

## **The complaint**

Mr G complains that Evolution Lending Limited ("Evolution") lent to him irresponsibly as he was suspended from work at the time the loan was taken out and had a drug and alcohol addiction. He is also unhappy that Evolution registered a County Court Judgment (CCJ) against him when he was in financial difficulties.

Mr G has also brought a complaint against the broker who provided advice and sold him the loan. I have dealt with that complaint in a separate decision.

## **What happened**

Mr G took out a second charge mortgage for £11,950 (plus fees) with Evolution in March 2017 in order to consolidate debt.

Mr G said that he had a drug and alcohol addiction at the time he took out the loan and was already suspended from his job. He spent the sum paid to him of around £7,300 on drug debts. Mr G made the first payment but was then unable to make any further payments as he lost his job. When he managed to find another job, Mr G says a CCJ was made against him with an arrestment of earnings which he says took most of his wages, exacerbated his addiction and caused his mental health to deteriorate.

Mr G says that he thought he would be able to sort out his debts when he sold the property but then found out that the amount of approximately £15,000 that had already been taken through the CCJ was just the original amount of the loan. When he sold his home he was asked for a further amount of around £15,000 for the interest, so now he feels that he is back to square one.

Evolution says that Mr G was referred to it on 24 February 2017. Evolution then completed a telephone application with Mr G in order to ascertain the suitability and affordability of the loan, which included a fact-find, credit search and income and expenditure assessment. It says that Mr G was asked questions about his credit file and there were no mortgage arrears or missed/late payments and he was maintaining his credit commitments. A verbal income and expenditure assessment (I&E) was also completed to ensure the loan was affordable and sustainable for him. During the call Mr G stated that he was employed and didn't have any work-related disciplinary proceedings against him and was not aware of any changes to his employment circumstances.

Evolution says that based on the initial checks Mr G qualified for a loan of £11,950 and a mortgage illustration document was issued. Following Mr G's confirmation of the terms, the application was passed to Evolution's case management department to assess the supporting documentation and validate the information he had provided verbally. Evolution says that its records indicate a verbal job check was completed with Mr G's employer. The loan funds were released to Mr G on 10 March 2017.

Evolution says that the loan was used to consolidate nine existing credit commitments for which Mr G was making a monthly payment of between £500 and £600, and therefore the loan benefitted him by reducing his monthly expenses. It says that Mr G applied for the loan by deception and lied regarding his employment status and any anticipated change to his circumstances. It says that it was not aware of this during the loan application.

Mr G made the first payment on 20 April 2017 but no further payments were made after this. Evolution says that attempts were made to contact him but these were unsuccessful and there was no response. It says that a decree was registered against Mr G as he was in breach of the terms and conditions of the loan. The intention to commence legal proceedings to obtain a decree against Mr G was communicated in writing on 8 December 2017. Following this, it received payments via an arrestment of earnings order granted by the Court. These commenced in May 2018.

Mr G sold the property in June 2022 and the remainder of the balance of the mortgage with Evolution was settled at that point.

### Investigator's View

Our investigator looked at the case and concluded that Evolution hadn't acted fairly.

She set out that Evolution had treated the contract as a consumer credit agreement under the Consumer Credit Act 1974 (CCA) but this wasn't correct and the lending ought to have been completed on a Consumer Buy To Let (CBTL) basis in Mr G's circumstances.

The investigator wasn't persuaded that Evolution had lent responsibly or fully assessed whether Mr G would be able to meet the obligations of the mortgage contract. Not all of the loans noted as being due to be consolidated were in fact consolidated.

Mr G's bank statements provided to Evolution showed significant expenditure on gambling and it had said in its underwriting notes that this was for a work syndicate and noted that there were payments in from work and that the winnings were more than the outgoings on gambling. The investigator couldn't see how Evolution had reached the conclusion that the payments received were part of a work syndicate for gambling or that *all* of the gambling transactions were from a work syndicate as she hadn't seen any evidence that there had been a detailed discussion about this. The I&E didn't consider the gambling expenditure and it wasn't reasonable to consider the level of winnings Mr G received as this wasn't guaranteed.

Mr G's credit file showed significant reliance on high cost and short-term credit. Whilst most of those debts were consolidated, the investigator found that, in the context of Mr G's gambling expenditure, Evolution should have considered whether he was in a cycle of escalating debt and whether this loan would have realistically brought this to an end. Overall, the investigator was not persuaded that Evolution had completed sufficient checks to show the loan was affordable for Mr G and she concluded that it lent to Mr G irresponsibly.

In relation to the way Evolution treated Mr G when he was in financial difficulties, the investigator found that taking action under the CCA was incorrect and inappropriate as this was a CBTL mortgage contract. She also found that it was unfair for Evolution to have applied a default to Mr G's credit file, as this would only be applicable for a mortgage where the property was repossessed.

The investigator also found that the statement of account Evolution presented to the court was incorrect, as it included all interest which was due to accrue over the term of the loan when it should have only included the interest that had accrued up until that point in time. However, she was unable to consider the order made by the court or what happened after the court's decision as this service doesn't have any jurisdiction over the court.

In order to put things right, the investigator thought that Evolution should remove all interest and fees applied to the loan and any costs in connection with the CCA action which hadn't been included in the Charge for Payment of Money. It should then treat all payments made as applying only to the capital. She also thought Evolution should remove the account from Mr G's credit file along with the default applied.

The investigator set out that she had no jurisdiction to direct that the court order was set aside, or that Evolution remove any of the costs included in the Charge for Payment of

Money, as the court had issued a judgment that these costs were owed. However, she recommended that Evolution remove these costs too and that it applied to the court for the court orders to be set aside. This was on the basis that it misled the court in relation to the amount owed and that the mortgage shouldn't have been lent in the first place.

