

Determination

September 23

2010

Key Issues:

1. whether the broker fee was a legally permissible fee under the COSL Rules; and
2. whether the demand by or receipt of the broker fee by the Member was in breach of the law.

Number: 009

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 Fourth 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
The Member: a broker

Complaint Summary

Time Line

In April 2008 the Complainant asked the Member to arrange a home loan for her, the purpose of which was to refinance her existing home loan.

The Complainant and the Member entered into a finance broking contract (FBC). Under the law, a FBC is required to, among other things, describe the features of a loan for which a broker is being engaged by a prospective borrower to arrange on their behalf.

The Member submitted a loan application to BankWest on behalf of the Complainant. BankWest offered to advance a loan to the Complainant (the BankWest loan offer) on 3 August 2008.

The Complainant declined to accept the BankWest loan offer because its loan features were not acceptable to her.

On 8 August 2008, the Member issued a Demand Notice/Intention to Sue to the Complainant and, on 15 August 2008, debited \$1,464 from the Complainant's credit card account.

The Complainant advised her credit card issuer that the debit was unauthorised. The debit was reversed at her request. Nonetheless, the Complainant subsequently paid the Member \$1,464 under protest because the Member had allegedly threatened to list a credit default in her credit reference file.

Our Review

We had been provided with three different versions of the FBC:

1. The first version of the FBC was provided by the Complainant along with her initial complaint to us on 29 October 2009. It does not contain a description of the loan features sought by the Complainant.
2. The second version of the FBC was provided by the Member on 23 December 2008 in their response to the issues raised in the complaint. It too does not contain a description of the loan features sought by the Complainant.
3. The third version of the FBC was provided by the Member on 2 February 2009 in their response to our request for additional information. There is a loan

schedule to the FBC which sets out the loan features sought by the Complainant.

The Member has not provided us with an explanation as to why there were two versions of the FBC in their possession.

All three versions appear to be signed by the Complainant, although she denies signing the versions of the FBC submitted to us by the Member. All three versions set out her credit card details and an authority to debit the broker fee.

It is not clear which of the three versions of the FBC is to be preferred. However, none of the versions entitle the Member to demand or retain a fee from the Complainant. In relation to the first and second versions of the FBC, they do not set out the matters prescribed in the Act. In relation to the third version of the FBC, the Complainant cannot be taken to have accepted the BankWest offer.

We issued a Case Assessment recommending that the Member refund the entire broker fee to the Complainant. The recommendation was based on our finding that, under the Consumer Credit (Victoria) Act 1995 ('the Act'), the Member was not entitled to demand or receive the broker fee because the FBC did not comply with the Act.

Members Position

On 7 May 2010, the Member offered to refund the broker fee in three instalments: the first instalment of \$464 on 7 May 2010, the second instalment of \$500 on 10 June 2010 and the final instalment of \$500 on 10 July 2010. The Complainant accepted the offer.

The Member made the first payment on 11 May 2010 and the second on 29 June 2010. To date, the Member has not made the third and final payment of \$500 to the Complainant.

Key Issues

The relevant questions in the present case are:

- (a) whether the broker fee was a legally permissible fee within the meaning of the Rule 34(d) of the Rules of the Credit Ombudsman Service (COSL Rules Fourth Edition); and
- (b) whether the demand or receipt of the broker fee by the Member was in breach of the law.

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 Fourth Edition of the COSL Rules, 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.

I am satisfied that the complaint concerns the charging of a fee, charge or commission that is in breach of the law and so consider that the complaint is one that I am permitted to deal with.

Breach of the law

I note that the FBC states that the loan the Member was engaged to arrange for the Complainant was for the specific purpose of refinancing the Complainant's existing loan. Significantly, the existing loan was secured by the Complainant's owner-occupied residence. I therefore consider that the new loan was intended for personal, domestic or household purposes and would have been regulated by the Act.

The Act provides that a finance broker must not demand, receive or accept any fee in respect of negotiating consumer credit unless:

- (a) the finance broker has been appointed by the client in writing to negotiate consumer credit on their behalf;
- (b) the document of appointment sets out the fee to be charged or its method of calculation;
- (c) the document of appointment specifies certain matters, including:
 - the amount of credit;
 - the terms of the credit contract;
 - the maximum annual percentage rate or rates the client is prepared to pay;
 - the duration of the appointment; and
 - an agreed maximum amount of credit application and valuation fees that the client may be required to pay;
- (d) the client has signed the document of appointment before the finance broker commences negotiating consumer credit on their behalf;
- (e) the client is given a copy of the signed document of appointment before the finance broker commences negotiating consumer credit on their behalf; and
- (f) the client accepts:

- the consumer credit that is specified in the document of appointment; or
- the consumer credit negotiated by the finance broker that is reasonably comparable to the consumer credit specified in the document of appointment.

If the finance broker charges, receives or accepts from a client an amount to which they are not entitled, the client may recover that amount from the finance broker.

The Act also provides that the finance broker may charge a fee in respect of the reasonable costs incurred, and a reasonable fee for the services provided, by the finance broker in negotiating consumer credit on behalf of the client if, among other things, the finance broker successfully negotiates the consumer credit specified in the document of appointment, but the client declines to accept that consumer credit.

Ombudsman's Determination

I find that the Complainant is entitled to a refund of the total broker fee of \$1,464. The Member must refund the Complainant the remaining amount of \$500, having already paid the Complainant \$964.

Finding and reasons for decision

I find that the Complainant is entitled to a refund of the broker fee (being \$1,464), as the first and second versions of the FBC do not set out the matters prescribed in the Act and, in relation to the third version of the FBC, the Complainant did not accept the BankWest loan offer or, alternatively, did not accept a loan arranged by the Member that is reasonably comparable to the loan described in the FBC.

As the Member has already made payments amounting to \$946 to the Complainant, the Member is ordered to refund the remaining \$500.

I do not consider that the Member is entitled to recover any reasonable costs incurred or a reasonable fee for the services it provided the Complainant, because the Member did not arrange a loan for her that accorded with the loan features described in the third version of the FBC.

Set out below is a comparison of the features of the loan described in the third version of the FBC and those described in the BankWest loan offer:

Loan Split 1	FBC features	BankWest Loan Offer
Loan Amount	\$120,000	\$121,000
Interest rate	Variable, 8.29% per annum	Variable, 9.55% per annum
Term	30 years	30 years
Repayment amount	\$417.47 per fortnight	\$471.62 per fortnight

Loan Split 2	FBC features	BankWest Loan Offer
Loan Amount	\$60,000	\$62,000
Interest rate	1 year fixed, 8.49% per annum	3 year fixed, 9.29% per annum
Term	30 years	30 years
Repayment amount	\$212.65 per fortnight	\$236.24 per fortnight

As can be seen, the BankWest loan interest rates were noticeably higher than those described in the third version of the FBC, and the fixed rate term for the second 'split' was three times that contemplated by the FBC.

Raj Venga
Credit Ombudsman