DRN-3692047

Complaint

1. Mr A has complained that Novitas Loans Ltd ("Novitas") negligently approved a litigation funding loan for his ex-partner and about the effect this had on him including it leading to him having to take out his own Novitas litigation funding loan in order to defend her claim.

2. Mr A has also additionally complained that Novitas didn't carry out sufficient enquires to establish that he was able to repay his loan. And had it done so, Novitas would have seen he wouldn't have been able to repay what he was being lent without selling his home. This was irresponsible and it shouldn't have lent to him.

3. I have read and carefully considered all the evidence and arguments submitted by both parties to decide what is, in my opinion, fair and reasonable in all the circumstances of the case.

4. Having done so and for the reasons I explain in detail below, I have decided to determine the complaint in favour of Mr A and to direct Novitas to put things right.

5. Under the rules of the Financial Ombudsman Service, I am required to ask Mr A either to accept or reject my decision before **18 December 2024**.

6. If Mr A does not accept my decision before **18 December 2024** it will not be binding on Novitas. Should Mr A seek to accept the decision at a later date, it will be a matter for Novitas to decide whether it is willing to settle the complaint in line with my direction.

Background

(a) The events leading up to this complaint

7. In December 2014, Mr A sought advice from a solicitor after his ex-partner (who I'll refer to as P through the course of this decision) threatened to bring a Trusts and Appointment of Trustees Act 1996 ("TOLATA") claim against him. Mr A's solicitor informed him of a loan product which Novitas offered.

The Novitas Loans – Family product

8. This product was a revolving credit facility where the proceeds were to be used to pay the legal costs of the borrower's divorce or separation proceedings. Novitas marketed it as a product *"to meet the growing demand for people struggling to fund their legal disputes and then secure the legal support they needed"*.

9. It was a form of restricted credit as the borrower's solicitor could draw down funds to cover any fees or disbursements accrued in relation to the divorce or separation proceedings. Novitas operated through a panel of solicitors. If the borrower's solicitor was on Novitas' panel, then they could arrange the loan for their client. Any solicitor

that the borrower used was independent of Novitas. But the solicitor arranged the loan and completed all of the relevant paperwork, which was then forwarded on to Novitas for it to make a decision on whether it wished to lend.

The first loan in December 2014

10. Following an initial consultation with Mr A in December 2014, Mr A's solicitor estimated that the costs of defending a TOLATA claim from P would be in the region of £60,000.00. Mr A's solicitor, on Mr A's behalf, made an application to Novitas to fund these costs.

11. The application process consisted of Mr A's solicitor completing an application form. The form asked questions such as how the loan would be repaid and a brief strategy for the case (including the best and worst case outcomes). Finally, the form also required details of the security to be used for the loan.

12. The application required Mr A to confirm that he had obtained independent legal advice on proceeding with this arrangement. He said he did so on 17 December 2014. The independent solicitor completed a pro-forma template which was returned to Novitas. This indicated that the independent legal advice covered the sums payable under the agreement, Mr A's responsibilities and obligations; and the representations and warranties Mr A was making to Novitas.

13. Mr A's loan application was successful and his solicitor was able to draw down funds up to a maximum of £60,000, to cover costs as and when required. Mr A's solicitor started drawing down funds on the facility from 20 February 2015. The amount lent by Novitas was secured via a second charge against Mr A's property, which was the property subject to the litigation in question. There was no fixed repayment schedule for the amount borrowed as it was anticipated that repayment would be made in full once the legal action had completed.

14. There was an expectation, at least on Novitas' side, that the property that was the subject of the dispute would be sold once the matter was resolved. Repayment was due on whichever of the following events occurred first, 12 months from the date of the first drawdown, or 7 days from the date any settlement was paid. The interest rate on the facility was 18% per annum.

15. Copies of the correspondence Novitas has provided, between it and Mr A's solicitor, indicates that Mr A's solicitor informed Novitas that it only learned that P's litigation costs were also being funded by a similar credit arrangement with Novitas, almost a year later, in or around November 2015.

16. The notes between Novitas and Mr A's solicitor show that the solicitor, in an email dated 7 January 2016, told Novitas a mediation hearing had to be adjourned because the disclosure of P's arrangement with Novitas by her solicitor only came to light on the day of the hearing.

17. Mr A has said that this is just one example of the delays in the proceedings caused by P's solicitor. Indeed, Mr A has provided extensive submissions on how P's solicitor failed to correspond with Novitas and keep it updated with the proceedings, even though Novitas said it required updates from both sides.

The second loan

18. In June 2017, Mr A's solicitor contacted Mr A to say that the funds from the initial facility had been exhausted and an extension to the facility had to be sought as further funds were required. Mr A has said that his solicitor wanted to extend the limit on the facility by a further £70,000.

19. An application for further funds was made in September 2017. The application process was broadly similar to the process which took place in December 2014. As a result of this application, in September 2017, Novitas agreed to provide an extension of £30,000. This time the facility was agreed without a charge on Mr A's property due to changes in the regulatory regime for second charge mortgages which had taken place in March 2016. Even though this loan wasn't secured on Mr A's property, these funds were agreed on the same interest and repayment terms as the initial loan.

20. In November 2017 and before any conclusion was reached on the proceedings between Mr A and P, the Solicitors Regulation Authority ("SRA") closed down the practice of P's solicitor. P obtained alternative representation and following a successful mediation with Mr A, an amicable agreement was eventually reached between Mr A and P in relation to their separation.

(b) Mr A's actions after his agreement with P and his subsequent complaint

21. Following their agreement, P complained about the conduct of her former solicitor. Mr A also made a formal complaint against Novitas in relation to the funding it provided to him.

22. In essence, Mr A's initial complaint to Novitas was that Novitas' negligence in lending to P, despite her solicitor's poor conduct and misrepresentation of facts, resulted in him having to obtain a similar loan from Novitas to defend the claim. Put simply, it was Mr A's view that he wouldn't have had a loan to repay if Novitas hadn't negligently approved P's loan in the first place and so he shouldn't be required to repay the balance.

23. Novitas didn't agree with Mr A's complaint. In its final response, it said Mr A's complaint related to matters regarding its agreement with P, rather than its agreement with him. Mr A remained dissatisfied and referred his complaint to our service.

The initial investigation of Mr A's complaint and his concerns around affordability

24. When referring his complaint to our service Mr A also complained that Novitas didn't carry out sufficient enquires to establish that he would have been able to repay the loan without selling his home. And had it done so, Novitas would have seen he wouldn't have been able to repay what he was being lent without selling his home. In essence, this part of Mr A's complaint can be characterised as Novitas irresponsibly lending which resulted in him entering into loans, which he could never afford to repay.

The parties' responses and submissions after the investigator's initial assessment

25. Novitas accepted the investigator's findings that it irresponsibly lent to Mr A. In the period between its initial response to our investigator's assessment and my provisional decision, Novitas notified our investigator that it had completed a review of its current book of its family loans. This included reviewing how the loans were working for each

of its customers. As a result of reviewing Mr A's loan, it proposed to write-off all interest and fees added to Mr A's loans and also ensure that Mr A would pay no interest going forward.

26. Mr A didn't think that the proposed resolution went far enough and he reiterated his request for an ombudsman to review his complaint.

(c) My provisional decision of 11 August 2022

27. I issued a provisional decision – on 11 August 2022 - setting out why I intended to partially uphold Mr A's complaint and why I intended to require Novitas to do more than simply write off all the interest and fees added to Mr A's loans and ensure that Mr A would pay no interest going forward.

28. I won't copy my provisional decision in full, but in summary I partially upheld the complaint and set out the reasons for my provisional decision as below:

- I was satisfied that Novitas hadn't carried out reasonable and proportionate checks before agreeing to provide Mr A with his loans. In my view, had Novitas carried out reasonable and proportionate checks it would have seen that Mr A would not have been able to repay his loan in a sustainable manner.

- While Novitas had agreed to refund all of the interest, fees and charges added to Mr A's loans (and leave him in the position where he'd only have the capital to repay), I did not think that this went far enough, or that this constituted fair compensation in Mr A's complaint.

- I disagreed with Mr A's view that Novitas was directly responsible for any losses he may have incurred as a result of P's solicitor's actions towards her.

- Nonetheless, Novitas failed to disclose (and in any event failed to take reasonable steps to ensure that Mr A knew) it was funding both sides of the litigation Mr A was involved in. Novitas' failure to take additional steps to ensure Mr A knew it was funding both sides of this legal matter meant that it is likely a court would conclude that the relationship between Novitas and Mr A was unfair to Mr A under s140A of the Consumer Credit Act 1974 ("CCA").

- If Mr A had been made aware that Novitas was funding both sides of the potential litigation, he was more likely not to have entered into this funding arrangement. In my view, at the very least, Mr A would have likely paid more attention to Novitas' oversight and requests for updates and might have been more proactive in attempting to move matters forward himself had he had known Novitas was funding both sides of the litigation, in the way that it was.

- Taking that into account, and the broad discretion available to the courts under s140B CCA to address an unfair relationship, I provisionally concluded that, to fairly compensate Mr A, Novitas should limit the amount that Mr A had to pay to 50% of the funds that had been advanced to him.

(d) The parties' representations

29. Both parties have made substantial representations in response to my Provisional

Decision. I have read and considered them all carefully and will not restate them all here. I will instead summarise the most relevant points.

30. Mr A responded and made a number of comments within the text of my provisional decision and in a further response in August 2024. While I've read and considered everything he has said, I'm only setting out below those comments which are relevant to my provisional findings and my decision. In summary Mr A has said:

- it remains unclear to him why Novitas' loan to P and the circumstances behind it have no relevance to his complaint. In his view, by failing to address evidence of fraud, Novitas itself is guilty of fraud;
- the second charge on his property was held by a dormant company;
- there is no evidence that Novitas carried out a credit check;
- Novitas shouldn't have approved P's loan, shouldn't have approved his loan and it is responsible for his losses because it failed to query P's solicitor's dishonesty. In his view, Novitas had clear evidence of fraud on the part of P's solicitor;
- the SRA cannot perform its function unless it is made aware that a regulated solicitor has breached its code. Novitas was best placed to report P's solicitor to the SRA. Novitas had a number of qualified legal professionals who were able to hold P's solicitor to account in the way that he suggests it ought to have;
- he was dissuaded from following up concerns regarding P's solicitor's probity and conduct by his own solicitor. And Mr A now suspects that this was because his solicitor was motivated by his friendship with one of Novitas' directors;
- P's solicitor was reprimanded and fined in 2016. And this reinforces his view that Novitas should have reported him earlier;
- he has now realised that his solicitor was not acting in his interests and this means his loan agreements should be void under s56(3) CCA.
- he reiterated that he would not have proceeded with a Novitas loan had he been made aware that P was already being funded by Novitas. He would have sourced funds from elsewhere or *"indeed, represented myself"*;
- he would have immediately questioned how P was able to obtain a loan for £50,000.00, had he received the form of notice, given what he knew about her financial position at the time;
- he did not benefit from his legal representation. His solicitor acted in Novitas' interests not his by insisting the loans should be repaid above all else;
- Novitas cannot enforce the debt because it has not provided a copy of the credit search referred to in the loan agreements;
- it would be a miscarriage of justice were he required to repay any amount at all to Novitas and the capital sum should be wiped clean in its entirety;
- he is concerned that Novitas will argue that he is in no position to arrange an affordable payment plan because he can no longer work and he is now on

benefits. He is also worried that it will attempt to take steps to enforce its security over his home.