### Evolution's Response

Evolution says that Mr G applied for the loan by deception and lied regarding his employment status and any anticipated change to his circumstances. It says that he was asked the purpose of the loan and did not advise it about the drug debts and, had he done so, it would have declined his application.

Evolution says that its records show that the level of gambling was discussed with Mr G and that he advised that he was in a work syndicate and was placing bets on behalf of his colleagues. In relation to the short-term loans, it says that it appreciates that this paints a picture of Mr G's past borrowing, but the loan consolidated all the active ones to break the cycle of Mr G continuing to use them.

Evolution disagrees that lending with a loan to value (LTV) of 110% is unreasonable as it says this fit within its lending criteria and that the risk sits with Evolution and not Mr G

In relation to seeking enforcement by way of a CCJ rather than repossession, Evolution says that it had the option of enforcing the security or proceeding directly against the debtor. In relation to the incorrect balance being provided to the court, it says that Mr G didn't raise any objections at the time and that Evolution presented several different documents to the court including a copy of the loan agreement.

### **What I've decided – and why**

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

Having looked at the evidence, I agree with the investigator's view for broadly the same reasons and I've explained my reasons further below.

### The Mortgage

It was clear from the information Mr G provided to Evolution when taking out the mortgage that he wasn't living in the property the loan was to be secured on. The property was already owned by him and it was his only buy to let property. Mr G has also confirmed to this service that the first charge mortgage was on a residential basis and that he had previously lived in the property.

As a result of this, the Mr G should have been sold a CBTL mortgage. This isn't a regulated mortgage contract governed by the regulator's rules on mortgage lending (known as MCOB). Nor is it a Consumer Credit Act loan covered by the consumer credit rules (CONC). Instead, the lending standards and conduct of a CBTL mortgage are governed by the rules set out in Schedule 2 of the Mortgage Credit Directive Order 2015 (MCDO). I've taken these into account in thinking about whether Evolution lent responsibly.

### Irresponsible Lending

The loan taken out by Mr G in March 2017 was for £11,950 over a term of seven years. Added to this was an arrangement fee of £1,195 (payable to the broker) and a servicing fee of £956. The loan was on a variable rate of 26.82% at the time the loan was taken (APRC 35.51%). The monthly payment was £347.95 with the total amount repayable being £29,227.56.

Mr G's property was valued at £48,000. The outstanding amount of the first charge mortgage on Mr G's property was £40,837, so along with the money borrowed for the loan with

Evolution, this meant a loan to value (LTV) ratio of 110%. Once the fees added to the loan are included, this gave an LTV of over 114%.

As set out above, the mortgage should have been lent on a CBTL basis and was therefore governed by MCDO. These rules set out that the lender is obliged to assess the creditworthiness of the borrower and state:

*“10 (1) Before concluding a [CBTL] mortgage contract, the creditor must make a thorough assessment of the borrower’s creditworthiness, taking appropriate account of factors relevant to verifying the prospect of the borrower meeting the borrower’s obligations under that contract...”*

*(3) The assessment of creditworthiness must not rely predominantly on the value of the property exceeding the amount of the credit or on the assumption that the property will increase in value unless the purpose of the [CBTL] buy-to-let mortgage contract is to construct or renovate the property...*

*(5) The creditor must only enter into the [CBTL] mortgage contract with the borrower where the result of the creditworthiness assessment indicates that the borrower is likely to meet the obligations resulting from that contract in the manner required under that contract.”*

The MCDO rules also set out that the lender must gather and verify the information provided when carrying out the creditworthiness assessment and state:

*“12 (1) A creditor must carry out the assessment of creditworthiness referred to in paragraph 10 on the basis of information which is necessary, sufficient and proportionate, including -*

*(a) any values provided to the creditor as part of its assessment of the property;*

*(b) typical rental levels and rental demands within the property’s locality;*

*(c) the impact of future interest rate rises, rental voids and rental arrears and the ability of the borrower to meet payments should such pressures arise; and*

*(d) typical letting costs.*

*(2) The information referred to in sub-paragraph (1) may include information obtained by the creditor from relevant internal or external sources, including one or more of the following -*

*(a) the borrower;*

*(b) any credit intermediary or appointed representative which obtained information during the credit application process; and*

*(c) a calculation developed by the creditor to demonstrate that the estimated rental income from the property will exceed the interest payments due by an amount sufficient to cover the estimated other costs associated with the property and its rental.*

*(3) The information referred to in sub-paragraph (1) must be appropriately verified through reference to independently verifiable documentation when necessary”*

The I&E completed by Evolution’s case management department on 7 March 2017 shows that Mr G had an income of £1,784.75, comprising his salary of £1,462.55 and rental income for the property of £322.20. His expenditure was entered as being £2,324.92, comprising £349 priority debts (mortgage and rent), £297 essential bills, £78.34 travel, £157.37 non-essential bills and unsecured credit of £1,443.21. This gave Mr G a disposable income of -£540.17. After the consolidation, the I&E said that this left Mr G with a disposable income of £704.04. After the Evolution repayment of £347.95 was included, this gave Mr G a ‘buffer’ of £356.09. Evolution applied a stress-test to this which left Mr G with £287.91.

Evolution says that the loan was used to consolidate a number of credit commitments and therefore benefitted Mr G by reducing his monthly expenses. It has also said that the funds from the secured loan consolidated all the active short-term loans to break the cycle of Mr G continuing to use them.

