

## **DETERMINATION**

**Complainants:**       **Mr and Mrs S**

**Member:**               **MM**

**Date:**                   **27 August 2007**

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I have reached the following Determination in the case of Mr and Mrs S, the Complainants and MM, the Member:

### **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 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 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 had professional representation throughout the COSL process.
2. Mr K operates a franchise and is a sub-originator for the Member. The Member is an originator and mortgage manager and provides white label loan products to the retail market. The products are funded under a securitisation programme.
3. The Complainants had a home loan of approximately \$97,000 with another lender, a credit card debt of approximately \$10,000 and two car loans totalling approximately \$47,000. The home loan was secured by the Complainants' home at Bass Hill, NSW (the Bass Hill property).
4. In August 2003, the Complainants met with Mr K to discuss the possibility of refinancing their existing home loan and paying out their credit card debt and car loans (amounting to some \$154,000).

5. During the meeting, a number of scenarios were discussed, including selling the Bass Hill property and purchasing a new property; purchasing a new residence outside Sydney but keeping the Bass Hill property as an investment; and purchasing an investment property and keeping the Bass Hill property as their residence.
6. Mr K advised the Complainants that, if they intended to purchase another property, it would be more cost effective for them to take out a larger loan at that stage, rather than apply for another at a later date.
7. Following a second meeting with Mr K, the Complainants submitted a loan application on 1 September 2003 ("the first loan") to refinance their existing loan, pay out the other loans and gain access to extra funds in the event they decided to purchase another property. The loan amount sought was \$440,000.
8. On 4 September 2003, the Complainants instructed their solicitor to prepare a contract of sale for the Bass Hill property. The property was not, however, sold at this time. (In fact, the Bass Hill property was not sold until 4 July 2006, despite persistent efforts by the Complainants to do so.)
9. The Member approved the first loan application, but (and with the acquiescence of the Complainants), for a reduced loan amount of \$384,000 so as to avoid the Complainants having to pay for lenders' mortgage insurance.
10. On 14 October 2003, the first loan was settled, with some of the proceeds used to refinance the Complainants' existing home loan and pay out the other debts. There remained an undrawn balance of about \$200,000.
11. On 30 October 2003, the Complainants applied to the Member for another loan (the second loan). Mr K completed the loan application based on the loan application for the first loan.
12. The second loan application was for an amount of \$560,000 and described the purpose of the loan as being for the purchase of an investment property worth about \$700,000.
13. The second loan application noted the Complainants' outstanding borrowings as \$150,000, when it should in fact have noted it as \$384,000. The assets and liabilities section of the application noted that the Complainants had 'savings' of \$200,000 and that the anticipated rental income was \$23,400 per annum.
14. The Complainants did not have savings of \$200,000. Rather, the \$200,000 referred to as 'savings' represented the undrawn balance of the first loan. This was however described as the 'available redraw' in communications from the parties to the Credit Ombudsman Service.
15. Around 1 December 2003, the Complainants entered into a contract to purchase a property at Brunkerville, NSW ('the Brunkerville property') for \$715,000.

16. Around 3 December 2003, the Member approved the second loan application for \$560,000.
17. Settlement of the Brunkerville property occurred on 23 January 2004 and the Complainants thereafter used it as their principal place of residence.

**Complainants' case**

The Complainants say that:

- (a) Mr K was advised that they intended to sell the Bass Hill property in the near future and were looking to relocate their family to a property on the outskirts of Sydney. They estimated that they could sell the Bass Hill property for \$550,000. Some of the sale proceeds would be used to pay out the first loan and the remainder would be used towards the purchase a new property for approximately \$700,000.
- (b) During the first two meetings between Mr K and the Complainants, Mr K discouraged the Complainants from selling the Bass Hill property and recommended that they instead build a portfolio of properties, using the equity in the Bass Hill property to fund the initial purchase of an investment property.
- (c) Based on the recommendations made by Mr K and his statement that he had a "background with the Australian Stock Exchange", the Complainants believed that he was a qualified financial planner.
- (d) The Complainants say that Mr K claimed he had "done the calculations" and suggested to them that they could borrow up to a million dollars and buy more properties for investment. The Complainants advised him that they had no interest in buying investment properties.
- (e) According to the Complainants, the second loan application was blank when they signed it. Mr K insisted that the Complainants needed only to sign the application - he would complete it using the information in the first loan application.
- (f) The Complainants contend that some of the information contained in the second loan application was false, including the reference to 'savings' of \$200,000; a share portfolio of \$15,000; furniture worth \$60,000; and a statement that the loan was for investment purposes.
- (g) It is asserted that Mr K knew that the second loan was for residential purposes, but it was noted as an investment loan in the loan application. The Complainants say that this permitted Mr K to represent to the lender that they would be in receipt of rental income and this, in turn, would provide the lender with some assurance that the Complainants would be able to service their loans.

