

# Determination

July 30

# 2010

## Key Issues:

1. Whether the particular application fees were legally permissible fees within the meaning of the Rules of the Credit Ombudsman Service.
2. Whether the charging of these fees was disclosed and authorised.

Number: 08

## The Ombudsman's Approach

The role of the Ombudsman is to investigate and resolve complaints in accordance with the Rules of the Credit Ombudsman Service Limited ("COSL"). In doing so, the Ombudsman is not bound by any legal rules of evidence and may inform itself about the complaint and all matters relating to it in such manner as he considers appropriate. The Ombudsman relies substantially on, and may draw inferences and conclusions from, available written material, particularly material which was created contemporaneously with events. *COSL Rules Fifth Edition – Rule 21*

The approach of the Ombudsman is to consider the available information and determine from that information what is more likely to have happened based on the balance of probabilities.



## Credit Ombudsman's Determination

I have reached the following Determination in relation to a complaint made by the Complainant about the Member.

### Parties

The Complainant: Mr JVD  
The Member: a mortgage manager

### Complaint Summary

#### Time Line

During July and August 2009, the Member sought to arrange commercial finance for the Complainant and his father, Mr JVD.

In its letter of 14 July 2009, the Member informed the Complainant that it had secured conditional approval for a loan of \$1,000,000 from a particular lender ("lender").

The letter described the loan approval as being conditional on:

- a) the valuation of the security properties being found satisfactory;
- b) the loan not exceeding a loan-to-value ratio of 66%;
- c) the lender being granted a first registered mortgage over the Complainant's property at Kenny Road, Horsham, Victoria; and
- d) personal guarantees being given by the Complainant and Mr JVD.

The letter of 14 July 2009 also stated:

*"To proceed with this finance request please sign acceptance of these terms and conditions below and direct deposit \$1,950 to enable us to order the valuation".*

There are no terms and conditions described in the letter, apart from the conditions of the approval referred to in (a) to (d) above. There is also no reference to any fees that may have been payable to either the lender or the Member.

On 21 July 2009, the Complainant electronically transferred \$1,950 to the Member's nominated bank account.

In late July or early August 2009, the loan application was amended such that, instead of named individual borrowers applying for the loan, the application for the loan was made in the name of a trust. On or around 19 August 2009, the loan application was re-submitted to the lender for a credit assessment.

On 21 August 2009, the Complainant decided not to proceed with the loan and asked the Member to refund the amount of \$1,950.

#### Members Position

The Member declined to refund the \$1,950 to the Complainant. In its response to us dated 16 November 2009, the Member claimed that the \$1,950 was made up of two fees:

- a) \$990, being an application fee charged by the lender ("lender application fee"); and
- b) \$960, being an application fee charged by the Member to arrange the valuation ("Member application fee").

In an email dated 27 December 2009 in response to our request for further clarification, the Member re-stated its position thus:

- a) the lender application fee of \$990 included the cost of the valuation; and
- b) the Member application fee of \$960 was in payment of the Member assisting in the loan application.

In response to our request for proof that:

- a) the lender application fee had been disclosed to and was payable by the Complainant;
- b) the lender application fee had in fact been paid to the lender; and
- c) a valuation of the proposed security properties had been carried out,

the Member confirmed that no fee had been paid to the lender (because the loan had been restructured) and that a valuation had not been carried out.

The Member maintains, however, that it discussed the fees with the Complainant before the fees were paid and the Complainant was aware of their nature and purpose. The Member claims that the Complainant's decision not to proceed with the loan application does not entitle him to a refund of the fees.

The Complainant disputes this and claims that, as he understood it, the payment of \$1,950 was intended to cover the valuation costs and would be refunded to him if the valuations were not carried out on the proposed security properties.

As is commonly the case, the discussions between the parties were not reduced to writing or supported by documentation or other collaborating evidence.

Given the nature of the conflicting evidence, I am unable to determine which version of events is correct or more likely to be correct. COSL does not have the power to subpoena witnesses or take evidence on oath or cross-examine witnesses.<sup>1</sup> Only a Court can do this.