I've listened to the call during which the advisor did a verbal I&E assessment and went through Mr G's credit report. It was proposed during that call that the loan would directly consolidate 14 other debts identified from Mr G's credit file, comprising of 7 payday loans (totalling £3,595), 6 credit cards (totalling £4,355) and an overdraft of £3,000. This amounted to £10,950, which meant that Mr G would have had an additional £1,000 on top of the consolidation. The debts discussed during the call as being directly consolidated (and noted on the I&E) are set out below:

Type	Lender	Date Taken	Outstanding Balance	Monthly Payment
Payday Loan	Lender A	Sep-16	270	90
Payday Loan	Lender B	Sep-16	420	420
Payday Loan	Lender C	Jan-17	607	116
Payday Loan	Lender B	Aug-16	400	133
Payday Loan	Lender B	Nov-16	74	16
Payday Loan	Lender B	Nov-16	78	17
Payday Loan	Lender D	Sep-16	1746	345
Credit Card	Bank A	Apr-16	1244	13.37
Credit Card	Bank B	Sep-16	286	16.4
Credit Card	Bank B	Sep-16	330	22
Credit Card	Bank C	Oct-16	1900	34.4
Credit Card	Bank D	Aug-16	399	14
Credit Card	Bank E	Jan-16	196	7.04
Overdraft	Bank C	N/A	3000	30
Remainder to Mr G	N/A	N/A	1000	N/A
<b>TOTAL</b>			<b>11950</b>	<b>1274.21</b>

During the call, the advisor told Mr G that he didn't need to include the credit commitments as an expense if Evolution was clearing them directly. I can see from the I&E that the same debts were included and all marked as being consolidated, save for the overdraft, for which the £30 remained included as an expense after the consolidation was taken into account.

Evolution has provided a copy of the remittances for the payments it made when providing the loan to Mr G. I am satisfied that these are all of the payments as they total £11,950, as can be seen from the table below:

Type	Lender	Payment
Payday Loan	Lender A	420.18
Payday Loan	Lender B	399.8
Payday Loan	Lender B	50
Payday Loan	Lender B	85.6
Payday Loan	Lender C	658
Payday Loan	Lender D	1865.32
Credit Card 0001	Bank A	390
Credit Card 0622	Bank B	326
Credit Card 6066	Bank D	385

Remainder to Mr G	Bank C	7370.1
		<b>11950</b>

These figures show that Evolution only directly consolidated ten of the debts (I have assumed that the £3,000 overdraft was consolidated for these purposes as the money paid to Mr G was paid into the overdrawn account, along with six of the payday loans and three of the credit cards). There were therefore three credit cards and one payday loan identified from the credit file and marked as being consolidated on the I&E which weren't directly consolidated (shaded in grey in the first table above). This meant that £7,370.10 was paid directly to Mr G, instead of the anticipated £4,000 (including the £3,000 overdraft).

Mr G had four payday loans with Lender B, three of which were consolidated. It seems most likely to me that the payday loan which wasn't consolidated is likely have been either the one amounting to £400 or £420 given the figures provided. Taking the lowest of these, the monthly repayment was identified as being £133 on the credit file. The figure of £133 should therefore have remained in the I&E as an expense as it hadn't been directly consolidated.

In relation to the credit cards, I have assumed that Mr G correctly identified which one was which from the credit file (as the name of the bank doesn't appear on the credit file, just details such as the balance and payments made). This means that the credit cards which weren't consolidated would have been the ones with monthly payments of £16.40, £34.40 and £7.04 from the credit file. A total figure of £57.84 should therefore have remained included in the I&E as an expense as these hadn't been directly consolidated.

Evolution have said that a verbal I&E was completed to ensure the loan was affordable and sustainable for Mr G and that its case management department then assessed the supporting documentation to validate the information Mr G had provided verbally regarding his income and expenditure.

I can see that Evolution did obtain a copy of Mr G's credit report and bank statements for one of his accounts covering the two-month period up until 24 February 2017 (albeit it is clear that some pages and transactions are missing). So I think it took reasonable steps to obtain supporting documentation to verify the information. However, I think once Evolution obtained these documents that should have led it to question what Mr G had said about his expenditure for a number of reasons which I will expand upon below.

I've looked at the bank statements provided to Evolution and there are a number of transactions shown which don't appear to be accurately reflected in the outgoings in the I&E.

In addition to the payday loans identified from the credit report and I&E (and those consolidated), the bank statements showed that there were numerous other payday loans. For example, there were payments to one payday lender for £148.47 on 20 January (direct debit), £126.81 on 30 January and £199.61 on 21 February (the direct debit for which was returned). The latter of these transactions has been annotated on the bank statement to indicate that it would be directly consolidated. The bank statement also shows that a new loan from this lender of £695 was paid into Mr G's account on 9 February. Nothing relating to Mr G's commitments to this lender has been added to the I&E and there was no direct consolidation to this lender. I can't see that Mr G was asked any questions about these transactions. Given that the most recent direct debit amount for this lender was £199.61, this should have been added to the I&E as a monthly expense.

There were direct debit payments to another lender for £90 on 23 January and £90 on 21 February. The latter of these transactions has simply had a cross put through the amount on the annotated bank statement. Nothing relating to Mr G's commitments to this lender has been added to the I&E and there was no direct consolidation to this lender. I can't see that Mr G was asked any questions about these transactions. Given that the most recent direct debit amount for this lender was £90, this should have been added to the I&E as an expense.

There was a further payment to another lender for £75 on 9 February 2017, which Evolution had marked on the bank statement would be directly consolidated. Nothing relating to Mr G's commitments to this lender has been added to the I&E and there was no direct consolidation to this lender. Given that the most recent payment amount for this lender was £75, this should have been added to the I&E as an expense.