- (h) The Complainants signed a business purpose declaration, but say that they did not read nor query the details of the documents presented to them. The Complainants were asked to immediately sign the documents and were not therefore afforded the opportunity to review them.
- (i) The Complainants assert that the second loan application for \$560,000 was assessed by the Member based on incorrect information provided by Mr K. Had the loan been assessed on correct information, the Member would not have approved the second loan.
- (j) The Complainants' income was insufficient to service both the first and second loans. Mr K failed to make proper and honest enquiries as to the Complainants' capacity to repay the loan.
- (k) According to the Complainants, Mr K engaged in acts that were misleading, dishonest, deceptive and fraudulent, and put his own financial interests ahead of theirs by recommending inappropriate finance to them. His "sole agenda" was to maximize the loans so as to increase his own financial gain from the transaction. This was unconscionable behavior.
- (l) The Complainants state that they had difficulty in meeting their financial commitments under the loans and the second loan fell into arrears in 2006.
- (m) The Complainants borrowed \$20,000 from family members and withdrew \$55,000 from their superannuation to maintain their loan repayments. [The amount withdrawn represented unrestricted and non-preserved components of their superannuation. It was withdrawn by the Complainants on their own accord without the Member's knowledge or encouragement.]
- (n) The Complainants also assert that Mr K did not disclose any commissions he may have received from the Member.
- (o) The Complainants believe that they have suffered a loss as a result of Mr K's conduct and are seeking compensation from the Member in the sum of \$95,001.31, comprising:
  - (i) \$22,050, being funds borrowed from family members, plus interest;
  - (ii) \$53,875.46, being funds released from their superannuation;
  - (iii) \$5,803.30, being tax and lost earnings on the funds released from their superannuation;
  - (iv) \$1,500, being early loan repayment penalties (estimate); and
  - (v) \$2,000, being legal/conveyancing fees (estimate).

#### **Member's case**

The Member says:

- (a) The Complainants approached Mr K with the primary objective of refinancing their existing loan and consolidating their debts.

- (b) At their first meeting with Mr K, the Complainants discussed several options that they were considering, including keeping the Bass Hill property and purchasing a second property. The sale of the Bass Hill property was presented as one possible option only.
- (c) Mr K denies that he was made aware of the Complainants' intention to use the second property as their primary residence.
- (d) At no time did Mr K recommend to the Complainants that they build an investment portfolio by purchasing a new property while retaining the Bass Hill property, but Mr K acknowledges that this was discussed with the Complainants as one of the options.
- (e) Mr K acknowledges that he advised the Complainants that, if they intended to purchase another property, it would have been more cost effective for them to take out a larger loan than was necessary at that stage to refinance their existing loans and consolidate their existing debts, rather than apply for another loan at a later date. If the Complainants did not wish to drawdown the entire loan, they could access the undrawn balance at a later date and interest would not be charged until then.
- (f) Mr K denies that the second loan application form was blank when the Complainants signed the form. He had completed the form based on the information that was provided to him. The Complainants were given the opportunity to review and correct any errors or omissions in the application.
- (g) The second loan application form was in relation to a property that was not identified at that time – it referred to the property as "TBA" and Mr K understood that the Complainants intended it to be for investment purposes. This is evidenced by the purpose of the loan being described in the second loan application as "Purchase of Investment property".
- (h) Mr K acknowledges that his completion of the assets and liabilities schedule of the second loan application was inconsistent with the manner in which the application should have been submitted to the lender for assessment. He makes particular reference to his describing the \$200,000 as 'savings' when it was in fact the undrawn balance of the first loan. A corresponding liability should also have been noted by listing the first loan as \$384,000 rather than \$150,000. Nonetheless, he denies that he intended to falsify the application or mislead the lender. It was, he says, an error on his part to have presented it in that manner.
- (i) The Member's Credit Officer confirmed that he realised that the reference to \$200,000 in savings was incorrect and that it was in fact a reference to the undrawn portion of the first loan. The Credit Officer amended the application to reflect that the total outstandings would be \$944,000, being \$384,000 on the first loan and \$560 on the second loan. The Credit Officer applied the lender's loan criteria to assess the serviceability of the loan by the Complainants and concluded that the loan application met the lender's requirements. This was confirmed by the lender.