31. Novitas also responded to my provisional decision. In this response and a subsequent follow up response in August 2024, it confirmed that it was in agreement with and did not seek to challenge the section of my provisional decision relating to it having been irresponsible to provide Mr A with his loans. However it did not agree with the section regarding whether an unfair relationship existed between it as lender and Mr A as borrower, beyond the unaffordability of his loan..

32. In summary, it disagrees with this section of my provisional decision, because:

- it does not consider that my findings are supported by the facts or the law;
- there was no conflict of interest or risk of unfairness for Mr A given the lack of any influence or direction that it had over the proceedings or the level of costs incurred. This was a fact acknowledged by the investigator who initially reviewed Mr A's complaint;
- its product is a fixed sum credit agreement and not a revolving credit facility and simple interest, rather than compound interest, was charged.
- the statements I referred to, in its marketing materials, did not create an inaccurate, unclear or misleading perception to Mr A. All the statements made were true regardless of whether it was lending to Mr A alone or Mr A and P;
- there was no risk of detriment to either party from it lending to both of them. It considers that it was in the same position as a bank which had made a personal loan to both parties to fund proceedings;
- P's solicitor's professional misconduct was a matter for the SRA not Novitas. It was entitled to rely on both P's solicitor and Mr A's solicitor being authorised by the SRA at the time the advances were made;
- It required a form of notice to be completed by P and then served on Mr A by P's solicitor. It was entitled to rely on an SRA regulated solicitor to comply with this request. This requirement to serve such a notice was in place for all loans not just where it was funding both sides of a litigation and not specifically to manage a conflict of interest;
- My provisional decision ignored the fact that it required this disclosure to have been made. In any event, the failure to serve a notice was not attributable to Novitas under s140A CCA;
- It does not consider that Mr A would have acted differently even if he had been made aware of P's arrangement at the time he entered into his arrangement with Novitas. All of the scenarios I put forward, such as a soft loan or an alternative loan, were not viable or likely alternatives and were instead based on pure conjecture which it considers fails to reflect the facts and reality of Mr A's circumstances at the time;
- Furthermore, it does not consider that Mr A would have made increased efforts to move matters along, had he known about P's agreement, given he was aware of the amount he would have to pay and the effect of the proceedings;

— My provisional decision did not establish any reasonable basis to consider that the relationship between Novitas and Mr A was affected in any way by the alleged imbalance in the parties knowledge of P's funding arrangements, much less that it created an unfair relationship of the type contemplated in s140A CCA.

33. Novitas was provided with a copy of Mr A's response and Mr A was also provided with a copy of Novitas' response. So I'm satisfied that the parties have had sight of the further arguments put forward after my provisional decision.

My findings

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

(e) Relevant considerations

35. The rules that govern this service are set out in the Dispute Resolution Rules (DISP) which can be found in the Financial Conduct Authority's Handbook.

36. DISP 3.6.4R sets out the factors that I must take into account when considering what is fair and reasonable in all the circumstances of the case.

37. DISP 3.6.4R says:

> *In considering what is fair and reasonable in all the circumstances of the complaint, the Ombudsman will take into account:*
>
> *1) relevant*
>
> *a) law and regulations;*
> *b) regulators' rules, guidance and standards;*
> *c) codes of practice; and*
>
> *2) (where appropriate) what he considers to have been good industry practice at the relevant time.*

38. I will refer to and set out several regulatory requirements, guidance provisions and legal concepts in this decision, but I am satisfied that of particular relevance to this complaint are:

- The FCA's Principles and CONC rules and guidance that applied when Mr A entered into his loan agreements with Novitas in December 2014 and September 2017 (and had applied to similar arrangements since April 2014 when FCA began regulating consumer credit activities).

- The law relating to unfair relationships between creditors and debtors as set out in ss140A-C of the CCA which has applied to credit agreements like this that were entered into since April 2007 (and in some cases before).

(f) Mr A's complaint

39. Mr A's complaint can be characterised as being in two parts. First, he's complained that he only had to take out his own loans with Novitas (and suffered losses as a result) because Novitas negligently lent to P in circumstances which it shouldn't have done. Secondly, he's also argued that the loans he was provided with were unaffordable for him.

40. Whilst I appreciate Mr A's first point, as I explained in my provisional decision, I am confined to considering Novitas' actions in relation to Mr A in this complaint that Mr A has brought to the Financial Ombudsman Service. Whilst Novitas' actions in relation to P might be relevant background in Mr A's complaint, I cannot comment directly on Novitas' actions in relation to P here. Furthermore, as I've previously explained an Ombudsman has already considered P's complaint about Novitas in relation to those actions and that matter has concluded.

41. As set out in DISP 3.6.1R, my role is to determine Mr A's complaint about Novitas by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case.

42. To my mind, there are two overarching questions that I need to answer in order to reach a fair and reasonable decision in this case.

43. These two overarching questions are:

    1. Did Novitas meet its obligations to Mr A in relation to responsible lending?
    2. Notwithstanding Novitas' obligations in relation to responsible lending, are there any other reasons why Novitas may have failed to act fairly and reasonably towards Mr A, including whether an unfair relationship existed under s140A CCA?

(g) Did Novitas meet its obligations to Mr A in relation to responsible lending?

44. We've explained how we handle complaints about unaffordable and irresponsible lending on our website. And I've referred to this approach when considering whether Mr A's loans were affordable.

45. Bearing in mind our approach to unaffordable and irresponsible lending complaints, which is set out on our website (and also includes information on how we would expect a lender to put things right should we find that it should not have lent), I think that there's one key question and two supplementary questions for me to consider in order to determine whether Mr A's loans were affordable.

46. These questions are:

    - Did Novitas complete reasonable and proportionate checks to satisfy itself that Mr A would be able to repay his loans in a sustainable way?
        - If so, did it make fair lending decisions?
        - If not, would those checks have shown that Mr A would've been able to repay his loans in a sustainable way?

47. Before I go on to consider the checks Novitas carried out before its decisions to lend to Mr A in 2014 and 2017, I think it would be useful for me to set out Novitas' main obligations at the time it decided to provide Mr A with these loans.

48. The first loan (Loan A) was secured by way of a second charge on Mr A's property and agreed in December 2014. So this loan was agreed and provided before the Mortgage Credit Directive, which moved second charge mortgage lending into the regulatory regime for mortgage lending, rather than consumer credit, on 21 March 2016. This loan was also provided after regulation of Consumer Credit Licensees had already transferred from the Office of Fair Trading to the Financial Conduct Authority ("FCA") on 1 April 2014.

49. While the second loan (Loan B) was provided in September 2017, after the Mortgage Credit Directive had already been implemented, as it wasn't secured by a second charge on Mr A's property, it was also agreed under the same consumer credit regime as Loan A.

50. Novitas' interim permission to provide consumer credit and its eventual authorisation to do so meant that it was subject to the FCA rules and regulations from 1 April 2014.

- *The FCA Principles for Business ("Principles")*

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

52. PRIN 1.1.1G, says

> "The *Principles* apply in whole or in part to every *firm.*

53. 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*."*

54. PRIN 2.1.1 R (6) which says:

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

55. And finally PRIN 2.1.1 R (8) which says:

> "A *firm* must manage conflicts of interest fairly, both between itself and its *customers* and between a *customer* and another *client."*

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

56. This sets out the rules and guidance which apply to consumer credit providers like Novitas when providing loans. CONC 5.2 set out a firm's obligations in relation to responsible lending and CONC 5.3 the conduct of business in relation to creditworthiness and affordability.

57. CONC 5.2 and CONC 5.3 were removed from CONC on 1 November 2018 and new rules came into effect on this date. But as both of Mr A's loans were provided before this date, I've referred to the rules which were in place (in CONC 5.2R and CONC 5.3R) at the time.

58. I've set out the provisions of CONC that I consider to be of the most relevance to

Mr A's complaint below.

59. CONC 5.2.4G(4) says:

> "A high level of scrutiny in the assessment required by *CONC 5.2.2R (1)* would normally be expected before the *lender* enters into a *regulated credit agreement* secured by a second or subsequent charge on the *customer's* home*."*

60. And, in the section entitled *"Unfair business practices: lenders"* CONC 5.3.4 R says

> "A firm must not base its *creditworthiness assessment*, or its assessment required under *CONC 5.2.2R (1)*, primarily or solely on the value of any security provided by the *customer*, but this *rule* does not apply in relation to a *regulated credit agreement* under which the *firm* takes an article in *pawn* and the *customer's* liability is limited to the value of the article plus interest on the *credit* and there are no additional charges."

61. Finally, CONC 5.3.1G refers to the need for a lender to take reasonable steps to assess the customer's ability to make payments in a sustainable manner. CONC 5.3.1G (6) defines sustainable and states:

> "…
> (6) For the purposes of *CONC* "sustainable" means the repayments under the *regulated credit agreement* can be made by the *customer*:
> (a) without undue difficulties, in particular:
> (i) the customer should be able to make repayments on time, while meeting other reasonable commitments; and
> (ii) without having to borrow to meet the *repayments*;
> (b) over the life of the agreement, or for such an agreement which is an *open-end agreement*, within a reasonable period; and
> (c) out of income and savings without having to realise security or assets; and
> "unsustainable" has the opposite meaning."
> [**Note**: paragraphs 4.3 and 4.4 of ILG]

Did Novitas complete reasonable and proportionate checks to satisfy itself that Mr A would be able to repay his loans in a sustainable way?

62. Our investigator set out, in some detail why he thought that the checks Novitas carried out were not reasonable and proportionate. As Novitas accepted our investigator's conclusions on this matter, I don't propose to go into too much detail on these matters in this final decision.

63. However, I do want to briefly set out the reasons why I'm satisfied that the checks Novitas carried out weren't reasonable and proportionate. These are:

- Novitas appears to have followed its usual lending policy of merely checking the borrower was a United Kingdom resident and had no County Court Judgments or an Individual Voluntary Arrangement ("IVA") recorded against them. It assumed that a lump sum would be available to repay the loan once the property in question was sold. As a result, it considered the borrower had net assets of at least three times the amount being lent. I can't see that Novitas had any regard for Mr A's particular circumstances apart from the general CCA/IVA checks and the fact that he owned a property.