In relation to credit cards, the bank statements showed that Mr G had a number of credit cards, some of which weren't on the credit file and most of which weren't directly consolidated. It can be seen from the statements provided to Evolution, covering the two-month period before the loan was taken out, that Mr G made payments to credit cards as follows:

Card Ending	Transaction Month 1	Amount	Transaction Month 2	Amount
0001	23 January 2017	£14.78	21 February 2017	£13.37
7029			20 February 2017	£34.40
4592	20 January 2017	£6.94	20 February 2017	£7.04
3566			09 February 2017	£72.12
7177			27 January 2017	£49.82
6179	11 January 2017	£47.00		
3945	29 December 2016	£28.79		

I've looked at the remittances from Evolution and (as set out in the table above) the three credit cards it directly consolidated were ending 0001, 0622 and 6066. Therefore, only the first of the seven cards shown on the bank statements was consolidated (despite annotations being made against some of the others on the bank statements to indicate that they were to be directly consolidated). I can't see that Mr G was asked any questions about the remaining cards.

The remaining six cards should have been taken into account in the I&E. I accept that one of these (the card ending in 3945) is one of the three on the credit file (with an outstanding balance of £1,900) which was supposed to be consolidated but wasn't, which I have already considered above. Therefore, I haven't counted it again for these purposes. Given that the most recent payments to the remaining five cards above (shaded in grey) which weren't consolidated amount to £210.38, these should have been added to the I&E as monthly expenses.

There are also a significant number of gambling transactions shown on the bank statements in the period before the loan was approved. For the month from 25 January 2017 until 24 February 2017, there was a total of £820 paid out on gambling over 63 transactions (including a £10 standing order for staff lottery). There is a total of £739 paid in from gambling operators over the same period.

For the previous month from 25 December 2016 until 24 January 2017, there was a total of £508.25 paid out on gambling over 50 transactions (including the £10 staff lottery) and a total of £170 paid in.

There is no entry on the I&E for gambling expenditure. Evolution says that its records show that the level of gambling was discussed with Mr G and that he advised that he was in a work syndicate and was placing bets on behalf of his colleagues. In its response to the investigator's view that she couldn't see how Mr G was in a work syndicate for gambling, it said that Mr G informed the case manager of this during the application.

I've listened to the application call on 24 February 2017 where Mr G was taken through the I&E and asked how much he spent on lotteries or gambling each month. He said that there were a few entries for gambling on his statements and that he gave £10 a month to a staff lottery fund. The advisor asked what Mr G would pay out in total for gambling each month

and Mr G said that he spent £150-200 a month. Other than the reference to the staff lottery, he doesn't say anything about a work syndicate.

I also note that in the application call, in relation to gambling entries, the advisor said "If we see entries like that, that does get questioned, it won't prevent us from giving you the loan so don't worry about that but just bear in mind you will get questioned when they see your bank statements".

Mr G has confirmed that the gambling was his own and was at the height of his addiction; he said that there were no in-depth discussions about this with Evolution.

Our investigator asked Evolution to provide evidence of any further discussions it had in relation to this. It says that there was a further call on 3 March 2017 but it has been unable to retrieve a copy of this call. It has been asked to provide evidence that it took into account Mr G's actual spend on gambling rather than what he declared or provide a call note to show what was discussed in the call but no further evidence has been provided.

I note that there is a reference on the underwriting notes on 3 March 2017 which states "*2 month BS as there is gambling on the account. (or Mogo) Gambling is syndicate from work [sic]*". However, there is no indication that this information was obtained in a further call to Mr G on that date. Entries on other dates include references to Mr G calling in or Evolution calling Mr G and call recordings have been provided for all of these instances (none of which contain any further discussion about the gambling). So it is not clear whether the author of this entry had spoken with Mr G or simply made an assumption based on what Mr G said in the initial call about the staff lottery.

There is a further entry in the underwriting notes on 7 March 2017 which states "*Mr has provided BS for 2 months to show details of the the gambling [sic]. There is gambling on the BS for Sky Bet & PP Online – but this is for a wrok syndicate [sic]. We can see £420 being paid in from work, also the total amount of gambling out is £744.50 but total of £844 has come in*". Again, it is unclear where this information has come from as this note doesn't refer to a call either to or from Mr G. There is an entry earlier on the same day to say that Mr G was called again to chase payslips; Evolution has provided a copy of that call and the advisor only asks Mr G to provide his wage slips again and there is no discussion about gambling.

Having looked at the statements, I don't think it is reasonable for Evolution to have concluded that no gambling expenditure should have been included on the I&E.

In the month up to 24 February 2017, Evolution marked five transactions on the bank statements as being money from a work syndicate for gambling. Four of these were from what appears to be a personal account with the reference 'D \*\*\*\*\*s Loan' totalling £420, being £100 in on 30 January, £90 on 13 February, £130 and then a further £100 on 20 February. The other transaction marked by Evolution is from what appears to be another personal account in somebody else's name for £90 on 3 February. So the total amount Evolution have marked as being payments from work is £510.

As set out above, there is no evidence to support that the gambling was for a work syndicate. Likewise, there is no evidence to support why these specific transactions have been identified as being funds paid in for a work syndicate. The transactions on the statement don't refer to work or gambling or a syndicate, and one of the depositing accounts gives the reference of a loan.

Even if it was Mr G who suggested this was what the payments in were for (which there is no evidence of), I think Evolution should have questioned whether this was plausible in the circumstances. There are five deposits in which Evolution has marked as being for the work syndicate, but 63 gambling transactions out of the account over the month. The amounts paid in seem to have no correlation to the amount spent or the timings of Mr G placing bets. Further, despite payments totalling £739 being received into Mr G's account from gambling



operators over the course of the month, no payments are made back to either of the accounts who supposedly deposited for a work syndicate.

For the reasons above, I don't think it likely that the funds paid in were for a work syndicate for gambling. But even if they were, no account has been taken of the amount Mr G pays into this syndicate himself. If he was part of a syndicate then, by its very definition, he would have had to pay something into the syndicate himself. Evolution hasn't even included in the I&E the £10 a month shown as a standing order on the bank statements for the staff lottery and declared by Mr G during the I&E call. The bank statements available to Evolution show that Mr G spent significantly more on gambling than it identified as being paid to him for the work syndicate; £510 was paid in from the two accounts and £820 was paid out. This left £310 of gambling transactions which Mr G funded himself which weren't included in the I&E. Therefore at least the £310, if not the entire £820, should have been considered as part of the I&E.

