis. I say this because as I set out in the other key publications section of this decision as a subscriber to the Standards of Lending Practice, Halifax committed to ensuring that Mr B's overdraft usage wasn't suggesting that his finances were under strain.

Equally Halifax's own correspondence to Mr B said that Mr B's usage of his overdraft facility would be reviewed on an ongoing basis. So it seems to me that – irrespective of the regulator's rules - the Standards of Lending Practice and Halifax's own terms and conditions confirmed Mr B's use of his overdraft would be monitored.

In any event, Mr B's account statements have overdraft renewal dates on them. And this suggests to me that his overdraft was, or at the very least it ought to have been, reviewed and/or renewed on an annual basis. So even if I agree that CONC didn't prescribe precise periods for any reviews, I'm satisfied that Halifax itself committed to reviewing and, depending on the circumstances, potentially renewing Mr B's overdraft each year.

Bearing in mind the circumstances of this case and in particular what I've already highlighted about Mr B's usage immediately after his overdraft was initially provided, I'm particularly mindful of the renewal that took place in August 2017. So I've considered whether it was fair and reasonable for Halifax to have renewed Mr B's overdraft in August 2017.

Halifax hasn't provided any details about what its review process in general would have involved or what it specifically did in relation to Mr B's account in August 2017. But I've given thought to what any review and renewals should fairly and reasonably have taken into account bearing in mind Halifax's regulatory obligations and the terms and conditions of Mr B's account.

As a starting point, I think that any review or renewal of Mr B's overdraft had to include a review of Mr B's repayment record – in other words it needed to look at how Mr B's account was funded, how often it was in credit etc. I also think that the factors listed in conditions 8.2 and 8.3 of the BATC also should have played a part. So I think that Halifax ought fairly and reasonably to have looked at whether any of the reasons it said might prompt it to reduce or withdraw Mr B's overdraft were present in his circumstances.

It's also important to note that in the 'Our easy-to-understand overdrafts' section of Halifax's Reward Current Account Getting Started Guide, (which Halifax itself provided to us) it states that *"any overdraft we agree is offered subject to status and repayable on demand"*. It is also stated in the Important information section of this guide that Halifax subscribes to The Lending Standards Board's' '*Lending Code'.*

I've also already set out that in the Overdraft glossary of this document that Halifax defines an overdraft as:

"An overdraft is a type of borrowing facility. It lets you borrow money through your current account in the short term to tide you over. Think of it as a back-up pot to dip into until pay day. As long as you're careful, using your overdraft facility can be a perfectly reasonable way to manage your money."

This message is reinforced in Halifax's notifications of the 2017 changes to its overdraft pricing structure, which stated that overdrafts are intended to help out with short-term borrowing needs. And it is a view shared by the FCA in Consultation Paper 18/42 *High-Cost Credit Review: Overdrafts consultation paper and policy statement* ("CP18/42"). I accept that this was published a year or so after the period I'm looking at. But I do think that it offers some insight on the FCA's perspective on the use of overdrafts. So I do consider it to be of some relevance in this case.

Paragraph 3.35 of CP 18/42 states:

"Overdrafts are intended for short-term or emergency borrowing, but some consumers use them repeatedly over a long period of time. This repeat overdraft use can harm consumers because it can be an expensive way to borrow, and they can build up problem debt over time."

Bearing in mind all of this, In these circumstances, I think that any review or renewal of Mr B's overdraft also ought fairly and reasonably to have had in mind that the facility was repayable on demand – in other words, had to be repaid in full should Halifax request this -, that it was only really intended to help out with short-term borrowing needs and the good practice set out in the Lending Code.

I've kept all of this in mind when thinking about Mr B's financial position in August 2017. And as Halifax had access to them, I consider it perfectly fair and reasonable to use Mr B's bank statements to form my view on what a fair and reasonable review of Mr B's overdraft (and whether it should have been renewed) is more likely than not to have shown. I've therefore gone on to do so and also set out what I think any such review ought fairly and reasonably to have uncovered.

Mr B's financial position in the period leading up to August 2017 renewal

Having carefully looked at the period in the year leading up to the August 2017 renewal, it is striking just how little time Mr B's account was in credit. In my view, Mr B's statements clearly show that he was hardcore borrowing – he was persistently overdrawn without ever really having a credit balance for any meaningful period. I can also see that there were instances where Mr B exceeded his overdraft limit. So while Halifax may argue that Mr B monthly income meant he could have cleared his overdraft within a reasonable period of time, it is clear that this simply didn't happen over the course of the year he had it.

However, what is most concerning of all on Mr B's statements is the sheer amount of gambling transactions that took place in the immediate period prior to the increase.
To be clear, I'm not saying that it is up to Halifax – or any other bank for that matter - to tell a customer how they can and can't spend their money. But, in this case, as Mr B was constantly using his overdraft he wasn't spending his own money. He was using the bank's money and gambling the funds that Halifax was lending to him. And it was becoming clear that his ability to repay what he owed was becoming more and more dependent on his success as a gambler.