- Novitas didn't obtain any income and expenditure information from Mr A. And I've not seen anything to ascertain that Novitas established Mr A had a lump sum available to repay the loan either, if for any reason his property was not sold at the end of the dispute (as was actually the case). This, together with the lack of any payment schedule or reasonable term for the repayment of the amounts lent suggests Novitas' assessment of affordability was based primarily or solely on the value of Mr A's property being three times the value of the amount lent, which runs contrary to CONC 5.3.4R. And even then, Mr A's equity in the property concerned was the subject of the proceedings. Given the existing mortgages on the property, it seems to me that any success for P in her TOLATA claim would have taken Mr A's equity below three times the amount Novitas was lending. So, it appears that the decision to proceed without any further checks may even have been against Novitas' own lending policy.

- Novitas carried out a credit search on Mr A and obtained certified copies of his driving licence and passport. But I don't think that this amounts to the high level of scrutiny normally expected before a lender enters into a regulated credit agreement secured by a second or subsequent charge on the customer's home, as set out in CONC 5.2.4G(4).

- Notwithstanding the above, the credit search carried out on Mr A simply didn't contain enough for Novitas to reasonably conclude he'd be able to sustainably repay this loan. In other words, the credit search carried out did not demonstrate that Mr A could repay his loan on time, while meeting other reasonable commitments. It also did not demonstrate that he could repay the loan without having to borrow, or use his income or savings to meet the repayments, if he didn't (or couldn't) sell his home.

64. As I'm not satisfied that Novitas carried out reasonable and proportionate checks before agreeing to provide these loans, I've gone on to consider whether such checks, had they been carried out, are more likely than not to have alerted Novitas to the likelihood that Mr A would not have been able to repay his loans in a sustainable way.

Would reasonable and proportionate checks have indicated to Novitas that Mr A would more likely than not have been unable to sustainably repay these loans?

65. I consider that reasonable and proportionate checks would more likely than not have shown that Mr A was unable to have been able to repay these loans in a sustainable manner. I consider that reasonable and proportionate checks, including those relating to his income and expenditure, would have likely revealed:

- that Mr A had earnings of under £10,000 a year in 2014

- Mr A already owed over £240,000 to existing creditors, including almost £217,000 in lending secured on his home. The majority of Mr A's monthly income was spent on his monthly mortgage payments alone.

- The above details show that Mr A had an obvious lack of disposable income. So it's difficult to see how he would have been able to repay an additional £60,000 and £30,000 in a sustainable manner. In my view, he was always going to have to either borrow further or sell his home – both of which are examples of making

payments in an unsustainable manner in the regulator's guidance at CONC 5.3.1G (6).

66. Bearing all of this in mind, I'm satisfied that reasonable and proportionate checks would more likely than not have demonstrated to Novitas that Mr A would not have been able to sustainably repay his loans. This means that I'm satisfied that Novitas failed to meet its obligations to Mr A in relation to responsible lending.

67. These findings are also relevant to my consideration of whether a court would likely conclude that the relationship between Novitas and Mr A arising out of the credit agreements was unfair to Mr A under s140A CCA 1974 – see below: section *(k) Did Novitas' conduct mean that its relationship with Mr A was unfair under ss140A-C CCA?* Finally, these findings are also relevant to my determination of *Fair Compensation* as I will set out in section *(m)* of my decision.

(h) Notwithstanding Novitas' obligations in relation to responsible lending, are there any other reasons why Novitas may have failed to act fairly and reasonably towards Mr A?

68. As I've explained earlier in this decision, Novitas has already agreed to waive all of the interest fees and charges added to Mr A's loans from the outset, as well as also agreeing not to add any interest and fees to the outstanding balance.

69. Usually, when a lender agrees that it provided credit to a borrower irresponsibly, we'd typically say it's fair and reasonable to expect the borrower to repay the funds they were lent, but not any associated interest, fees or charges. So what Novitas has already agreed to do to put things right for Mr A is broadly along the lines of what a lender would usually – but not always – be expected to do in circumstances where it provided credit in breach of its of obligations in relation to responsible lending.

70. However, as I'll go on to explain, this is not a typical case and Mr A has argued that what Novitas has agreed to do doesn't go far enough because it also acted unfairly and unreasonably towards him in a way that went beyond simply irresponsibly providing him with unaffordable loans.

71. So I'll now consider whether there are any other reasons – independent of Novitas' failure to meet its obligations in relation to responsible lending - Novitas acted (or failed to act) fairly and reasonably towards Mr A in all the circumstances of this case. In doing so, I will have regard to each of the following in turn:

    (i) Mr A's arguments in relation to Novitas being directly responsible for all of P's solicitor's actions and any losses he might have suffered in relation to them.

    (ii) Novitas' regulatory obligations outside of CONC 5.2 as well as CONC 5.3 and separate to those in relation to irresponsible lending only.

    (iii) The unfair relationship provisions set out in ss140A-C of the CCA.

(i) Is Novitas directly responsible for all of P's solicitor's actions and therefore all losses Mr A may have incurred in relation to them?

72. As I have previously explained, whilst I appreciate that P's solicitor's actions put Mr A in a difficult and unfortunate position, I can only consider Novitas' actions towards Mr A

in this complaint. As Novitas was also funding P's litigation at the same time, I have considered Novitas' actions in relation to Mr A in these circumstances.

73. As I understand it, Mr A accepts, or at least doesn't appear to dispute, that a lender who finances a litigation wouldn't usually owe any direct obligations to the other party subject to the litigation being financed. In other words, Novitas wouldn't ordinarily owe Mr A any obligations as a prospective defendant, in relation to P's solicitor's actions and conduct, simply because it was financing P's litigation.

74. However, Mr A argues that Novitas' agreement to finance his costs of defending any litigation instigated by P meant that he was linked to P's agreement by the underlying legal proceedings and Novitas accrued additional obligations towards him, in relation to P's solicitor's conduct, as a result. I've thought about the argument that Mr A has advanced here.

75. I think it's fair to say that Novitas' decision to fund Mr A's litigation costs after it had already started funding P's litigation costs created an unusual situation here. It's also clear that there were not only differences of opinion but also disputes of fact between the arguments made by P's solicitor – in relation to P's marital status and her legal title to the property subject to any litigation – and those made by Mr A's solicitor. And it also isn't unreasonable to say, as Mr A has, that P's solicitor made it appear as though P's prospects of a successful TOLATA claim against Mr A were stronger than they actually were.

76. Mr A argues that the unusual situation here meant that Novitas was uniquely placed to cross-reference the claims made by P's solicitor against those made by his solicitor. And as it chose to place itself in the position where it received updates from both sides to the same dispute about the progression (or non-progression) of the case – it was the only party in possession of all the facts.

77. Furthermore, Mr A argues that as both P's loan and his loan were individually prepared and approved by the same Novitas director, it is inconceivable that she failed to notice the serious inconsistencies in the two solicitors' accounts.

78. Mr A submits that Novitas' director ought to have spotted the factual discrepancies and halted, or at the least queried, the applications for further funding, which might have prevented Mr A from being indebted to Novitas to the extent that he currently is. Since my provisional decision Mr A has said that Novitas shouldn't have approved P's loan at the outset; that it ought to have refused his application for a loan and further funding when the inconsistencies between his solicitor's version of the facts differed from P's solicitor's; and that it is responsible for his losses because it allowed P's solicitor to get away with the frauds he was accused of. While I understand all of these arguments and can see their logic and simplicity, I'm afraid that I don't agree with them for a number of reasons.

79. First, Novitas was and is a lender. It is not a legal professional. And while there may have been discrepancies between the facts, opinions and reasons why each side believed there were reasonable prospects of a successful outcome, I don't think that Novitas was in a position to second guess the conclusions which legal professionals reached on what were strictly legal matters. Indeed, both P's solicitor and Mr A's solicitor were regulated by the SRA (at least at the time of the applications). Novitas was entitled to rely on the respective solicitors' assessments of the prospects of success when deciding whether to lend, or to extend its lending.

80. Furthermore, the SRA's Code of Conduct for solicitors requires solicitors to not only

act in their client's best interests but also not to mislead their clients, the court or others. The Code of Conduct sets out that a solicitor will only act for clients on instructions from the client or someone properly authorised to provide instructions on their behalf. It's also worth emphasising that as the body responsible for regulating the conduct of solicitors it is the SRA that is responsible for assessing a solictor's compliance with the Code of Conduct, not Novitas.

81. Mr A says that the SRA cannot perform its function unless it is made aware that a solicitor has breached its code. But this rather misses the point. It isn't Novitas', or any other entity other than the SRA's, responsibility to assess a solicitor's compliance with the SRA code. This is a matter solely for the SRA. Another party may allege that there may have been breaches of the code but it is for the SRA to make any such finding.

82. I've also considered Mr A's submissions in relation to the legal qualifications of some of Novitas' staff. Some of Novitas' staff may have had legal training. But it is clear that Novitas wasn't providing Mr A with legal services. It was providing Mr A with credit. I don't think that the fact that some of Novitas' personnel having been authorised themselves, or having previously practiced the law, in itself places additional obligations in relation to Novitas owing Mr A a duty to ensure that P's solicitor always acted in compliance with the SRA code. This is especially as Novitas' staff were not acting as lawyers or any other form of legal professionals in this instance.

83. Instead, as P's solicitor continued to hold a practicing certificate and his firm continued to be regulated by the SRA, I think that Novitas was entitled to rely on what it was being told about the litigation from the relevant solicitors.

84. Mr A says Novitas should have reported P's solicitor to the SRA earlier, and that this would have avoided an escalation of his own costs (and borrowing) in defending the matter. Even if I were to agree that Novitas was under an obligation to report P's solicitor (which I do not agree I have enough evidence to conclude), it doesn't automatically follow that the SRA would have taken action as swiftly as Mr A believes that it would have done.

85. I say this because Novitas could not have known enough about solicitor misconduct to report P's solicitor for his actions in P's case. But even if it did (and for the avoidance of doubt I don't think the evidence suggests it did), it does not automatically follow that the SRA would have taken action as swiftly as Mr A believes it would have done.

86. This is particularly the case as it is my understanding that P's solicitor was already known to the SRA for irregularities in his handling of client money and the eventual action which resulted in his firm being closed down was due to a number of issues with a number of clients. So it is not clear to me how an additional report in relation to P's case would have made such a dramatic difference in the way that Mr A suggests given the overall sums involved.

87. Finally, it's also worth noting that since my provisional decision, the criminal proceedings in relation to P's solicitors' actions have been finalised. I understand that P's solicitor pleaded guilty to the charges and the matter was concluded on this basis. I'd like to assure Mr A that I've taken into account the arguments he has made in relation to the SRA's disciplinary proceedings against P's solicitor. But the reality is that the criminal proceedings have merely confirmed that P's solicitor was involved in fraud, which is not in dispute in this case.

88. The matter in dispute here has been to what extent, if any, Novitas is, or can be held, responsible for P's solicitor's fraud in the way that Mr A has argued. I've not seen

anything from the criminal action taken against P's solicitor which indicates that Novitas was, or should be, held liable by the court in the way that Mr A argues, I should hold it liable here.