I say that because Mr G had a gambling addiction at this time. Although Evolution didn't know that, as I've set out it didn't make the obvious enquiries about his gambling expenditure that it should have done and appears to have disregarded it on a false basis (which I have found no evidence it was told about by Mr G). Had it considered this expenditure properly, I think it would have discovered that Mr G was in fact spending all this money himself on a compulsive basis. This in itself ought to have led it to question whether further lending, secured at 114% over a property Mr G depended on, in part, for income was responsible. And even if Evolution had not considered this to be a reason not to lend, it ought to have taken proper account of the impact it had on whether the loan was affordable.

Evolution has referenced in its underwriting notes the fact that the total amount of gambling out was £744.50 and the total of £844 has come in. Firstly, I disagree with the figures provided by the underwriter (as set out above, from 25 January 2017 until 24 February 2017, there was a total of £820 paid out on gambling and £739 paid in). In any event, whilst I accept that there were gambling winnings paid into the account, this cannot be considered to be guaranteed or reliable income and should not have been taken into account for the purposes of the I&E.

The statements also show numerous transfers to and from two other accounts belonging to Mr G (ending 5460 and 3162). One of these other accounts was also on his credit file and Mr G confirmed that this was another current account during the I&E call. The transfers out to his other accounts amounted to £1,070 and the transfers in totalled £430 for the month up to 24 February 2017. Evolution hasn't provided any information to indicate that it questioned what the transfers were for or asked for statements for these other accounts, and I can't see that any of this has been taken into account in the I&E. Incidentally, this service has asked Mr G for copies of the statements for the account ending 5460. The earliest statement Mr G has been able to obtain is from 20 April 2018 to 23 May 2018 and this shows numerous gambling transactions.

Evolution said in its response to the investigator's view that it advised Mr G that it required statements for all the accounts as part of the validation of the I&E and he did not provide the statements for the other accounts. I accept that it was Mr G's responsibility to declare relevant information as part of his application – but it was Evolution's responsibility to ensure that the loan is affordable for the customer, and to carry out proper checks to make sure it is. Given that the other accounts are obvious from the information and statements Evolution *did* have, I don't accept that this is a reason for Evolution not to have requested the further statements once they were aware (or ought to have been aware) of their existence. And if it did request them but Mr G failed to provide them that would have been a further matter of concern.

The information provided to Evolution also indicates a number of other transactions which don't seem to be accurately reflected in the I&E:

- During the I&E call on 24 February 2017, Mr G said that he spent £100 a month on food. In the I&E, Evolution has included a figure of £150 for food (as this is the lowest amount permitted). The bank statements for the month before the loan was approved show that Mr G spent £271.04 on restaurants, takeaways, supermarkets and local convenience stores.
- The bank statement shows that £530 was withdrawn in cash during the month up to 24 February 2017. Evolution hasn't provided any information to indicate that it questioned what the cash was used for and I can't see that any of this has been taken into account in the I&E.
- The bank statement for the month up to 24 February 2017 shows transfers to one person of £20 on 10 February, £50 on 10 February and £90 on 14 February. Evolution hasn't provided any information to indicate that it questioned these transactions and I can't see that they have been taken into account in the I&E.
- The bank statement for the month up to 24 February 2017 shows bank charges and interest totaling £79.56. I accept that £30 has been included in respect of the overdraft but nothing further has been included on the I&E under the field 'Bank Charges'.
- During the I&E call, Mr G said that he spent £15 a month on toiletries and £25 a month on clothing. Nothing for clothing and toiletries is included in the I&E.

As set out above, in her view, the investigator considered that not all of the loans noted as being due to be consolidated were in fact consolidated, and that Mr G's statements provided to Evolution showed significant expenditure on gambling.

In line with this, and just taking just the figures of £133 for the payday loan on the I&E which should have been consolidated but wasn't, £57.84 for the three credit cards on the I&E which should have been consolidated but weren't, and (even taking the lower amount) at least £310 of the gambling spend, they amount to an additional £500.84 a month expenditure for Mr G which wasn't included in the I&E. Given that Mr G's disposable income on the I&E was calculated to be £287.91 without any of these outgoings being included, it is my view that, had these been included as they should have been, these alone would have meant that the loan was unaffordable for Mr G.

Taking into account the entire gambling spend of £820 (rather than just the £310 on top of the payments which Evolution concluded were from a work syndicate), this would have added £1,010.84 to Mr G's monthly expenditure which hadn't been included on the I&E.

In relation to the other loans and credit cards shown on the bank statements but not on the I&E and not consolidated, these had monthly payments of £199.61, £90 and £75 for the loans and £210.38 for the credit cards. This amounts to a further £574.99 expenditure a month for Mr G which also hasn't been included on the I&E.

These figures don't even take into account the factors mentioned in the bullet points above, which would likely add further expenditure to Mr G's monthly outgoings, and which Evolution should have taken into account given the information available to it. Taking all of the information into account, it is my view that the loan was clearly unaffordable for Mr G.

Evolution says that Mr G was asked questions about his credit file and there were no mortgage arrears or missed/late payments and he was maintaining his credit commitments.

I disagree that Mr G was maintaining his credit commitments. His credit file shows that he had opened 15 accounts in the last six months, that he had taken £1,145 of cash advances on credit cards in the last 12 months, that 13 credit searches for loan applications had been done in the last three months and 55 in the last 12 months.

