

## **DETERMINATION**

**Complainants:**       **Ms B and Mr H**

**Member:**             **Lender**

**Date:**                **8 January 2007**

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

### **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. Ms B is a mortgage broker. In early 2003, when she was a broker with XYZ Loans, she attended a training session for brokers conducted by the Business Development Manager of the Lender, Mr D.
2. Ms B alleges that Mr D made an oral representation during the training session to the effect that a borrower with more than one loan with the Lender would receive an early repayment fee ("ERF") refund on the discharge of a loan, provided the borrower still held at least one loan with the Lender.
3. In June 2003, Ms B and her partner, Mr H ("the Complainants") applied to the Lender for, and were granted, three loans, all secured by different properties.
4. In December 2003, Mr D advised Ms B that the Lender's ERF refund policy had been revised such that the ERF would be refunded if the borrower took out another loan with the Lender within six months of the discharge of the relevant loan.

5. Mr D ceased to be an employee of the Lender in early 2004 and has not since then been contacted by either the Complainants or the Lender in relation to this matter.
6. In April 2004, one of Ms B's client borrowers discharged one of their two loans with the Lender. After representations made by Ms B to the Lender, the ERF was refunded.
7. On 10 September 2004, the Complainants refinanced their first loan. After being told that they did not qualify for an ERF waiver, Ms B made a complaint and received a refund of the ERF.
8. On 25 October 2005, Ms B sought confirmation from the Lender whether the ERF would be waived if she sold her house and discharged her second loan with the Lender. She was advised that the ERF would not be waived and that the ERF on her first loan had been refunded only as a gesture of goodwill.
9. On 21 November 2005, the Complainants refinanced their second loan. After being told that they did not qualify for an ERF waiver, Ms B made a complaint. The Lender refused to refund the ERF.
10. The Complainants have indicated that, but for the oral representation made by Mr D during the training session about the ERF waiver, they would not have applied for the three loans.
11. The Complainants are seeking a refund of the ERF in an amount of \$3,000 which was paid on the discharge of their second loan on 21 November 2005.

### **Complainants' case**

1. Ms B asserts that Mr D's oral representation about the ERF waiver at the training session was intended to generate business for the Lender and that Mr D's encouraged his broker audience to inform their clients about the ERF waiver.
2. Ms B has submitted a statutory declaration from another broker who also attended the training session. The document indicates that the other broker also recalled Mr D's oral representation about the ERF waiver.
3. Ms B states that she checked with Mr D on several occasions that the ERF waiver was available. She also says that she regularly contacted the Lender's broker on-line service which confirmed the availability of the ERF waiver.
4. According to Ms B, the Complainants applied for three loans from the Lender on the basis of the ERF waiver. Ms B also says that she put a number of her clients into loans on the basis of the ERF waiver.

5. Ms B states that she was told by Mr D in December 2003 that the original ERF waiver was no longer available and that a refund would now only be made if the borrower took out another loan with the Lender within six months of the discharge of the loan. Ms B says that, on confronting Mr D, he assured her that she and her client borrowers would still be able to rely on the original ERF waiver if she advised him of their details when they discharged their respective loans during the relevant early repayment period.
6. Ms B contends that when she discharged the first of her three loans on 10 September 2004, the Lender refunded the ERF on the basis of the ERF waiver described by Mr D, and not as a gesture of goodwill, as the Lender submits.
7. Ms B also contends that since her second loan was entered into at the time the First ERF Policy applied, the Lender should refund the ERF paid on that loan on the basis of Mr D's oral representation about the ERF waiver.

### **Lender's case**

1. The Lender acknowledges that in February 2003, it developed a discretionary internal ERF policy ("First ERF Policy") which provided that the Lender could elect to waive the requirement for a borrower to pay an ERF where the borrower repaid their loan from the proceeds of sale of the secured property and the borrower continued to have at least one other loan with the Lender. According to the Lender, the policy made it clear that the Lender would not consider refunding the ERF where the loan was "externally refinanced" ie. refinanced with a loan from another lender. (Ms B contends that this proviso had not been conveyed to her by Mr D or the Lender's broker on-line service.)
2. The Lender contends that the First ERF Policy, being entirely discretionary, was not set out in loan agreements between the Lender and borrowers, including the Complainants. On the contrary, the Lender's standard loan agreements provided that an ERF was payable if a loan was discharged during the early repayment period of three years.
3. The First ERF Policy applied at the time the Complainants applied for the three loans with the Lender in June 2003. The First ERF Policy was replaced in December 2003, but the amending ERF policy ("Second ERF Policy") also made it clear that the Lender would not consider refunding the ERF where the loan was "externally refinanced".
4. The Lender rejects Ms B's claims that Mr D orally represented to her that the Lender would waive an ERF in any circumstances provided the borrower continued to hold at least one other loan with the Lender. The Lender asserts that all its broker relationship managers would have been briefed by the Lender about the content and application of the First ERF Policy.