89. Mr A also says it remains unclear to him why Novitas' loan to P has no direct bearing on his complaint. Mr A has referred to s56 CCA, but as I explained in my provisional decision, this is only relevant insofar as the respective solicitors' conduct to their own individual clients. Mr A was not a client of P's solicitor – only P was. Mr A was a client of his own solicitor. P's complaint involved a debtor-creditor-supplier relationship whereby P's solicitor was the supplier and Novitas was the creditor. As a result, Novitas had direct additional responsibilities in respect of P's solicitor's actions towards P. Novitas cannot and does not directly owe these same duties to Mr A just because Mr A was the other party in the same legal proceedings.

90. Novitas only directly owes similar duties in relation to Mr A's solicitor's obligations to him by virtue of the debtor-creditor-supplier agreement between Mr A, Novitas and Mr A's solicitor.

91. Since my provisional decision, Mr A has said that he was dissuaded from following up his concerns about P's solicitor's probity and conduct, by his own solicitor and that he suspects this was because his solicitor was motivated by his friendship with one of Novitas' directors. Mr A has not provided any evidence to support this statement. In any event, Mr A has never raised this issue with his solicitor or Novitas before and therefore it does not form part of my consideration here.

92. Overall and having carefully considered matters, I'm satisfied that the separate debtor-creditor-supplier agreement Novitas entered with Mr A and Mr A's solicitor, to fund the cost of defending any litigation from P, doesn't make Novitas directly responsible for any losses Mr A may have incurred as a result of P's solicitor's actions towards her.

93. So the decision on approving P's loan has no bearing on the subsequent decision to approve Mr A's funding.

(j) Did Novitas act in breach of any other regulatory obligations when funding both sides of the litigation?

94. While I'm satisfied that Novitas may not be directly responsible for any losses Mr A may have incurred as a result of P's solicitor's actions in the way that Mr A has suggested, I have nonetheless also considered what, if any, other obligations (other than those obviously set out in the agreement) Novitas – as a lender – may have owed Mr A as a result of its decision to fund both sides of the same legal dispute.

95. As well as CONC, which applied specifically to those firms carrying out credit related regulated activities, Novitas was also subject to the FCA's Principles which set out the overarching requirements which apply to all authorised firms carrying on regulated activities.

96. In *R (British Bankers* Association*) v Financial Services Authority* [2011] EWHC 999 (Admin), Ouseley J considered the Principles and the potential impact on any rules contained in the relevant sourcebook pertaining to an authorised firm's activities. Paragraph 162 - 163 of Ouseley J's judgment said:

> *"[162] The Principles are best understood as the ever present substrata to which the specific rules are added. The Principles always have to be complied with. The*

specific rules do not supplant them and cannot be used to contradict them. They are but specific applications of them to the particular requirements they cover. The general notion that the specific rules can exhaust the application of the Principles is inappropriate. It cannot be an error of law for the Principles to augment specific rules.

[163] That role for the Principles has been clear from the language describing their role in the Handbook; see PRIN 1.1.7G to 1.1.9G, and paragraphs 29-31 above. That was also clear from what the FSA said in the 1998 Consultation Paper and the Supplementary Memorandum on which [counsel for the BBA] relied in submission on the first ground."

97. And when considering the Principles in relation to an ombudsman's decision making, in paragraph 77 of his judgment Ouseley J said:

"[77] Indeed, it is my view that it would be a breach of statutory duty for the Ombudsman to reach a view on a case without taking the Principles into account in deciding what would be fair and reasonable and what redress to afford. Even if no Principles had been produced by the FSA, the FOS would find it hard to fulfil its particular statutory duty without having regard to the sort of high level Principles which find expression in the Principles, whoever formulated them. They are of the essence of what is fair and reasonable, subject to the argument about their relationship to specific rules."

98. Principle 6 says:

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

99. Principle 8 says:

> 'A *firm* must manage conflicts of interest fairly, both between itself and its *customers* and between a *customer* and another *client*.'

100. I have therefore considered whether a conflict of interest existed between Mr A's interests and Novitas' interests, or whether Novitas' actions led to a conflict of interest between Mr A's interests and P which was another of Novitas' clients. And if such conflicts of interest existed, whether they were managed fairly and in a way which paid due regard to Mr A's interests.

<u>Was there a conflict of interest between the interests of Novitas and Mr A and/or the interests of Mr A and P?</u>

101. At this point, I think that it would be useful to consider some of the marketing material Novitas provided to its clients. Novitas' website around the time it agreed to lend to Mr A had a section entitled *'Who We Are'.* This section of the website had the following statement:

"Novitas is a specialist lender for the legal profession. Operating across the UK, we provide innovative and cost effective solutions for solicitors and their clients.

Novitas was founded by Directors [names of directors removed for anonymisation purposes] *at the start of 2011. The company was created to meet a growing demand for people struggling to fund their legal disputes and thus unable to secure the legal support they needed. Over the last 3 years, Novitas has grown to become one of the*

leading lenders to law firms and their clients, across the UK. The company is privately owned and is fully independent with no ties to any financial institutional."

102. Furthermore, Novitas also had a '*Novitas Loans Family - Frequently Asked Questions For Clients in England and Wales'* ("FAQ") document available on its website at this time.

103. In the section entitled '*Is the loan with me or with my solicitor?'* the document states:

"The loan contract is between yourself and Novitas. The solicitor does have obligations to Novitas as part of your loan, namely to:

- *Communicate anything material to the loan that happens during the case;*
- ***Pay off the loan from any proceeds they receive as part of the settlement, before the remainder is passed to you*** [my emphasis]*."*

104. I can see how the above statements on Novitas' website and the terms of the Agreement between Novitas and Mr A may create the perception (at least to Mr A as the recipient of credit) that Novitas' and Mr A's interests in the litigation were aligned in some way – that if Mr A was successful, he would repay the loan from the "proceeds" of any settlement. However, this becomes a problem in circumstances where Novitas is also funding the other side to the same dispute, as this suggests that its interests are also aligned with the other party's.

105. Since my provisional decision, Novitas has said that the statements I've referred to, in its marketing materials, did not create an inaccurate, unclear or misleading perception to Mr A. In its view, all of these statements are true regardless of whether it was lending to Mr A alone, or to Mr A and P.

106. Nonetheless, in my view, Novitas choosing to fund Mr A's litigation in circumstances where it had already agreed to fund P's litigation created an additional conflict and risk to Mr A's interests which Novitas was required to manage fairly under the overarching requirements of Principle 8.

107. The conflict between the interests of Novitas and those of Mr A arose in two ways. Firstly, as Mr A says, the loans were set up in a way that meant Novitas was the only party that had access to legally privileged information from both sides of the dispute.

108. This brings me on to the second source of the potential conflict of interest. Novitas' decision to fund both sides to the same dispute placed it in the position where it effectively controlled the 'purse strings' for both sides. Novitas' decision to fund both sides to this dispute meant that it could make further funds available for both parties to drawdown, or even simply provide additional funds to just one party. For example, every time Novitas advanced funds to one side, it is reasonable to infer that this could disadvantage the other side, if that money was going to be used to strengthen the legal position of the opponent.

109. In its response to my provisional decision, Novitas has said that there is no evidence that this happened. To be clear, I'm not saying that this did in fact happen. However, Novitas' decision to lend to both parties to the same dispute put itself in the position where it had access to legally privileged information from both sides. There was therefore, at the very least, the possibility that Novitas could – unless it had a clear and transparent process to manage this conflict of interest – make decisions in respect of Mr A's loans and drawdowns on the basis of information that was both unknown to him

and which he could not know because it was P's legally privileged information.

110. Furthermore, even if Novitas only increased the loan available to one party, this could have the indirect effect of increasing both parties' indebtedness, as the opposing party would likely seek additional funding, to defend itself. In these circumstances, it's not unreasonable to conclude that this situation had the potential to become doubly profitable for Novitas as protracted litigation could create an inflationary cycle where it benefitted both directly and indirectly from the need of the other side to respond (by drawing down further funds).

111. This is especially the case bearing in mind the way that interest was accruing on any amount owing without any payments, in line with any amortisation schedule being made to reduce the capital. It's also worth noting that Mr A's debt was secured on his property. Novitas knew that a prospective TOLATA claim was ongoing and that Mr A's share of the property could reduce at the end of the process.

112. I'm also mindful that Novitas funding both sides to the litigation had the potential to be doubly disadvantageous to Mr A and P. After all, the whole reason the litigation was taking place was because there was a dispute over their joint assets. Lending to both parties to the same dispute, especially on the terms the funds were advanced on, had the unusual effect of diminishing these joint assets from both sides.

113. Novitas says that the arrangements here did not create any conflict of interest and that it was in the same position as a bank which had made a personal loan to both parties to fund proceeds. However, I don't agree with this view. Novitas provided Mr A with a loan that was secured on his property and this is different from a personal loan. More importantly, a key feature of this lending arrangement was that Novitas was in a unique position where both solicitors of Mr A and P were members of its Panel under a pre-existing business arrangement. This meant Novitas was the creditor in debtor-creditor-supplier agreements with both Mr A and P.

114. Had P and/or Mr A taken out personal loans from their banks there would have been no pre-existing agreement between the bank(s) and the legal services provider(s) - i.e. it would have been more straightforward and simple debtor creditor agreement. The lack of any arrangement between the bank and the provider of the legal services means the bank is unlikely to have known much about the litigation at all and would simply be concerned with the creditworthiness of the borrower and affordability of any loan.

115. This also ignores the fact that the terms and conditions of Mr A's loan indicated that Novitas would receive regular updates from Mr A's solicitor, which a bank would not receive. And as I've explained above, this placed Novitas in a position where it had access to legally privileged information from both parties

116. The CCA imparts additional requirements and responsibilities on the part of lenders in the case of debtor – creditor - supplier agreements, such as s56 CCA. These requirements can hold the creditor responsible for some the actions and/or negotiations of the supplier. For these reasons, my conclusion is that Novitas was not in the same position as a bank would have been where it provided personal loans to Mr A and P which they then used to pay for their legal representation.

117. I'm also satisfied that Novitas' interests cannot have been aligned with those of both Mr A and P when it began funding both their litigations. Novitas has said that it does not dispute that it had "*an interest in our customers both achieving a good outcome (an inherent possibility in separation proceedings unlike, for example, civil litigation)*.

However, it is clear to me that Mr A's and P's interests would inevitably diverge in respect of different issues and outcomes sought from the legal dispute. That is the nature of the adversarial legal system. A solicitor could not act on behalf of both Mr A and P because they might be unable to act in the best interests of *both* of their clients.