In my view, all of this means that, in August 2017, Halifax ought reasonably to have realised that it could no longer simply rely on Mr B's income and regular expenditure to justify a £5,000.00 being affordable. The large sums going out to gambling transactions clearly affected Mr B's ability to repay. And this in turn means that no reasonable decision maker, on these facts, could reasonably conclude that he'd be able to repay what he owed on demand, or within any sort of reasonable period of time, without having regard to these transactions. I think that the sheer number of gambling transactions – especially in the lead up to the renewal meant that any further lending was simply unsustainable for Mr B.

I think that instead of realising this and taking steps to help Mr B, as per its regulatory obligation to provide a customer in difficulty with assistance (and what its own terms and conditions said an adverse change in his financial circumstances would lead to), Halifax unfairly and unreasonably added a significant amount of overdraft interest, fees and charges to his balance.

This meant that Mr B paid Halifax high amounts of interest for the privilege of allowing him to continue to hold what, in my view, had clearly become an unsustainable debt. Taking all of this into account, I find that Halifax didn't act fairly and reasonably towards Mr B when it renewed his overdraft in August 2017.

<u>Did Mr B lose out because Halifax didn't act fairly and reasonably towards him?</u>

I've already explained that Halifax ought reasonably to have realised that Mr B was unlikely to be able to sustainably repay his overdraft when it renewed it in August 2017. And at this point Halifax ought reasonably to have exercised forbearance and helped Mr B managed his debt. But instead of doing this Halifax allowed Mr B to continue drawing down further funds and this resulted in Mr B paying more in interest and charges.

I'm also particularly concerned by what happened from November 2017 onwards. Halifax's own records show that Mr B was referred to its money management team, just prior to its new overdraft pricing structure being introduced, because of his excessive overdraft usage and he had no savings available. Halifax's further notes show that it had recorded Mr B had a gambling addiction, that he was using his overdraft to gamble and he couldn't afford the overdraft charges.

Halifax's argument for not removing the overdraft at this stage is because Mr B said he was already seeking assistance and he was referred to other organisations for help with his gambling and his other debts. Rather bizarrely Halifax has also appeared to suggest that removing the overdraft (or account) wouldn't have made a difference here as Mr B would have found another way to gamble when he started doing so again around April 2018.

I have to say that I find Halifax's rather flippant attitude to a customer it flagged as being vulnerable to be incredibly disappointing. It appears to be saying that as another party would have lent Mr B the money to gamble, it might as well have been Halifax. In my view, this is hardly in keeping with its overarching obligation, as set out in the FCA principles for business, to pay regard to Mr B's interests and treat him fairly.

I think that this completely overlooks the fact that by placing restrictions on Mr B's account – in particular by refusing to lend him further funds - he would have found it far more difficult to gamble. Furthermore, there is a difference between removing all banking facilities from a customer and refusing to provide any credit whether on a formal or informal basis.

I'm particularly concerned that Halifax didn't see fit to reduce the overdraft limit even though it was aware Mr B had additionally said that he was struggling to manage his debts as well as had a gambling problem. And while Halifax says it thought that Mr B's position had improved, not only was Mr B gambling even more from April 2018, but he was now also borrowing from payday and other high-cost lenders in order to stay within his overdraft limit.

So I think that Halifax didn't treat Mr B fairly and reasonably by allowing him to continue gambling using his overdraft even after he told Halifax he was in financial difficulty because he had an addiction in November 2017. And I think that what Halifax should do to put things right for Mr B ought fairly and reasonably to reflect this.

Overall and having carefully thought about everything provided – including the key questions I set out on page 9 of this decision - and what is fair and reasonable in all the circumstances of this case, I'm satisfied that Halifax failed to act fairly and reasonably towards Mr B by renewing Mr B's overdraft (and allowing him to continue using it) in August 2017.

Fair compensation – what Halifax needs to do to put things right for Mr B

I've thought about what amounts to fair compensation in this case. Where I find that a business has done something wrong, I'd normally expect that business – in so far as is reasonably practicable – to put the consumer in the position they *would be in now* if that wrong hadn't taken place. In essence, in this case, this would mean Halifax putting Mr B in the position he'd now be in if it hadn't renewed his overdraft in August 2017.

But when it comes to complaints about irresponsible lending this isn't straightforward. Mr B *was* allowed to continue using his overdraft and he used the funds – albeit Mr B's statements show (and Halifax appears to accept) that significant amounts may well have been lost gambling. So, in these circumstances, I can't undo what's already been done. And it's simply not possible to put Mr B back in the position he would be in if his overdraft hadn't been renewed – because I don't think Mr B has the funds available to return to Halifax (or the third-party debt purchaser his balance was sold to) for his balance to be cleared.