5. The Lender contends that it refunded the ERF in relation to Ms B's first loan as a gesture of goodwill since (a) Ms B was a valued broker client of the Lender at that time; and (b) the Lender could not itself refinance the loan for her as the increase in the loan amount she sought was not approved by the Lender's lenders' mortgage insurer. This was made known to Ms B.
6. The Lender says that it only refunded the ERF to Ms B's client borrower as a gesture of goodwill since Ms B was considered a valued broker of the Lender. Her clients did not otherwise qualify for the ERF refund under the Second ERF Policy because, having sold their property and not intending to purchase another, they did not take out another loan with the Lender within six months of discharging the first of their two loans, as required by the Second ERF Policy.
7. The Lender states that the loan agreements between Ms B and the Lender make no reference to any waiver of the ERF. In fact, the loan agreements specifically provide that an ERF is payable if a loan is discharged during the early repayment period.
8. The Lender also points out that the loan agreement provides that the Lender may vary the "amount and type of fees and charges and when they are payable (including by imposing new fees and charges or changing the method of calculation of a fee or charge)" without a borrower's consent. A fee or charge includes an ERF.

### **Issue**

The issue in the present case is whether the Complainants are entitled to a refund of the ERF paid by them on the discharge of their second loan on the basis of Mr D's oral representation to Ms B about the ERF waiver.

### **Reason for decision**

I do not accept that the Lender is liable to refund the ERF to the Complainants for the following reason:

On 23 March 2004, the Complainants increased the amount of their second loan and entered a new loan agreement with the Lender for this purpose. The new loan agreement, like the three previous ones entered into between the Lender and the Complainants, again provided that an ERF would be payable if the loan was discharged within the early repayment period. There was again no reference to any ERF waiver.

Whatever oral representation was or was not made by Mr D during the fateful training session, I consider that the new loan agreement for the increased borrowing should have at least prompted Ms B to obtain from the Lender confirmation in writing that the First ERF policy still applied to the loan, as she so contends. This is particularly so since she had been advised by Mr D in December 2003 that the First ERF Policy had been replaced by the Second ERF Policy.

In any event, I consider that the new loan agreement for the increased borrowing is a supervening event that severed any causal link there might have been between the alleged oral representation of Mr D and the loss the Complainants say they have suffered as a result of not being able to rely on the ERF waiver.

Put simply, Ms B cannot rely on an ERF waiver policy (however described) that expired in December 2003 in relation to a loan she entered into in March 2004.

Ms B must therefore be responsible for any detriment she believes she has suffered as a result of discharging her second loan. Her decision to proceed to discharge the second loan has caused her loss and she has not taken steps to mitigate that loss.

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

Although not required to, I make the following observations:

1. There is little to collaborate Ms B's version of events.

Ms B did obtain a statutory declaration declared on 8 August 2006 from another broker. It reads:

*"Meeting at (XYZ Loans) Early 2003 (Approx). Mr D of (Lender) (guest presenter) spoke about the plus' and minus' (sic) of his company's products. I believe he made the following statement in regards to deferred establishment fees: If a client had multiple facilities with the Lender, and they were to discharge one mortgage completely, but had one or more current loans remaining, they would not be charged the deferred establishment fees."*

However, I am cautious about placing too much weight on the contents of the statutory declaration because:

- (a) the fact that Mr D made the oral representation is not in dispute; the declarant does not indicate one way or another whether Mr D failed to also mention that the loan being discharged had to be "internally refinanced" to qualify for the ERF waiver;
  - (b) the declarant purports to recall an oral representation made some three and a half years before;
  - (c) I am not in a position to impose a penalty on the declarant if he has provided a false declaration; and
  - (d) I cannot test the information provided by examining the declarant under oath.
2. It is imprudent for a person with an industry background such as Ms B to rely on an oral representation made in a public forum without seeking written confirmation from the person making the representation or their principal.

I find it difficult to accept that Ms B would not have thought to obtain written confirmation of the oral representation she says she relied on, considering she intended to put some of her clients into loans with the Lender.

3. I note that Ms B has indicated that, at the time of applying for the loans and shortly thereafter, she contacted Mr D on several occasions, and regularly contacted employees of the Lender working at its broker on-line service, to confirm the availability of the ERF waiver. I find it difficult to accept that Ms B would not have been advised on any of these occasions that the ERF waiver would only apply where the loan being discharged was refinanced "internally".
4. It was an express term of each of the loan agreements between Ms B and the Lender that an ERF was payable if she repaid the loan within the early repayment fee period. I accept that the terms of the First and Second ERF policy do not as of right apply automatically to borrowers. Consequently, I consider that a reasonable person with Ms B's industry background would have asked for the loan agreements to be amended or, failing that, required the ERF waiver, as understood by her, to be put in writing before applying for the loans.
5. COS sought the advice of the Credit Industry Advisor on 12 July 2006 as to whether the conduct of the Lender in relation to the Complainant met the standard of good practice in the credit industry. The Credit Industry Advisor indicated that the Lender's conduct in not waiving the ERF in the circumstances meets the standard of good practice in the credit industry.

Dated            January 2007

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