118. For these reasons, I am satisfied that Novitas agreeing to fund both sides of the litigation created a situation where Novitas had two or more competing interests and there was at least the potential that serving one of those interests could damage or harm the other interest. And for Novitas to comply with Principle 8 (and to be of mindful of Principle 6), it was incumbent on Novitas to manage these potential conflicts fairly. I'll now consider whether Novitas did in fact do so.

Did Novitas manage any conflicts of interest between itself and Mr A, caused by it agreeing to fund both sides of the litigation, fairly and in a way that paid due regard to Mr A's interests?

119. I recognise that as a litigation funder, there could be a situation where Novitas is funding both sides to the same litigation (as it happened here) and that a potential conflict of interest could arise. I do accept that managing a conflict of interest fairly is not the same as disclosing a conflict of interest. And it therefore does not automatically follow that all conflicts of interests need to be disclosed in order for them to be managed fairly.

120. For example, there may be certain circumstances where a firm cannot divulge the details of a potential conflict. However, it can nonetheless instead demonstrate that it has clear organisational and/or administrative arrangements in place (such as an ethical wall) which would enable it to successfully prevent or manage that conflict. I have asked Novitas if it had any such arrangements in place several times. Novitas has not been able to detail to me, or provide evidence in support of, any arrangements it may have had in place to manage potential conflicts effectively. Indeed, I can see that the same director at Novitas approved both Mr A's and P's loans.

121. Notwithstanding the above, I have considered whether Novitas took any steps to manage any conflicts of interest fairly. I have also considered whether, as a regulated firm, it took any further steps to ensure it met its overarching obligations to manage any conflicts of interest between itself and Mr A fairly and in a way that paid due regard to Mr A's interests in these unique circumstances.

122. In this case, I think that in order for Novitas to manage this conflict of interest fairly it needed to alert Mr A to the source of this conflict – i.e. that it was funding both sides of the litigation. In my view, this needed to be done in a way that communicated this information in a way which was clear, fair and not misleading in line with Novitas' broader regulatory obligations when communicating with customers.

123. I consider that any disclosure also needed to clearly explain the arrangements in place at Novitas to mitigate the conflict and also explain the risks of Mr A proceeding with his loan in these particular circumstances. This would have enabled Mr A to make an informed decision on whether he wished to proceed notwithstanding the potential conflict of interest that arose.

124. I have considered whether any such disclosure was made.

125. The FAQ document, which I've previously referred to above, has a section entitled *'Does my spouse need to know about the loan?'* at page 10. The answer to this

question states:

> *"Yes; but only once the loan is in place unless we are requesting their permission for a legal charge over an asset which needs permission in advance. There is a letter you sign and send to your spouse once the loan is in place saying that you have assigned the proceeds of the divorce to Novitas to discharge the loan, after which all proceeds are returned to you."*

126. As part of his application, Mr A was also required to sign a form of notice addressed to P where he disclosed that he'd agreed to grant a charge on the property to fund his litigation costs. The date on the copy of the document provided isn't entirely clear. But I think it was signed on around 15 December 2014.

127. Novitas has suggested that it was also a condition of P's loan that its existence was disclosed to Mr A. It has said that the terms of P's loan indicate that it was her responsibility to disclose her loan by serving a form of notice, similar to the one Mr A completed, on Mr A. Although having looked at P's loan agreement, I can't see that it refers to this notice. However, section 3.2 of the deed of assignment, which is dated 7 November 2014 and which P signed, states that she will give notice of the assignment of her right, title, benefit and interest in the Financial Provision.

128. Mr A has consistently said that throughout this complaint that Novitas didn't disclose that it was also funding P's litigation and that he only found this out in or around November 2015. I've not seen anything on Novitas' website, or within any of the documentation that I've been provided with on this case, which suggests that Novitas set out that there may have been certain situations where it would decide to fund both sides to a dispute, or if did decide to do so, any additional measures it would take in such circumstances

129. Having reviewed the documentation, I can see that P did sign an undated form of notice and that Novitas expected P's solicitor to have served this form of notice on Mr A as part of the serving of papers at the commencement of the litigation. I say this because I've also seen a handwritten note on a *'with compliments'* slip that Novitas sent P's solicitor with the loan documents in November 2014. This refers to the form of notice and states that it was *"to be served on the spouse via their solicitor"*.

130. Mr A and his solicitor have been consistent in saying that this form of notice was never served by P's solicitor. It's also worth noting that it was P's evidence that her solicitor advised her to keep the existence of the loan confidential too. Indeed, the barrister instructed by P's solicitor to represent her, wrote to P, in July 2019, explaining:

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

131. So it seems to me that P's solicitor kept the existence of P's loan from the barrister he instructed too. The barrister's letter together with P's, Mr A's and Mr A's solicitor's submissions and evidence on this matter persuade me that it is more likely than not that P's signed and completed form of notice was never served on Mr A. And neither Mr A or his solicitor would necessarily have known they should have been expecting one from P either. So I don't think they would have questioned why one wasn't received, even if they may have wondered how P was funding the litigation (as Mr A said he did at the time).

132. The documentation Novitas required Mr A to sign, which was correctly completed and served on P, meant that P and her solicitor knew that Novitas was funding both parties to the dispute. For obvious reasons, Novitas knew it was funding both sides too. Therefore, the only party who was left in ignorance of this arrangement was Mr A.

133. Furthermore, as I've set out in paragraph 12, Novitas required Mr A to obtain independent legal advice on proceeding with the first loan. He was also required to have an independent legal representative complete a pro-forma form to confirm this had happened. Therefore, Novitas clearly placed importance on Mr A receiving legal advice on the implications of entering into his agreement, before he elected to go ahead with this. I can't see how the legal representative could have done this without being told that Novitas was also funding P.

134. Novitas has suggested any failure to disclose the existence of P's loan (and Mr A subsequently being left in ignorance as a result) wasn't down to its actions but P's actions in not adhering to the terms of her loan agreement with it. For the avoidance, of doubt I have not ignored the existence of this form or the fact that Novitas' usual process did require it to be served by P (or P's solicitor) on Mr A.

135. However, although I am aware of this form of notice and can understand Novitas' submissions regarding P's solicitor's involvement in this being served, I still need to consider whether Novitas met its obligations to Mr A by acting fairly and reasonably towards him, in fairly managing a conflict of interest, considering that it had placed itself in the position where it was funding both sides to the dispute.

136. I say this because it was open to Novitas to decline Mr A's application for funding from the outset on the basis that it was already funding P's case, if it was not able to satisfy itself that it could avoid any potential conflicts, or to proceed without disclosing its arrangement with P to Mr A. But Novitas accepted Mr A's application and then relied entirely on the notice it expected P's solicitor to subsequently serve on Mr A to disclose the financial arrangement to him.

137. As the regulated lender in this arrangement, with overarching responsibilities to fairly mange any conflict of interest between its interests and those of its customers and also to pay due regard to the interests of its customers and treat them fairly, I don't consider Novitas can rely entirely on P's solicitor's failure to serve the notice on Mr A to absolve it of all responsibility in this context.

138. Indeed, Novitas has not provided any evidence to suggest that it had any checks in place to ensure that this notice had been served properly (for example, by requiring a P's solicitor to return documentation completed by Mr A's solicitor to confirm that the notice had been served before it released any funds to P's solicitor), or indeed that it took any other measures to check it had been served and consider alerting Mr A directly if it had any concerns.

139. I'm satisfied that as a regulated lender subject to the FCA principles, Novitas should have considered its own overarching obligations and responsibilities as a regulated lender to manage any conflict of interest and treat Mr A fairly notwithstanding any other separate obligation that may have existed on P or her solicitor to serve the relevant notice Mr A. Novitas has been unable to demonstrate that it had any checks of its own in place to ensure this important disclosure took place. Even if it was enough for Novitas to rely on P and her solicitor to make this disclosure (which I don't think it was), it should have at least taken steps to ensure that this was done and Mr A had been informed appropriately, which again it did not do.

140. It's also worth noting that Mr A and any obligations Novitas might have owed him in the context of his loan agreements are unlikely to have been in its contemplation when Novitas asked P to sign the form of notice, given Mr A didn't have any agreement with Novitas at this stage. As far as I'm aware Mr A's solicitor hadn't even contacted Novitas about the possibility of obtaining funding at that stage either.

141. Nonetheless it's clear that by requiring a prospective borrower to serve a form of notice on the other party in any litigation, Novitas considered it important for its borrower to disclose the existence of a litigation funding loan, regardless of whether the other party in the litigation was also a Novitas customer. In any event, what is key here is that once Novitas decided it wished to accept Mr A's application, bearing in mind the risks of a conflict of interest, which I've already set out, it became even more important that Mr A was aware of P's loan. In these circumstances, I'm satisfied that, at this stage, Novitas needed to take steps to ensure that the notice was served on Mr A by P's solicitor before it went ahead with the process of formally agreeing to Mr A's loan.

142. Overall and having considered everything, I'm not satisfied that the form of notice was served on Mr A. I've not been provided with anything else which demonstrates Novitas alerted Mr A to the source of the conflict of interest that existed – i.e. the fact that it was funding both sides of the litigation either.

143. Bearing all of this in mind, I'm satisfied that Novitas failed to manage any conflicts of interest between itself and Mr A, caused by it agreeing to fund both sides of the litigation, fairly and in a way that paid due regard to Mr A's interests. So I'm satisfied that Novitas failed to comply with its overarching Principle 8 and Principle 6 obligations to Mr A.

144. These findings are also relevant to my consideration of whether a court would conclude that the relationship between Novitas and Mr A arising out of the credit agreements was unfair to Mr A under s140A CCA 1974 – see below: section *(k) Did Novitas' conduct mean that its relationship with Mr A was unfair under ss140A-C CCA?* Finally, these findings are also relevant to my determination of *Fair Compensation* as I will set out in this section *(m)* of my decision.

(k) Did Novitas' conduct mean that its relationship with Mr A was unfair under ss140A-C CCA?

145. Under DISP 3.6.4R, I'm required to take into account relevant law (as well as other considerations, such as a firm's regulatory obligations) when considering what is fair and reasonable in all the circumstances of the case. So, I'll now proceed to consider the relevant law in relation to Mr A's complaint.

146. To do so, I'll consider the relevance of the unfair relationship provisions in ss140A-C CCA, and whether this may be another reason why (whether in addition to or independently of the reasons I have considered above) Novitas may not have acted fairly and reasonably towards Mr A.

The law relating to unfair relationships

147. Ss140A-C CCA apply to a creditor and a debtor who have entered into a credit agreement, regardless of whether it is a regulated credit agreement. The relevant exceptions (for example, in relation to regulated mortgage contracts entered into after

21 March 2016) do not apply here. In this instance, Novitas is Mr A's lender for two regulated credit agreements. Therefore, it is a creditor for the purpose of s140A and Mr A is a debtor, for both loans.

148. Loan A became a regulated mortgage contract, but as it was entered into before 21 March 2016, the relevant transitional provisions mean ss140A-C continue to apply to it. Loan B wasn't secured on Mr A's property and is therefore a credit agreement to which ss140A-C apply.

