

## **DETERMINATION**

**Complainants:**        **Mr and Mrs H**

**Member:**                **Lender A**

**Date:**                    **29 December 2006**

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I have reached the following Determination in the case of Mr and Mrs H ("Complainants") and Lender A:

### **DETERMINATION**

The Complainants' claim for loss has not been made out.

### **Ombudsman's approach**

The role of the Ombudsman is to investigate and resolve complaints in accordance with the Rules of the Credit Ombudsman Service ("COS"). 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 it 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.

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.

### **Chronology**

1. The Complainants engaged Broker to assist them in obtaining a loan to consolidate various loans into a single loan. Mr H was an architect of more than 25 years with extensive business experience.
2. Broker arranged for a loan in the sum of \$210,000 to be provided by Lender A. This loan ("Lender A's loan") was settled on 1 August 2002.
3. On 20 August 2002, the Complainants requested Lender A to amend their monthly repayments of \$1,586.88 to fortnightly repayments of \$800. However, as a result of an administrative error by Lender A, monthly repayments continued to be debited, but only for \$800.
4. The Complainants noted in mid-January 2003 from the loan account statement that amounts of \$800 were being credited to their loan account on a regular basis, but failed to appreciate that these were being credited on a monthly, not fortnightly, basis.

5. In February 2003, Mrs H was diagnosed with a re-occurrence of non-Hodgkin's lymphoma, and commenced treatment immediately. Mr H ceased full-time employment and received the proceeds of his income protection insurance policy in early 2003.
6. In April 2003, Lender A discovered that it had not correctly amended the frequency and amount of the repayments in the manner requested by the Complainants. It promptly notified the Complainants of the error and advised them that their loan was by then some 8 months in arrears, totaling \$7,095.04.
7. Lender A did not charge default interest or fees in relation to the eight-month period during which the loan was in arrears due to Lender A's error.
8. The Complainants requested Lender A to "refinance" the loan, including arrears. This would have required the funder of the loan to, in effect, cancel the arrears and increase the original amount of the loan by the amount of the arrears. The funder declined to do so.
9. Lender A proposed a payment arrangement to put the loan in order and this was agreed to by the Complainants. However, the Complainants did not adhere to the payment arrangement and it was only then that Lender A charged default fees.
10. Mrs H received the proceeds of an insurance pay-out.
11. By 22 August 2003, the Complainants made a series of payments that brought the loan account into order.
12. The Complainants eventually refinanced the Lender A's loan on 16 September 2003 with a loan from Lender B at a higher interest rate, and then on 8 October 2004, refinanced Lender B's loan with a loan from Lender C.

### **Complainants' case**

- (a) The Complainants say that they received the Lender A's loan account statement in mid-January 2003 and although, at a quick glance, noted that repayments of \$800 had been made regularly during the loan statement period, they had not appreciated that the repayments had been made on a monthly, not fortnightly, basis. The Complainants attribute this to the fact that Mrs H was suffering very serious health problems at the time and the Complainants may not have been as diligent as they might otherwise have been.
- (b) The Complainants assert that it was eight months before they were notified by Lender A that the loan was in arrears by a substantial sum of \$7,095.04.
- (c) The Complainants say that they requested Lender A to "refinance" their loan (and arrears), but that Lender A declined to do so.

- (d) The Complainants say that because of their reduced income due to Mr H ceasing full-time employment, they had difficulty in adhering to the payment arrangement put forward by Lender A and agreed to by them.
- (e) The Complainants assert that because they were not able to refinance their loan (and arrears) with Lender A, they approached another lender with the assistance of Broker. The Complainants say that because their loan with Lender A was in arrears, their choice of alternative lenders was limited, and they eventually refinanced Lender A's loan with a loan from Lender B at a higher interest rate of 9.75% p.a. (the interest rate applicable to the Lender A's loan was 7.75%.)
- (f) The Complainants say that once they had established a good credit record with Lender B, they refinanced Lender B's loan with a loan from Lender C, at a lower interest rate of 7.15%.
- (g) The Complainants contend that they had to refinance Lender A's loan with a more expensive loan from Lender B because:
  - (i) Lender A's loan was in arrears as a result of Lender A's failure to correctly amend the frequency and amount of the repayments; and
  - (ii) Lender A declined to "refinance" their loan (and arrears) as they had requested.
- (h) The Complainants are seeking compensation from Lender A in an amount of \$17,500, comprising half of the amounts referred to in items (i) – (xiv) below, interest of \$1,700 and a payment for trauma and stress of \$2,500.