The credit file also showed that an arrangement had been in place for the last 2 months for both the payday loan with Lender A and the payday loan of £420 with Lender B. The payments were a month behind (or the last payment was late) for the three other payday loans with Lender B. For the credit cards with Bank A and the one with a £286 balance with Bank B, the credit file showed that they were both over their limit and a month behind (or the last payment was made late). The other credit card with Bank B with a balance of £330 was close to the limit and a month behind (or the last payment was made late). The credit cards with Bank C and Bank D showed the last statement balance as being over the limit and the credit card with Bank E was close to the limit.

The bank statement also showed that Mr G was frequently near his overdraft limit and had exceeded it occasionally. For example, on 30 December 2016, 24 January 2017 and 31 January 2017, Mr G was already over his overdraft limit of £3,000 then spent money on gambling transactions which took him further over his limit. These examples indicate that Mr G was clearly not managing his debts sustainably and that he potentially had a gambling problem. The statements also showed that direct debits for a loan and a credit card had been returned unpaid. So I don't think the information available to Evolution demonstrated that Mr G was maintaining his credit commitments at all.

Of the active loans and credit cards on the credit file, all but one of the credit cards had been opened in the previous six months (as shown on the first table above). In addition to these, Mr G had taken out a further unsecured loan of almost £10,000 for a new car in October 2016. I also note that during the I&E call Mr G said that he had taken out the payday loan with Lender C in January (a month before his application) in order to pay for a deposit on a holiday. He also told the advisor that reducing his outgoings was important as he wanted to go on holiday. Given the information available to Evolution, I think it ought to have questioned whether Mr G was managing his finances and whether he would be able to sustainably make the repayments.

Whilst the loan reduced Mr G's monthly expenditure by consolidating some – but not all – of his debts, it increased his overall indebtedness by over £6,500. This was due to the additional amount of £4,370.10 paid to Mr G on top of the consolidation (not including the £3,000 he was paying off his overdraft), along with the arrangement fee of £1,195 (payable to the broker) and a servicing fee of £956. It also meant that the debt was secured against his rental property – which provided part of his income – over seven years which would add a significant amount of interest to the amount he initially borrowed and mean that his property could be repossessed if he was unable to maintain the repayments. This would also have left him in negative equity as the LTV was 114% including the fees which had been added to the loan.

In its response to the investigator's view, Evolution disagreed that lending with an LTV of 110% was unreasonable as it says this fitted within its lending criteria and that the risk sits with Evolution and not Mr G. Firstly, the LTV was 114% as the fees were added to the loan which was secured on Mr G's property. Further, the fact that Evolution says this met the requirements of its internal policy doesn't of itself mean it has acted fairly. I would expect Evolution to take this into account when determining whether it was appropriate to lend in the other circumstances of this case.

In combination with the other information available to Evolution, this should have indicated that Mr G was already heavily indebted and that a further loan – particularly another loan secured against his property – may have been unsustainable for him. And I don't agree that Evolution was taking all the risk. This lending placed Mr G in negative equity on the property, meaning it's likely he wouldn't be able to re-finance the lending, for example to reduce the interest rate; that he couldn't sell the property to repay it should it prove unsustainable; and that he would be left with a shortfall if it was ever repossessed. These seem to me to be substantial risks that Mr G was exposed to by virtue of this lending.

For the reasons above, I don't think Evolution carried out adequate checks having regard to the information it held about Mr G's financial circumstances, particularly given the large amount of the loan and the fact it would be secured against his property.

Evolution requested bank statements, so this was information in its possession. In light of the gambling, it even asked Mr G to provide two months of bank statements instead of just one. In the circumstances of this case I think it would have been prudent for Evolution to ask more questions about what was shown on the bank statements in order to determine Mr G's expenditure.

Had Evolution considered whether the information in its possession gave grounds for doubting what was on the I&E, as I think it fairly should have done, I think it ought reasonably to have questioned whether the loan was affordable and sustainable for Mr G. And given that it was secured on his property, the impact of that on Mr G could be significant. I think this ought to have led Evolution, acting fairly, to question whether it was responsible to lend in these circumstances.

I think the information available supports that the loan was not affordable or sustainable for Mr G. It is my view that had Evolution properly reviewed the information available to it, it would not have been able to demonstrate that the loan was affordable or sustainable for Mr G.

Overall, I don't think it was reasonable for Evolution to offer Mr G the loan secured against his home. I am of the view that it didn't carry out sufficient checks and, had it done so, it would have shown that the loan was unaffordable and unsustainable for him and should not have been offered. In all the circumstances I am persuaded that Evolution lent irresponsibly.

Evolution says that Mr G applied for the loan by deception and lied regarding his employment status and the purpose of the loan being to fund drug debts. It says that, had he acted honestly then it wouldn't have approved the loan.

As explained by the investigator, the fact that Mr G lost his job has had no impact on the reason the complaint has been upheld. For the reasons set out above, even if Mr G had remained in his job the loan would have been unaffordable for him based on the information available to Evolution. Likewise, regardless of the purpose of the loan (and disregarding the fact that Evolution paid around £3,370 of the money which was supposed to directly consolidate debts directly to Mr G instead), the figures show that it was clearly unaffordable.

I accept that it's likely Mr G misled Evolution as part of the loan application. But Evolution ought to have discovered the matters I've set out above as part of its responsible lending enquiries, regardless of what Mr G has said. I'll say more about redress below – but I am not writing off this loan or enabling Mr G to benefit from the capital he borrowed without repaying it. But equally I don't consider it fair and reasonable for Evolution to recover fees and interest in respect of a loan it should never have lent regardless of what Mr G said to it.

#### Financial difficulties

Mr G is unhappy that Evolution registered a CCJ against him when he was in financial difficulties and took money from his salary through an arrestment of earnings.