149. So I'm satisfied that ss140A-C CCA is relevant law that I am required to take into account when considering what is fair and reasonable in all the circumstances of Mr A's case. This includes taking into account whether a court is likely to find, based on the evidence available, that an unfair relationship existed in this case under s140A(1)(c) CCA and what it may order as a result.

150. S140A CCA states:

> *"140A Unfair relationships between creditors and debtors*
>
> *(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;*
>
> *(b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;*
>
> *(c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of 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)."*

151. In *Plevin v Paragon Personal Finance Ltd*[1] *("Plevin")* Lord Sumption stated:

> *"[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."*

152. The application of s140A is fact specific. And s140A(1)(c) CCA allows for anything done or not done by, or on behalf of, the creditor either before or after the making of the agreement to be considered by a court when determining whether there was an unfair relationship between the parties.

153. I think that, for a number of separate reasons, a court is likely to find the relationship between Novitas and Mr A unfair under these provisions, and I take this into account separately in determining whether Novitas acted fairly and reasonably towards Mr A as

[1] *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61; [2014] 1 WLR 4222.

set out below.

Unfair relationships – Novitas' failure to meet its obligations to Mr A in relation to responsible lending

154. First, I'm satisfied that Novitas' failure to conduct appropriate creditworthiness and affordability checks, as required by the rules and guidance in CONC 5, was something done by the creditor within s140A(1)(c).

155. In Plevin, the Supreme Court held that the fairness or unfairness of a debtor-creditor relationship may be legitimately influenced by the standard of commercial conduct reasonably expected of the creditor. The applicable regulatory rules and guidance were the Insurance Conduct of Business Rules ("ICOB") and the court held that although they provided some evidence of the standard they were not determinative of the question posed by s140A.

156. The concept of irresponsible lending, compliance with the rules in CONC and the relationship with s140A was considered in Kerriganv Elevate Credit International Limited (in administration)[2] ("Kerrigan"). In Kerrigan, HHJ Worcester held in paragraph 188 that the CONC rules:

> *"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."*

157. The Judge went on to state (in paragraph 190) that:

> *"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."*

158. Finally in paragraph 209 HHJ Worcester states:

> *"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."*

159. In this case, I'm mindful that (as I set out in paragraph 60 of this decision) basing an assessment of affordability primarily on the value of any security provided is (under CONC 5.3.4R) an example of an act which amounts to an unfair business practice. I've explained that why I consider this is what Novitas did (in paragraph 65). Furthermore, as the loan was secured on Mr A's home, this unfair business practice had the effect of putting his home at risk in circumstances where it is clear that Mr A had no means to be able to sustainably repay the capital advanced let alone any interest accrued.

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[2] *Kerrigan v Elevate Credit International Limited (t/a Sunny) (in administration)* [2020] EWHC 2169 (Comm).

160. Bearing in mind all of this, I think that a court would likely conclude that Novitas lending to Mr A in breach of its regulatory obligations to lend responsibly is one of the reasons why the lending relationship between Novitas and Mr A was ultimately unfair to Mr A under s140A.

Unfair relationships – conflict of interest

161. Secondly, having given careful thought to the matter, I'm satisfied that Novitas agreeing to fund both Mr A's and P's litigation was something done by the creditor within s140A(1)(c).In the particular circumstances of this case, this caused an unfair relationship between it and Mr A.

162. As I've explained, in paragraphs 100 to 104, Novitas' marketing materials would reasonably have led Mr A to consider that his interests were aligned with those of Novitas. I also explained how and why Novitas accepting Mr A's application in these circumstances meant that it was not possible for Novitas' interests to be aligned with both Mr A's and P's. So I am satisfied that Novitas agreeing to fund both sides of the litigation created the situation where Novitas had two or more competing interests and that serving one of those interests could damage or harm the other interest.

163. I accept a court might take the view that any unfairness to Mr A – created by Novitas funding both Mr A and P's litigation might have been negated if Novitas had taken internal steps to guard against the conflict – for example, having separate case officers on the case and having a system where the Novitas case officers only had access to the file for Mr A or P's case, depending on which client they had been assigned to. But Novitas has offered no evidence that it took such steps and the available evidence indicates that the same director approved and was in charge of both Mr A's and P's applications.

164. Furthermore, in its response to my provisional decision, Novitas has said that the requirement to serve a notice was in place for all loans and not just where it was funding both sides of a litigation to enable it to manage a conflict of interest. This argument further persuades me that Novitas did not in fact take any additional steps at all to manage the potential conflict that existed in these unique circumstances fairly.

165. I therefore think a court would likely find the arrangements Novitas operated here - i.e. taking no steps - over and beyond those taken in any routine application - to negate a conflict of interest which it created by electing to proceed with Mr A's application in circumstances where it was already funding P's litigation – rendered the lending relationship between Novitas and Mr A unfair to Mr A.

Unfair relationships – inequality of knowledge and understanding

166. I also find that Novitas's proceeding with Mr A's application without ensuring he knew and understood that it was already funding P's litigation, before approving his application, was another thing done or not done by, or on behalf of, the creditor which made Novitas' relationship with Mr A unfair to Mr A.

167. Both Novitas and P's solicitor knew that Novitas was funding both sides of the litigation and the effect that this could have (and did go on to have in some respects) going forward. Mr A and his solicitor did not.

168. In considering the effect of this, I'm mindful of Lord Sumption's comments in *Plevin.* At

paragraph 19, he said:

> "*What is it that engages the responsibility? Bearing in mind the breadth of section 140A and the incidence of the burden of proof according to section 140B(9), the creditor must normally be regarded as responsible for an omission making his relationship with the debtor unfair if he fails to take such steps as (i) it would be reasonable to expect the creditor or someone acting on his behalf to take in the interests of fairness, and (ii) would have removed the source of that unfairness or mitigated its consequences so that the relationship as a whole can no longer be regarded as unfair.*"

169. As I've explained, the documentation Novitas required Mr A to sign, which was correctly completed and served on P, meant that P and her solicitor knew that Novitas was funding both parties to the dispute. Mr A and his solicitor not being in receipt of such documentation regarding P's loan meant that Mr A was reasonably entitled to believe that no such loan existed on P's side – after all the process he went through quite reasonably would have led him to believe that he would have received similar documentation to what he had to complete if P had entered into a similar arrangement.

170. I think it's more likely than not that, if Mr A had known that Novitas was funding both sides of the litigation, Mr A would, as a minimum, have questioned whether to enter the first agreement. I think he is likely to have considered the impact that Novitas funding both sides of the dispute could have. This is particularly as Novitas' payments (plus interest) would be made at the end and were coming from what was a finite source of joint assets that was the subject of the dispute between Mr A and P.

171. I'm mindful that Novitas may argue that it couldn't have disclosed that it was funding P's loan for confidentially or data protection reasons. But I'm not persuaded by this argument given there were a number of options available for Novitas to have found a way around this.

172. The first option would have been to refuse Mr A's loan application, on the basis that it was conflicted, as it was already funding P in the same dispute. This would have avoided any of the potential conflicts that may arise (set out above) when funding both sides to the same dispute.

173. The second option would have been for Novitas to contact P and/or her solicitor to check that the notice had been served on Mr A and ask for proof or some kind of certification of this, as soon as it received Mr A's loan application. As I've explained, in paragraph 141, once Novitas decided it wished to accept Mr A as a customer, in addition to already having P as its customer, it became even more important that Mr A had been served with the notice for P's loan. Novitas knew that there was a conflict of interest that it needed to manage at this stage and it ought to have taken steps to ascertain that the notice had been served on Mr A.

174. Novitas may argue that the handwritten note, I've referred to earlier on in this decision, directed P's solicitor to serve the form of notice on Mr A and if this notice had been served Mr A wouldn't have been left in ignorance. But it does leave open the question that given Novitas recognised the importance of telling Mr A this information, why didn't it take steps to do this itself – with P's consent? Particularly as it was the only party that would have a conflict of interest and therefore it was the party that should have ensured Mr A was able to make an informed decision on proceeding with his own application in light of this.

175. As a third option, Novitas could have obtained P's or her solicitor's consent to disclose

the existence of P's loan directly to Mr A so that he could make an informed decision about whether he wished to proceed with his application.

176. As a fourth option it could simply have asked Mr A how P was funding her litigation. If Mr A said that he did not know – as was the case – Novitas would have been on notice that Mr A was unaware of P's loan. Finally, Novitas could have taken any other steps to ensure that it checked that Mr A knew it was funding P's litigation before it entered into the loan with Mr A.

177. In my view, if Novitas had made Mr A aware of the conflict of interest and its source, this would have removed the unfairness, or at least mitigated the effect of any unfairness, as it would have allowed Mr A to make a properly informed decision about his agreements. However, Novitas' actions in failing to ensure that Mr A was made aware of the fact that it was funding both sides to the litigation meant that the only party who was left in ignorance of this matter was Mr A.

178. This created a significant inequality of knowledge and understanding between Mr A and Novitas and I'm satisfied that a court would most likely conclude that this made the lending relationship between Novitas and Mr A unfair to Mr A.

Unfair relationships – anything done or not done on behalf of Novitas - P's solicitor's failure to provide Mr A with the form of notice

179. In my provisional decision, I stated that it was not my finding that P's solicitor's failure to serve the form of notice was an action that was done by Novitas, or an action done on behalf of Novitas, which was a likely to lead a court to conclude that the relationship between Novitas and Mr A was unfair to Mr A under s140A CCA.

180. However, in its response to my provisional decision, Novitas has said it required all solicitors receiving payment through funding from Novitas, to serve a form of notice on the other party confirming that this was the case. And that I failed to place enough weight upon this fact when concluding that there was a failure to disclose the existence of P's loan.

181. It therefore seems clear to me that Novitas was placing reliance on P's solicitor to notify Mr A (or his solicitor) of its involvement. I've already explained (in paragraphs 130 and 131) why I think it is more likely than not that the form of notice was not served on Mr A (or his solicitor) by P's solicitor.

182. Bearing in mind Novitas' submission that it relied on P's solicitor to disclose the arrangement and that Novitas made no arrangements of its own in relation to notifying Mr A that it was funding P's litigation (even at the point when it subsequently accepted Mr A's own application), I now also consider that this reliance by Novitas on this notice means that P's solicitor's failure to serve the form of notice on Mr A was another act/omission to be regarded as done or not done by, or on behalf of, Novitas which made the relationship between Novitas and Mr A unfair to Mr A.

183. For the sake of completeness, it is not my finding that there was an unfair relationship because of P's solicitor's fraud. My finding here is that Novitas relied on P's solicitor to serve the form of notice (notifying Mr A of its interest), as a matter of fact this was not done, and that this was something that was not done on Novitas' behalf.