(i)	Lender A's default fees on defaulting on agreed payment plan:	\$400
(ii)	Lender A's early repayment fee:	\$2,100
(iii)	Lender A's discharge settlement fee:	\$153.75
(iv)	Lender B's establishment fees:	\$4,857
(v)	Lender B's valuation fee:	\$275
(vi)	Broker's brokerage fee for Lender B loan:	\$6,000
(vii)	Interest differential between Lender A's loan and Lender B's loan:	\$5,880
(viii)	Lender B's legal fees for discharge of its loan:	\$137.50
(ix)	Lender B's discharge fees:	\$250
(x)	Lender B's payout statement:	\$10
(xi)	Lender B's deferred establishment fee:	\$1,975
(xii)	Lender C's establishment fee:	\$242
(xiii)	Brokers's brokerage fee for Lender C's loan:	\$2,310

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\$26,474.72

**Lender A's case**

- (a) Lender A concedes that it made an administrative error in failing to correctly amend the frequency and amount of the repayments as requested by the Complainants.

- (b) Lender A asserts that, despite its error, the Complainants were still required under Lender A's loan contract to make monthly repayments of \$1,586.88 and, accordingly, had the benefit of an amount (\$1,586.88 less the monthly repayment of \$800) which should have been available to meet the arrears.
- (c) Lender A indicates that, in consultation with the Complainants, it prepared a payment arrangement that would have enabled the Complainants to pay off their arrears within a specified period.
- (d) Lender A states that the funder of Lender A's loan has a policy of not "refinancing arrears" (that is, cancelling the arrears and increasing the original amount of the loan by the amount of the arrears). Consequently, the decision whether or not to refinance the loan (including arrears) was not Lender A's to make.
- (e) Lender A contends that the Complainants had other alternatives available to them which would not have required them to refinance Lender A's loan. Lender A identified the alternatives as follows:
  - (i) the Complainants had indicated that they would sell their residential property and purchase a less expensive one; or
  - (ii) the Complainants had the opportunity to commit to a payment arrangement that would have enabled them to continue to repay their current loan and make good the arrears.
- (f) Lender A asserts that, as there were alternatives to refinancing Lender A's loan, Lender A should not be responsible for the costs incurred by the Complainants in refinancing the loan.
- (g) Lender A also notes that the request for the discharge of the mortgage securing Lender A's loan was received on 4 September 2003. The reason given for requesting the discharge of the mortgage was the proposed sale of the property the subject of the mortgage.

### **Relevant considerations**

In making a Determination in accordance with the COS Rules, I am required to have regard to:

- (a) relevant legal requirements;
- (b) the Code of Practice prescribed by the Mortgage Industry Association of Australia ("MIAA");
- (c) good practice in the credit industry; and
- (d) fairness in all the circumstances.

Under clause 19.2 of the MIAA Code of Practice (Edition 1, promulgated on 24 May 2000), a Member must act with all due skill, care and diligence in their dealings with borrowers. I consider that Lender A's failure to correctly amend the frequency and amount of the repayments in accordance with the Complainants' instructions is not consistent with Lender A's obligation under clause 19.2.

I am also required to have regard to what is considered to be good practice in the credit industry. COS sought the advice of the Credit Industry Advisor on 19 June 2006 as to whether the conduct of Lender A, in failing to correctly amend the repayment frequency and amount, met the standard of good practice in the credit industry. Predictably, the Credit Industry Advisor advised COS that Lender A's conduct failed to meet this standard.

I do not consider that Lender A acted unfairly towards the Complainant for the reasons set out below.

### **Issues and findings**

The issue in the present case is whether Lender A's failure to correctly amend the frequency and amount of the repayments in accordance with the Complainants' instructions and Lender A's inability to "refinance" the loan (and arrears), caused the Complainants to suffer a loss for which they are entitled to be compensated.

In the circumstances, I do not accept that the loss suffered by the Complainants can be attributed to the conduct of Lender A.

### **Reasons for decision**

1. On checking Lender A's loan statement received in mid-January 2003, the Complainants say that they did not notice that repayments of \$800 were being credited on a monthly basis, not fortnightly. This is understandable if Mrs H's illness presented as early as then. However, it is a little surprising that the Complainants also failed to appreciate, this time from their monthly bank account statements from August 2002, that an amount of \$800 was being debited on a monthly, not fortnightly, basis. I also note that the Complainants did not receive any written confirmation from Lender A that the frequency and amount of their repayments had been duly changed in accordance with their instructions.