It is nonetheless open to me to consider, on balance, which version of events is to be preferred, having regard to:<sup>2</sup>

- a) the information provided by the parties;

---

<sup>1</sup> COSL Rule 67, Fifth Edition Rules

<sup>2</sup> COSL Guideline 3.3, Third Edition

- b) whether the conduct of the parties was consistent with the version of events they say occurred;
- c) because I cannot cross examine the parties on the statements or documents they have provided, whether I can otherwise draw inferences as to the facts of the matter; and
- d) what is more likely to have occurred, having regard to the information available to me.

## Key Issues

The relevant questions in the present case are:

- 3. whether the lender application fee and the Member application fee were legally permissible fees within the meaning of the Rule 34(d) of the Rules of the Credit Ombudsman Service ('COSL Rules')<sup>3</sup>; and
- 4. whether the charging of the fees was disclosed and authorised.

## Relevant Considerations

In making a Determination in accordance with Rule 49 of the Rules of the Credit Ombudsman Service Limited, I am required to have regard to:

- a) relevant legal requirements;
- b) applicable codes of practice;
- c) good practice in the finance industry; and
- d) fairness in all circumstances.

Where relevant, the application of these to the facts of the present case is discussed below.

## Preliminary Considerations

### Legally permissible fee

Under the COSL Rules<sup>4</sup>, I am not permitted to deal with a complaint relating to a fee, charge or commission unless:

- a) the complaint concerns the non-disclosure, misrepresentation, miscalculation or incorrect application of the fee, charge or commission; or
- b) the charging of the fee, charge or commission is in breach of the law or is unconscionable.

---

<sup>3</sup> COSL Rules, Fifth Edition

<sup>4</sup> Fifth Edition Rules



I am satisfied that the complaint concerns the non-disclosure of fees and so consider that the complaint is one that I am permitted to deal with.

### **Breach of the law**

I note that the loan was clearly intended for commercial purposes. It would not therefore have been regulated by the Consumer Credit Code (NSW). Consequently, the Code's provisions in relation to the disclosure of fees, charges and commissions and its provisions about unconscionable establishment fees have, consequently, no application in the present case.

I also note that a finance broker agreement was not entered into, but that this is of no consequence because the loan would not have been regulated by the Consumer Credit Administration Act (NSW) 1995.

I have not considered whether either or both of the lender application fee or Member application fee are unconscionable within the meaning of sections 12CA, 12CB or 12CC of the ASIC Act<sup>5</sup> as my finding does not require me to consider this.

## **Ombudsman's Determination**

I find that the Complainant is entitled to a refund in an amount of \$1,950.

### **Finding and reasons for decision**

I am satisfied that, on balance, the \$1,950 paid by the Complainant was solely for the purpose of paying for the valuation of the proposed security properties.

Consequently, I find that the Complainant is entitled to a refund in the amount of \$1,950 because:

1. The letter from the Member, dated 14 July 2009 (informing the Complainant that the loan application had been conditionally approved), makes no reference to any loan application or other fees being payable to either the lender or the Member. There is also no other evidence that such fees were payable in relation to the loan application. A fee can only be charged if it is disclosed to the intended payee.
2. By the Member's own admission, the \$1,950 was not paid to the lender and a valuation was not carried out.
3. None of the information available to me suggests that the \$1,950 was otherwise than refundable if the valuation was not carried out.
4. There is no evidence to suggest that the Member was entitled to retain the \$1,950 or any part of the \$1,950.
5. There is no evidence supporting the Member's assertion that the cost of the valuation was included in the lender application fee allegedly payable to the lender.
6. The letter from the Member dated 14 July 2009 does not provide a breakdown of the \$1,950 nor does it suggest that it was partly in payment of an application or other fee.

---

<sup>5</sup> Australian Securities and Investments Commission Act 2001

7. Significantly however, that letter supports the Complainant's assertion that the \$1,950 was solely for the payment of the valuation because the request for the payment follows immediately after a reference in the letter to the conditions of approval, the first being "Satisfactory Bank Valuation" (the other conditions did not require an outlay from the Complainant).

Accordingly, the Member is ordered to refund an amount of \$1,950 to the Complainant.

**Raj Venga**  
Credit Ombudsman