184. I would also add that it is not my finding that the unfair relationship arose solely because P's solicitor did not serve the form of notice. The failure to serve the notice is

just one of the things (detailed in this section) that were done, or not done, by or on behalf of Novitas which lead me to conclude that a court would consider the lending relationship between it and Mr A was unfair to Mr A.

Unfair relationships – overall conclusions

185. I consider that a court would likely find that Novitas' relationship with Mr A was unfair under s140A CCA for each of the reasons I have identified above – both cumulatively and independently of each other.

186. However, even if I am wrong and a court did not find that there was an unfair relationship under s140A, I am satisfied that Novitas acting in breach of its responsible lending obligations (contained in CONC 5), as well as Principle 6 and Principle 8 meant that it failed to act fairly and reasonably towards Mr A in its dealings with him. This is independently of whether or not a court would also find that these breaches/failures themselves make the relationship between Novitas and Mr A unfair under s140A CCA.

(I) Conclusions

187. In summary, and for the reasons set out in full above, I'm satisfied that Novitas failed to act fairly and reasonably in its dealings with Mr A in all the circumstances of this case. In summary, this is for the following separate reasons taken individually (although taken cumulatively they reinforce my views):

- Novitas failed to act in accordance with its regulatory obligations set out in CONC 5 in order to lend responsibly and this led to it providing Mr A with unaffordable loans.

- Novitas failed to manage a conflict of interest between itself and Mr A fairly. This conflict was caused by its decision to fund both sides of the litigation. It failed to manage this conflict, fairly and in a way that paid due regard to Mr A's interests. This also meant that Novitas failed to comply with the FCA's overarching Principles - particularly Principle 8 and Principle 6.

- It is likely a court would conclude that the relationship between Novitas and Mr A was unfair to Mr A under s140A of the CCA for each or any of the following separate reasons taken together:

  (1) Novitas' failure to lend responsibly. This created an unfair relationship both generally and because it meant Novitas failed to comply with CONC 5.

  (2) Novitas' failure to take any steps to manage the conflict of interest it created by agreeing to Mr A's loans, despite it already having agreed to fund P's litigation. This created an unfair relationship both generally and in light of Principle 6 and Principle 8.

  (3) The inequality of knowledge and understanding created by Mr A being left as the only party not to know about Novitas funding both sides of the litigation. This deprived Mr A of the opportunity to make an informed decision on whether to agree to his Novitas loans despite the conflict of interest that this would create.

(4) P's solicitor's failure to serve the form of notice on Mr A, as done on behalf of Novitas as the creditor.

188. I will now go on to consider what impact Novitas' failure to act fairly and reasonably on Mr A had and what would be fair compensation in all the circumstances of the complaint.

(m) Fair compensation

189. It seems to me that the appropriate starting point in determining fair compensation is to consider whether – had Novitas acted fairly and reasonably in its dealings with Mr A – Mr A would have ended up in a better position overall, including in relation to his credit agreements.

190. As I have explained, I consider it is likely that a court would find that Novitas' actions in failing to lend responsibly and failing to manage the conflict of interest fairly when it accepted Mr A's application, in circumstances where it was already funding P's litigation, created an unfair relationship both generally and because it meant Novitas failed to comply with CONC 5, Principle 6 and Principle 8.

191. Novitas' decision to lend irresponsibly meant that Mr A was provided with loans that he cannot pay back sustainably. And Novitas' failure to manage fairly the conflict of interest caused by it funding both sides of the litigation meant that Mr A was deprived of the opportunity of making an informed decision on whether to proceed with his loans.

192. So the impact of the unfairness created by Novitas irresponsibly providing Mr A with unaffordable loans and also failing to manage a conflict of interest fairly, is likely to be the possibility that Mr A lost out on the chance of fairly evaluating other alternative options, instead of these loans, which Novitas accepts he cannot pay back without selling his property.

193. I am mindful when considering the question of fair compensation that there is no exact science to determining this matter. However, s229 of the Financial Services and Markets Act 2000 ("FSMA") permits me a wide discretion in determining compensation. And where a court determines that the relationship between a creditor and debtor is unfair under s140A CCA, the court is similarly empowered to make a variety of different types of orders under s140B CCA in order to remedy that unfairness.

194. These powers include altering the terms of the credit agreement or any related agreement, requiring the creditor to repay sums paid by the debtor, and reducing or discharging any sums payable.

195. To that end, I will consider the likely impact the different sources of unfairness had on Mr A and, the parties' comments about that, and their submissions on redress.

Mr A's submissions on redress

196. Prior to my provisional decision, Mr A argued that Novitas' actions, or indeed its failure to act, in relation to P's loan means that the direction in his case should mirror the direction in P's case. This is because Novitas' failure to act exacerbated his losses so the amount he owes should be capped to £1,745.00.

197. Since my provisional decision Mr A has gone further. He now argues that it would be a miscarriage of justice if he were required to repay any amount at all to Novitas. He says the amount he owes Novitas should be written off in its entirety.

198. I've thought about what Mr A has said. I agree that Mr A's losses were exacerbated by Novitas' failure to disclose that it was funding both sides to the litigation. But I've already explained why I don't think that Novitas is responsible for all of Mr A's losses. In particular, I'm satisfied that Novitas isn't responsible for P's solicitor's fraud notwithstanding the fact that it was Mr A's lender as well as P's. And while Mr A has referred to the decision reached in P's case and the ombudsman's direction, I think there is an important distinction between the facts and circumstances of P's case and the facts and circumstances of Mr A's case, even though the cases are linked.

199. First, in P's case, the ombudsman made a clear finding that P's solicitor breached its contract with P. And Novitas, under s75A (or alternatively s75) of the CCA, was jointly liable for this breach of contract. However, in Mr A's case there is no suggestion that his solicitor breached its contract with him.

200. There has been no indication that Mr A's solicitor didn't carry out the work, or provide the legal services he billed for. I'm satisfied that this key difference between Mr A's case and P's case means that mirroring the ombudsman's direction in P's case, or going further and requiring that Mr A pays nothing at all, wouldn't be fair and reasonable in all of the circumstances of this particular case.

201. As I've previously explained, Mr A now says that he is unhappy with aspects of his legal representation. I have not seen any evidence to show that Mr A has complained about his legal representation either to his solicitor, Novitas, or the SRA. And while he says that he didn't receive the benefit of the service that his solicitor provided as the solicitor acted in Novitas' interests by insisting the loan should be repaid, this argument ignores the fact that the solicitor provided a service in defending Mr A against P's claim. So, as far as I can tell from the evidence I have considered, Mr A did by and large receive the services he is being asked to pay for – albeit he believes that these costs were incurred defending a claim which should never have been funded in the first place.

202. Therefore, I'm satisfied Mr A had the legal representation his loans funded and given the matter has now been settled amicably with the involvement of his solicitor, I don't think fair compensation would involve putting Mr A in the position he would have been in had he not had to pay anything to defend the legal action P instigated against him.

203. Mr A has also said that Novitas cannot enforce any debt because it has not provided a copy of the credit search referred to in the loan agreements. Mr A made a request to Novitas under s77(1) CCA. This requires Novitas to provide Mr A a copy of the executed agreement and any other document referred to in it. Mr A argues that his credit agreements refer to credit searches and as Novitas has been unable to provide copies of them, it means his agreements are unenforceable.

204. As I explained in my provisional decision, I considered Mr A's credit agreements. The agreements state that Novitas will search credit reference agencies using his name. However, they go on to say that details of such searches will be kept by the agencies. It doesn't say that copies will have been provided to Novitas or that any information relating to them will be retained.

205. So I don't think that the credit searches fall within the type of document referred to in

s77(1) CCA. In any event, whether Novitas has sufficiently complied with s77(1) CCA is a matter for the Court to decide. Mr A has continued to dispute my findings on this matter in the comments he made in response to my provisional decision. But in the absence of anything new from him, I've not been persuaded to alter my conclusion.

206. In any event, even if I'm wrong about this, Mr A's agreements being unenforceable doesn't mean that Mr A no longer has a debt with Novitas, or that it can't ask him to pay what he owes. Furthermore, my role is to consider what's fair and reasonable in all the circumstances and I've already explained why it wouldn't be fair and reasonable to place Mr A in the position he would be in had he not been provided with the funds from these loans at all.

207. Finally, since my provisional decision Mr A has added that the amount he owes should be cleared as he is concerned that Novitas will say that he is in no position to arrange an affordable payment plan because he can no longer work and he is now on benefits. He is also worried that it will attempt to obtain a charging order and take steps to possess his home.

208. In my provisional decision I explained that I would have considered whether it was appropriate for any charge to be removed if it had been present. However, Novitas had already removed its charge on Mr A's property, (entered into at the time of his first loan) during the course of its complaint with this service.

209. I appreciate that Mr A may be concerned about his ability to agree a repayment plan while he is unable to work and on benefits. However, as part of the process of setting up an affordable payment plan, Novitas would need to conduct an income and expenditure assessment to form a view on this.

210. I don't think that it's appropriate for me to second guess what Novitas' income and expenditure assessment is likely to conclude at this stage. This is particularly as once a lender - such as Novitas - is told, or it realises, that a borrower is experiencing financial difficulties, it is expected to exercise forbearance and due consideration, in line with its regulatory obligations.

211. Furthermore, I've not seen anything to indicate that Novitas has applied for a charging order or that it has contemplated doing so. I don't think speculation over a course of action (such as a charging order) that hasn't been taken and there is no indication will be taken, is a valid reason to require Novitas to write off the full amount of Mr A's loan.

212. So to start with I'm satisfied it would be fair to approach the question of fair compensation on the basis that Mr A has to repay at least some of the amount that is currently owed to Novitas.

Novitas' comments about redress

213. Novitas accepts that it failed to lend responsibly to Mr A and it has already agreed to write off a total of £38,503 in interest, fees and charges. It has also said that it considers this to be fair and reasonable outcome in all the circumstances of Mr A's complaint.

214. As I explained in my provisional decision, we explain on our website that 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 and fees.

215. However, I think that it is important for me to emphasise that this is the usual approach in a typical case, and each case has to be considered according to its own circumstances. It won't always be the case that we'd consider it fair and reasonable to expect the customer to pay back all of the capital advanced. Indeed, I'm mindful that our website provides a couple of non-exhaustive examples where fair compensation might require a lender to write off some of the capital, as well as the interest and fees. One such example "*might be where the lender had enough to know that providing funds to the borrower was so clearly unsustainable, as there was no realistic prospect of them paying back what they were being lent"*.

216. I'm mindful that there is an argument for saying that those circumstances exist here, given the evidence from the time indicates that Mr A did not have the means to repay the amount advanced (let alone the interest) and Novitas' assessment appears to have wholly relied upon the proceeds generated by Mr A selling his home. I've already explained why this meets the regulator's definition of unsustainable lending. As Novitas should not have counted on Mr A selling his home, there was no reasonable prospect of him paying back the capital advanced.