I can see that Mr G made the first payment on the loan in April 2017 but that no further payments were made following that. Evolution tried to contact Mr G but was unsuccessful. It sent him arrears letters and on 16 August 2017 it sent Mr G a Notice of Default letter under CCA setting out that it had been unable to contact him. It stated that if the arrears weren't paid in full by 31 August 2017 it would terminate the agreement, demand full repayment of the outstanding balance and commence court proceedings for recovery of the balance. It also said that it would notify the credit reference agencies advising them that the account was in default which would be entered on his credit report (a default was ultimately applied to Mr G's credit file on 7 December 2017).

A writ was requested by Evolution on 15 November 2017 in the sum of £28,879.61 with interest at the rate of 26.82% per annum from 13 November 2017 until payment, along with expenses. The writ stated that £28,879.61 was the balance due as of 13 November 2017.

On 8 December 2017, Evolution sent Mr G a letter notifying him of its intention to commence legal proceedings against him to obtain a CCJ for the full balance outstanding.

A decree for payment of money was granted at court on 20 December 2017 and the decree was extracted on 15 January 2017.

An execution of charge was made on 6 March 2018 for the payment of money. The sum due was the principal sum of £28,879.61 plus interest of £2,397.86 (as of 6 March 2018, the daily rate being £21.22) plus expenses of £473.10. There was then an agent's fee of £9.75 and charge fee of £79.10 added. The total sum due was £31,839.42. The decree set out that if the sum was not paid within 14 days, Mr G would be liable to have further action taken against him including arrestment of his earnings, arrestment in execution and the attachment and auction of articles belonging to him. The earnings arrestment schedule was served on Mr G's employers on 21 March 2018.

Mr G contacted Evolution on 23 March 2018 as he had been informed that his wages were being arrested and asking if there was anything he could do as this would take a lot of his finances. He sent another email to similar effect on 31 August 2018. I can't see that Evolution responded to this.

In relation to seeking enforcement by way of a CCJ rather than repossession, Evolution says that in Scotland a lender with a security always has the option of enforcing the security through repossession or proceeding directly against the debtor. It says that, due to the timescales in relation to enforcing a security, direct action 'might be the better option for the lender'. Evolution said it was important to consider the value of the security having regard to the sums due to the first charge holder before enforcing the security via possession proceedings. It says that at the point of sale, the value of the property was recorded as £48,000 with an outstanding mortgage value of £40,837 for the first charge and the outstanding balance of Mr G's secured loan as of 20 November 2017 was £15,970.78. Therefore, had it enforced the security via possession proceedings there would have been a shortfall. Having regard to this and the fact that Mr G was in employment but not making repayments, Evolution considered 'the better strategy' to be to obtain a money decree and take an earnings arrestment.

I have considered this and disagree. The fact that Evolution considered that 'the better strategy' to obtain its money was to obtain a CCJ due to its concerns about the negative equity is not relevant to which rules were applicable for enforcement. The negative equity is not a reason not to seek repossession. Had Evolution been concerned about negative equity, then this might have been a consideration when deciding whether the loan was affordable and sustainable in the first place and might have been a reason not to offer the loan given the high LTV. However, Evolution was happy to accept this risk and lent to Mr G on an LTV of 114% (including the fees added to the loan) from the outset.

The fact remains that the mortgage should have been lent on a CBTL basis as the relevant circumstances applied. Therefore, the applicable rules were the MCDO, and not the CCA.

The MCDO rules set out the process to be taken where a borrower is in arrears and state:

*"19 (1) A creditor must exercise reasonable forbearance before initiating possession proceedings.*

*(2) Any charges that the creditor imposes on the borrower arising from the borrower's default must be no greater than is necessary to compensate the creditor for costs incurred by the creditor as a result of the default.*

*(3) Where the price obtained for the secured property affects the amount owed by the borrower under the contract, the creditor must take all reasonable steps to obtain the best possible price for the secured property.*

*(4) Where, after possession proceedings, outstanding debt remains, the creditor must put in place measures to facilitate repayment by the borrower.”*

I think it was reasonable for Evolution to have tried to contact Mr G when he hadn't made his repayments. However, the mortgage should have been lent on a CBTL basis and therefore it was not a loan under the CCA. Therefore, when Evolution was unsuccessful in contacting Mr G, I don't think it was reasonable to take action under the CCA to apply a default and obtain a CCJ.

Further, the guidance from the Information Commissioner's Office (ICO) sets out that a default should only be applied when the lender decides the business relationship with the customer has broken down. The guidance sets out that, in respect of long-term secured loans, the asset financed being repossessed or instructions for repossession being given would indicate that a breakdown has occurred. The lender may therefore decide that there is no breakdown until they have decided to take possession of the asset, as the existence of a secured asset will indemnify them if repossessed.

Evolution says that the investigator has contradicted her position as she has first said that the lender must exercise reasonable forbearance before taking possession of the property, but later said that it should have repossessed the property. It also references the investigator's view that there was a chance that the property could be repossessed and sold with a shortfall, still leaving Mr G with a debt to pay but no property. Evolution says that "This supports the reason to take reasonable forbearance (Defaults, CCJ) before taking possession of the property have been demonstrated [sic]".

I disagree that these are contradictory statements. Firstly, defaults and CCJs would not be considered to be forbearance under the MCDO. These were enforcement actions taken under the CCA, which didn't apply to this loan. Further, as set out above, the fact that there might be a shortfall sale may be a reason not to lend, as opposed to being a reason not to repossess in line with the relevant regulatory framework which *did* apply.

Given that this was a CBTL loan secured on Mr G's property, the appropriate route for Evolution to have taken if Mr G was unable to make his repayments would have been for it to try to exercise reasonable forbearance and, if this was unsuccessful, to seek repossession before applying a default. Evolution followed the wrong procedure and took action on an incorrect basis. It should not have applied for a CCJ as if this was an unsecured debt; it should – once reasonable forbearance had been exhausted – have applied to repossess and sell the property.