I consider that it is likely that a reasonable person would have discovered that incorrect repayments were being credited to the loan account. I also consider it likely that that a reasonable person would have noticed an amount of \$800 remaining in their account each month.

2. I accept that despite Lender A's failure to correctly amend the frequency and amount of the repayments, the Complainant was still under a contractual obligation to make monthly repayments of \$1,586.88 and, accordingly, had the benefit of an amount (\$1,586.88 less the monthly repayment of \$800) which should have been available to the Complainants to pay the arrears.
3. I accept that Lender A did not take any action that might have prompted the Complainants to refinance Lender A's loan, such as commencing recovery action, requesting the Complainants to sell a property in order to pay out the loan or lodging a default listing with a credit agency.

4. I consider that the decision to apply for Lender B's loan was a decision made by the Complainants alone. I am not persuaded by the argument that the arrears on Lender A's loan were such that the Complainants had no alternative but to refinance Lender A's loan with a loan from Lender B.

Firstly, in the Customer Complaint Form dated 18 October 2005, the Complainants state: *"In April 2003, we received advice from CS regarding their error demanding we bring the loan up to date and that they would not extend the loan to make up the arrears. Under the circumstances it was extremely difficult to make up (sic) such an unreasonable demand and were only able to do so thru (sic) an insurance payment for Helen."* The Complainants' letter of 25 November 2005 also refers to this insurance pay-out in relation to Mrs H's illness.

This insurance pay-out is in addition to payments made to Mr H under his own income protection policy. Indeed, according to Lender A in its letters of 17 February and 10 August 2006, the Complainants had, by 22 August 2003, made a series of ad hoc payments that brought the loan account into order. Consequently, Lender A's loan was up to date and not in arrears well before the time of its discharge on 16 September 2003.

I therefore consider that the Complainants were under no pressure to refinance Lender A's loan.

Secondly, according to an email from Broker to an employee of Lender A, dated 14 August 2003, the Complainants had "signed a contract to sell one residence for \$315K which will settle in a few weeks clearing (Lender A's) debt." Consequently, there would have been no need to take out Lender B's loan for the specific purpose of refinancing Lender A's loan.

Thirdly, the fees and charges (including the brokerage fee paid to Broker) for establishing Lender B's loan alone was \$11,132. This was far in excess of the actual arrears on Lender A's loan, being \$7,095.04. The whole exercise of paying out Lender A's loan and then taking out Lender B's loan cost the Complainants about \$26,474.72. It is difficult to see how the arrears on Lender A's loan could have been the reason for the Complainants incurring such costs. I accept Lender A's assertion that once the outstanding arrears on Lender A's loan were cleared, the normal interest rate of 7.75% would have applied, and after two years, would have reverted to the then standard variable rate of 6.4%.

I therefore consider that there was likely to have been another reason that prompted the Complainants to incur these costs, and there is some suggestion that the Complainants purchased a house at around the same time as Lender A's loan was discharged. I also note that Lender B's loan of \$297,000 was for a significantly higher amount than Lender A's loan of \$210,000, and that Lender B's loan was secured by a different property to that of Lender A's loan. This suggests, although not conclusively, that Lender B's loan was not for the specific purpose of refinancing Lender A's loan.

5. Under the COS Rules, I can only compensate the Complainants for direct loss. Direct loss is loss or damage suffered as a result of the conduct of a member (Lender A) in relation to the services provided by it. In order to establish a direct loss, the Complainants would need to have suffered a loss that is causally linked to the failure of Lender A to meet the standards imposed under clause 19.2 of the MIAA Code of Practice and good practice in the credit industry.

I accept that Lender A had no control over the decision of the funder of Lender A's loan not to "refinance" the loan (and arrears). Accordingly, Lender A cannot be said to have failed to meet the standards imposed under clause 19.2 of the MIAA Code of Practice or other standards of good practice in the credit industry.

I consider that, while Lender A's failure to correctly amend the frequency and amount of the repayments was not consistent with clause 19.2 of the MIAA Code of Practice or other standards of good practice, there is no causal link between that failure and the loss the Complainants claim they have suffered.

Consequently, the Complainants are not entitled to compensation for the loss.

Dated            December 2006

**Raj Venga**  
**Credit Ombudsman**