217. So I don't think that it automatically follows that what Novitas has already agreed to do is fair and reasonable even solely in relation to failing to meet its obligations to lend responsibly and the resultant unfair relationship that this caused, let alone it failing to manage the conflict of interest caused by it agreeing to fund both sides of the litigation and the unfair relationship this caused. I also consider the circumstances of the lending here distinguish Mr A's case from that of *Kerrigan.* In that case, as the customers were being provided with cash, rather than funds for a service, there was no suggestion that they could not have repaid the cash advance.

218. I've also considered what Novitas has said about why it considers no harm to have taken place here and that Mr A would not have acted differently even if he had been made aware of P's arrangement at the time he entered into his arrangement with Novitas. In its response to my provisional decision, Novitas has said that all of the scenarios I put forward, such as a soft loan or an alternative loan, were not viable or likely alternatives and fails to reflect the facts and reality of Mr A's circumstances at the time.

219. I do not agree that there were no consequences to Mr A not knowing about P's funding arrangements. I say this because of the records of the contact between Novitas and Mr A's solicitor. In an email dated 7 January 2016, responding to a request for an update, Mr A's solicitor wrote:

> *"The case is still ongoing. We are waiting to see if P's* [changed from P's real name for anonymization purposes] *advisers issue a claim on her behalf under TOLATA – we suggested a session of mediation to them after we had to adjourn the last session just before it occurred due to an issue with her disclosure. It seems they are also funded by yourselves."*

220. So it's clear that Novitas' failure to manage the conflict of interest caused by it funding both sides of the litigation, at the very least, led to some wasted costs for Mr A.

221. I've also thought about what Novitas has said about it being the case that I need to consider what Mr A is more likely than not to have done had he known that it was funding both sides of the litigation. It goes on to say that none of the options I set out in my provisional decision were realistic. In Novitas' view, there were therefore no viable or likely alternatives.

222. I've considered Novitas' arguments. I accept that a soft loan and, bearing in mind my conclusions on Mr A's means, a loan from another regulated lender were not the most viable of prospects. However, having reconsidered the options available to Mr A, in light of the submissions made in response to my provisional decision, I'm satisfied that Mr A had at least three other viable alternatives to agreeing to these loans from Novitas.

223. First, if Mr A had been made aware that Novitas had already agreed to fund P, I think that he could, as he now says, have opted against taking any funding at all and instead decided to act for himself as a litigant in person. I accept the possibility that Mr A is making this argument with the benefit of hindsight. Nonetheless, it would have been a real possibility for Mr A to represent himself as a litigant in person – as many do.

224. Mr A has also said that he has friends in the legal profession. Not only has Mr A shown himself to be articulate but his tenacity in pursuing this complaint in the way he has and for as long as he has leads me to think that Mr A could have represented himself in this claim. So Mr A could well have benefited from being a litigant in person with friends who may have been able to advise him such that he could have been very effective at representing himself – albeit he would still have incurred some legal costs such as mediation fees or court fees.

225. Secondly, I am persuaded that if Mr A had been informed that P had already taken litigation funding from Novitas, he would likely have contacted P directly and attempted to reach a settlement privately. I say this because, as I've previously explained, the whole reason the litigation was taking place was because there was a dispute over Mr A and P's joint assets. This was a finite pot of assets. Novitas' lending to the parties, especially on the terms the funds were advanced on, were potentially diminishing these joint assets from both sides. There is no dispute that the longer the litigation went on for, repaying these funds would leave Mr A and P with less overall at the end. It is also likely that had Mr A known Novitas was also funding P's litigation, he would have been mindful of P's ability to repay the funds she borrowed sustainably.

226. In reaching my conclusions, I'm mindful that Novitas may say that P's solicitor was being obstructive and instructing her not to contact Mr A. But given Mr A and P had a child, I don't think that it was possible for them to have ceased all contact completely. Indeed, an email from Mr A's solicitor to Novitas, on 12 April 2016, informed Novitas that *"they (Mr A and P) have been discussing child arrangements between themselves directly"*. So it is clear that Mr A and P remained in contact because of their daughter and I think that it was a possibility they could have reached a private settlement, without incurring further costs or indebtedness to Novitas.

227. In my view, knowing that the overall amount they'd have for themselves was going to reduce significantly because repayment of Novitas' loans was going to deplete their joint assets might well have spurred Mr A and P to reach an amicable settlement without the involvement of litigation. I think that this was an especially realistic course of action given both sides' financial means at the time and the fact that Mr A and P had a child to look after and these loans would likely require the sale of their property.

228. Finally, I also think that even if Mr A had decided to go ahead with the loan, had Novitas taken steps to ensure Mr A made an informed decision about his loan, I think that he would have acted differently in the course of his dealings with his own solicitor and applied pressure to move things forward.

229. Novitas says that this suggestion is based on pure conjecture which fails to reflect the

facts and reality of the circumstances of the time. But it has been Mr A's evidence right from the beginning of his complaint that he would have kept a closer eye on the dispute and its escalation by P's solicitor, particularly when he failed to engage in mediation, had he known that Novitas was funding both sides of the litigation. I do accept that Mr A's submission is to some extent influenced with the hindsight of now having knowledge of P's solicitor's fraud. However, I don't think that this means I should completely disregard Mr A's evidence in the way that Novitas appears to be suggesting.

230. There is no dispute that Mr A might, as Novitas now says, have known that he would have to pay more the longer the proceedings went on. But, in my view, this is different from knowing that Novitas stood to profit more from a longer dispute as the amount of interest it would receive from P would also increase. The conflict of interest wasn't necessarily that there was the potential for Novitas to favour P over Mr A or vice versa. It is that it was arguably in Novitas' interests for the proceedings to become protracted as the longer the matter took to resolve, the more it would receive in interest.

231. In my view, Mr A would have likely paid more attention to Novitas' oversight and requests for updates and might have been more proactive in attempting to move matters forward himself had he had known his interests weren't necessarily aligned with Novitas' in this regard. This is particularly the case as Novitas was also funding P's litigation and therefore stood to benefit doubly from protracted legal proceedings. I don't think that it would be unfair to say that the matters were progressing at a slow pace – especially in the early stages. As Novitas was essentially in charge of the 'purse strings' on both ends, I don't think it unreasonable to conclude that Mr A would have been more concerned about Novitas' role in the arrangement and the oversight it exercised given the slow progress.

232. In reaching these conclusions, I'm mindful that Novitas may question why Mr A applied for a further £30,000 to cover further costs when he was already aware of P's litigation funding arrangements. Novitas may say that it demonstrates that Mr A wouldn't have acted differently even if its arrangement with P had been disclosed at the outset of his loan arrangements with Novitas. But I'm not persuaded by this argument as Mr A was almost three years into his dispute in September 2017. By this point he already owed Novitas £60,000 plus interest, which he would have had to repay immediately if he switched solicitors or went to another lender.

233. Furthermore, the FAQ document I've previously referred to also has a question "What happens if I change solicitor?". The answer to this question is stated as:

> *"The loan is linked to your current solicitor as they have obligations to Novitas under the agreement. Any new solicitor would have to be approved to use the Novitas scheme (and agree to take on your case) otherwise this is a breach of the loan agreement and the loan will need to be repaid as per the terms of the loan agreement."*

234. All of this suggests to me that when Mr A's solicitor told him he'd exhausted the initial facility of £60,000 in September 2017 and that an extension needed to be sought, Mr A was faced with the choice of either borrowing more from Novitas in the hope it would be enough to finalise the legal dispute with P; sourcing further funds from somewhere else at short notice; or taking his chance with new representation. And if he opted to take his chance with new representation, he'd be doing so in circumstances where if he couldn't find another Novitas approved one, he'd have to immediately repay all of the funds his existing solicitor had already drawn down.

235. None of these options were particularly appealing or realistic considering Mr A's circumstances at the time. So I'm not surprised he opted for the path of least resistance at this stage. I also don't think that Mr A's choice from a much more constrained position in September 2017 should be taken as an indication of what he is more likely than not to have done in very different circumstances in December 2014 when he first entered into a loan arrangement with Novitas.

236. Therefore, bearing in mind all of the above, in deciding fair compensation, I think it's appropriate to for me to approach this from the point of view that it would not be fair and reasonable to expect Mr A to repay the full £73,255 that would be owing after all the interest, fees and charges have been removed from the current balance.

237. As I've explained, s229 FSMA provides me with a wide discretion to award fair compensation. And I'm satisfied that fair compensation in this case should take into account my finding that a court is likely to find an unfair relationship existed between Novitas and Mr A for all of the reasons I've set out.

238. I accept that determining what fair compensation is in this case may place Mr A in a slightly better position than he would be in had Novitas acted fairly and reasonably towards him. It is also possible that whatever direction I make may place him in a worse position than he would now be in.

239. Nonetheless, I have considered everything I've set out in this section of my decision and had particular regard to the unique factors at play in this case. I remain satisfied that Novitas should reduce the amount Mr A owes by 50% and cap his liability for any debts resulting from these agreements to £36,627. In my view, this is a fair way of correcting the unfairness of Novitas' actions in a way that and by and large reflects the financial loss I estimate Mr A to have suffered.

240. Given the lack of a payment schedule for the loan and Novitas' responsibility to exercise forbearance and due consideration where a borrower may be in financial difficulty, Novitas should contact Mr A to arrange an affordable repayment plan for this amount.

The charge on Mr A's property

241. I would also have considered whether a direction for Novitas to remove the charge that it (or any affiliated companies) recorded against Mr A's property was fair and reasonable in the circumstances. However, during the period Mr A's case has been with me, Mr A has confirmed that the charge on his property has been removed.

242. I understand that Mr A has since received a response to his separate complaint with the service regarding the delay on removing the charge. He has since provided information to show that the charge on his property was held by a dormant company. Mr A has received a final decision from another ombudsman on this matter already. Therefore, I've not considered Mr A's complaint about the fairness of the charge being recorded for the period it was as part of my final decision on this case.

243. Overall and having considered everything, I'm upholding Mr A's complaint and directing Novitas to take the following actions:

- Refund all the interest and charges so that only the capital sum remains outstanding.

- Reduce the capital sum by 50% and cap Mr A's total liability as a result of its loan agreements with Mr A to £36,627.50.

- Arrange an affordable payment plan with Mr A to repay this amount.

- End Mr A's existing agreements and amend any information it has recorded on Mr A's credit file to reflect that his total liability is a maximum of £36,627.50.

My final decision

244. For the reasons I've explained, I'm upholding Mr A's complaint. Novitas Loans Ltd. I require it put things right in the way I've directed it to do so in paragraph 243 above.

245. Under the rules of the Financial Ombudsman Service, I am required to ask Mr A either to accept or reject my decision before **18 December 2024**.

246. If Mr A does not accept my decision before **18 December 2024** it will not be binding on Novitas. Should Mr A seek to accept the decision at a later date, it will be a matter for Novitas to decide whether it is willing to settle the complaint in line with my direction set out in paragraph 243.

Jeshen Narayanan
Ombudsman