In relation to the balance presented to the court for the CCJ, Evolution says that it presented several different documents to the court including a copy of the loan agreement and the terms and conditions. It says that, had it not provided adequate information, then the court would have thrown the application out. Evolution also says that Mr G didn't raise any objections at the time and, if he had believed the wrong legal action had been taken, he had the opportunity to address this in court but chose not to.

I don't accept this. It was Evolution's responsibility to ensure the correct figures were before the court. It was not Mr G's responsibility to raise that the amount Evolution had requested was incorrect or that it was taking the incorrect legal action, and I'm not persuaded that Mr G would have been aware of this as a lay person.

The writ prepared by Evolution stated that £28,879.61 was the balance due as of 13 November 2017. The subsequent court order was made for this amount in addition to expenses and interest at the rate of 26.82% per annum from 13 November 2017 until

payment. The court relied on information as to the balance given by Evolution when giving judgment.

In its response to this service, Evolution indicated – when giving its reasons why it had decided to take action under the CCA rather than repossession – that the outstanding balance of Mr G's secured loan as of 20 November 2017 was £15,970.78. So it is not clear why the writ requested by Evolution on 15 November 2017 stated that £28,879.61 was the balance due as at 13 November 2017. This was clearly incorrect and represented the entire balance due under the agreement over its whole term less what Mr G had paid to date, including the 26.82% interest which would have been due over the entire seven-year term of the loan (assuming the payments had been made on time). In other words, Evolution told the court that Mr G already owed interest which had not yet accrued. At the time the writ was requested, just over eight months had passed of the seven-year term. In my view it was incorrect and misleading to include interest for the remaining six years and four months in stating the amount that Mr G owed at that time.

So I am satisfied that Evolution overstated to the court the amount that Mr G owed at that time. Further, the court order meant that Mr G was to pay not only the contractual interest which hadn't yet accrued but also to pay a further 26.82% interest (the contractual rate) on top of this incorrect amount applied at a daily rate. This was incorrect. It had the effect of requiring Mr G to pay interest on amounts he did not owe.

This service has no jurisdiction to interfere with an order which has been made by the court. Therefore I'm unable to direct that the court order is set aside. However, for the reasons I've given it seems to me that Evolution took action using the wrong procedure and presented incorrect information to the court, leading to the court issuing judgment for sums far in excess of what Mr G actually owed. While my powers do not extend to directing it to do so, in the circumstances I would recommend that Evolution apply for the judgment to be set aside on the basis that it was inappropriate for it to take this action and Evolution requested the judgment for the incorrect amount, bearing all the costs of doing so.

I am also unable to consider what happened after the court made the order, as the actions of Evolution thereafter were to enforce the court order, as opposed to enforcing a credit agreement – and this is outside our jurisdiction. However, to the extent that Mr G has paid more than he ought to have done as a result of Evolution presenting the wrong figure to the court, I recommend that Evolution refund that to him.

### **Putting things right**

Whilst I don't think the loan should have been given, Mr G has had the benefit of the money borrowed, so I think it right that he should have to repay that amount. However, had the loan not been given then he would not have had to pay the fees, charges or interest incurred on this.

In order to put things right, Evolution should remove all interest, and the fees it charged, from the loan balance. It should treat all payments Mr G has made to date as being repayments of capital. If that means that Mr G has now repaid more than the initial capital sum he borrowed, it should then refund any overpayments to Mr G along with interest. It should also remove the loan and any entries associated with it (including the default) from Mr G's credit file.

I recognise that this is not an ideal way of putting things right – it doesn't take into account the fact that Mr G did consolidate some (though by no means all) of his existing debts, and has therefore, through my award, saved interest on that debt he would otherwise have paid. However, given the interest rates charged by Evolution, and the difficulty of estimating what Mr G would have paid towards other debts, I think it's reasonable to take a relatively simple approach to resolving this matter by simply saying that Evolution should not retain fees and

interest on money it ought not fairly to have lent. I'm satisfied that this is as close to fair compensation as it is reasonably possible to get in this case.

So I recognise that there is likely to have been some saving through consolidating high-interest short-term loan and credit card debt into the secured loan, albeit I don't think I can accurately estimate that saving, and I don't think it's likely to be very substantial. However, my award for financial loss will result in Mr G having paid no interest on any of the consolidated debt. In recognition of the fact that this may, to some extent, leave Mr G over-compensated, I am not awarding any further compensation for any distress and inconvenience in addition to that award in respect of the irresponsible lending.

In light of the above, I require Evolution to do the following to put things right:

- Evolution should remove all interest and fees applied to the loan, save for the arrangement fee of £1,195 (I'm asking the broker to refund this advice fee separately) and any costs in relation to CCA action not included in the court order but added to the balance. It should then treat any payments made to it by Mr G as payments towards this amount.
- If this results in an overpayment, Evolution should refund the overpaid amount and pay Mr G simple annual interest of 8%\* on any overpayments, running from the date they were paid to the date of settlement.
- Evolution should remove the default and any information about the loan from Mr G's credit file.

\* HM Revenue & Customs requires Evolution to take off tax from this interest. Evolution must give Mr G a certificate showing how much tax it's taken off if he asks for one.

Whilst I have no power to require Evolution to remove the costs in relation to the CCA included in the court order, I recommend that it refunds these costs too, on the basis that it was inappropriate for it to have taken this action. Likewise, I have no power to require Evolution to set aside the court orders for money and arrestment of earnings but I recommend that it applies for the orders to be set aside on the basis that it was inappropriate for it to take this action, Evolution requested the judgment for the incorrect amount and the loan shouldn't have been approved in the first place.

### **My final decision**

For the reasons I've explained above I uphold this complaint against Evolution Lending Limited and require it to put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 10 January 2024.

Rachel Ellis  
**Ombudsman**