As this is the case, I have to think about some other way of putting things right in a fair and reasonable way bearing in mind the particular circumstances of the case. And I'd like to explain the reasons why I think that it would be fair and reasonable for Halifax to put things right in the following way.

As we explain on our website where we find, or a lender agrees, credit was provided (or a customer was allowed to continue access credit) irresponsibly, we'd typically say it's fair reasonable to expect the borrower to repay the funds they were lent, but not any associated interest, fees or charges. So to start with as Halifax ought to have realised the overdraft was unsustainable in August 2017, I'm satisfied that it should remove any and all interest added to Mr B's overdraft from August 2017 onwards from his current balance.

However, having given careful thought to the matter before me and the circumstances of this particular case, I don't think that simply refunding the interest added to Mr B's overdraft from August 2017 onwards goes far enough here. I think that this is the case for two reasons.

Firstly, for the reasons I have in some detail already explained on page 15 of this decision, Halifax ought to have been even more mindful of the significant risk Mr B would gamble any funds lent to him from November 2017 onwards. And in these circumstances, his ability to sustainably repay what he was being lent let alone the associated interest was in large part dependant on his success gambling.

Halifax chose to lend in these circumstances despite the reasonably foreseeable prospect of the funds being gambled away and no longer being available to repay any debt as a result. And while Halifax may have been comfortable with that from a creditworthiness point of view, I think that there was a reasonably foreseeable risk that lending Mr B in these circumstances might worsen his financial position as well as his personal circumstances. As I understand it, both parties are in agreement that the funds have dissipated as a result of gambling losses.

It's also my understanding that Mr B has since lost his job and is unable to work due to depression and anxiety. While I don't think that Halifax's actions are directly responsible for this, I think it's clear that things will be difficult for Mr B in his current financial position and it's difficult to see how Mr B will be able to make payments to repay his overdraft going forward, in these circumstances, without experiencing severe financial difficulty.

Bearing in mind the circumstances in which Halifax continued lending Mr B funds to gamble from November 2017 onwards, Mr B's current financial position and the amount of distress and inconvenience Halifax unfairly continuing to lend to Mr B, in the circumstances it did is likely to have caused, I don't think removing the interest fees and charges added from August 2017 goes far enough.

The circumstances of this case and in particular the financial hardship which is likely to be caused by requiring Mr B to pay funds he doesn't have and is unlikely to get, lead me to think that the fair and reasonable thing for Halifax to do here, given all the circumstances, is to deduct any amounts it lent Mr B to gamble (in other words, any gambling transactions which took place while Mr B was overdrawn) from Mr B's current balance up to a maximum of the amount owed. In other words, Mr B's current overdraft balance should be reduced by any amounts Halifax lent, which are clearly identifiable as gambling transactions up until the balance is cleared. Halifax does not need to refund any extra should the total amount lent exceed the amount now owed.

As this will result in Mr B having repaid substantially less than the amount he was lent and is likely to go someway towards alleviating any distress and inconvenience going forward, I'm satisfied that this also encompasses fair compensation for any distress and inconvenience Halifax's actions in continuing to lend to him caused Mr B. So while I've carefully thought about matters and I may have told Halifax to pay a not insubstantial amount of compensation for the distress and inconvenience its actions caused Mr B were it not for my direction to reduce and possibly clear Mr B's outstanding balance, I'm not making an additional award for distress and inconvenience.

I turn now to Mr B's credit file. We'd typically expect a lender to remove any adverse information regarding credit provided, from the borrower's credit file, where a complaint is upheld for irresponsible lending. However, I don't think that doing this would be the fair and reasonable thing to do here given what I'm asking Halifax to do in terms of Mr B's current overdraft balance. To explain, the basis for Mr B's complaint was and is that he has a problem which was made worse by Halifax's decision to continue lending to him. I've accepted this is the case and this has played a large part in my decision to uphold Mr B's complaint.

In these circumstances, it seems to me that amending Mr B's credit file to remove adverse information thus increasing the chances of him being able to access further funds would be counterproductive, unreasonable in its logic and arguably not in his best interests, or those of any potential lender. And as a result, I think it's fair and reasonable for Halifax to reflect what I'm asking it to do in relation to the outstanding balance on Mr B's overdraft. And depending on the final position of Mr B's balance once all adjustments have been made Halifax should either record that whatever amount remains outstanding, or that it wrote off a balance on Mr B's overdraft on his credit file.

It is my understanding that Halifax sold an outstanding balance on Mr B's account to a third-party debt purchaser. So Halifax will need to either buy the account back from the third-party and make the necessary adjustments, pay an amount to the third party in order for it to make the necessary adjustments, or pay Mr B an amount to ensure that it fully complies with this direction.

My final decision

For the reasons I've explained, I'm upholding Mr B's complaint. Bank of Scotland Plc (trading as Halifax) should put things right in the way that I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 31 May 2022.

Jeshen Narayanan
Ombudsman