- (j) The lender's assessment calculator indicates that the second loan would have been approved had Mr K correctly completed the assets and liabilities schedule of the application.
- (k) The Complainants have refused to provide further information (including a statement of their assets and liabilities at the time of the second loan application) requested by the Member to substantiate their claims or calculations of alleged loss.
- (l) The Member contends that there is no indication that the application for the second loan was falsified and that it is not in possession of any information that contradicts the information in the application for the second loan.
- (m) Mr K at no time made recommendations as a financial planner. Mr K, an exclusive agent of the Member, is not and does not purport to be authorised to provide financial planning advice of the kind the Complainants say he provided them.
- (n) Mr K advised the Member that all information in the application for the second loan was obtained directly from the Complainants, with the exception of the \$200,000 which was noted as 'savings' in the assets and liabilities section of the loan application. Mr K acknowledges that this was an error, but did this because there was not a specific place in the application to note the undrawn balance.
- (o) The Complainants were obtaining advice from a relative who was a well-known and experienced property developer. In fact, Mr K's first meeting with the Complainants was in the presence of this relative.
- (p) The Member asserts that the loan application satisfied the servicing requirements set by the lender and the mortgage insurer.
- (q) The amount of the repayments and the method of calculation of repayments were provided to the Complainants. They would have had a reasonable opportunity to review these and the loan agreement and assess their ability to afford the loan before signing the agreement.
- (r) The Member contends that it was under no obligation to provide information about the remuneration it may have paid to its originating branch or identify commissions received or paid by the Member given the loan to the Complainants was a white label product.
- (s) Mr K did not recommend to the Complainants that they start building an investment portfolio.

**Issue**

The issue in the present case is whether Mr K's or the Member's conduct was such as to have caused the Complainants to suffer a loss for which they are entitled to be compensated.

## **Relevant considerations**

In making a Determination in accordance with Rule 63 of the Credit Ombudsman Service Limited, I am required to have regard to:

- (a) applicable law;
- (b) the Code of Practice prescribed by the Mortgage and Finance Association of Australia ("MFAA");
- (c) good practice in the credit industry; and
- (d) fairness in all the circumstances.

## **Reason for decision**

The reasons for my decision are set out below:<sup>1</sup>

### *Nature of relationship*

I consider that neither Mr K nor the Member was acting as a finance broker on behalf of the Complainants. Mr K is a franchisee of the Member and conducts an 'originating branch' for the Member which offers only the Member's branded products. Mr K is an agent for the Member.

Not being an agent for the Complainants or acting on their behalf, I do not consider that Mr K owed the Complainants a fiduciary duty in relation to both the first and second loans.

### *Affordability*

The Complainants say they signed a blank application form for the second loan. This allowed Mr K to represent to the lender that the purpose of the second loan was for investment and that rental income would be available. The Complainants contend that this was to ensure that the lender would approve the loan. The loan so approved, according to the Complainants, was beyond their capacity to service given the repayments payable on their first loan.

It is difficult to understand why, if true, the Complainants would sign a blank application form given they are educated, had taken out loans before, and appear to be quite capable of protecting their own interests.

Indeed, the general policy of the law is that people should honour their contracts.<sup>2</sup> In the absence of fraud or any other vitiating factor, it is wholly immaterial that a person has signed a contract without having read the document or knowing its contents or understanding all its terms.<sup>3</sup> Such a person is "nevertheless committed to those terms by the act of signature or execution. It is that commitment which

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<sup>1</sup> Under COS Rule 65, any Determination Settlement is required to be in writing and include a statement of reasons.

<sup>2</sup> Gleeson CJ in *Baltic Shipping Co v Dillon* (1991) 22 NSWLR 1 (at 9).

<sup>3</sup> *Parker v South Railway Company* (1877) 2CPD 416 at 421, per Mellish LJ; *L'Estrange v F Graucob Limited* (1934) 2KB 394 at 403 per Scrutton LJ; *No Fuss Finance Pty Ltd v Miller* [2006] NSWSC 630 (27 June 2006). The principle is not limited to contractual documents – *Wilton v Farnworth* (1948) HCA 20; (1948) 76 CLR 646 at 649.

enables third parties to assume the legal efficacy of the instrument. To undermine that assumption would cause serious mischief."<sup>4</sup>

I note that the repayments on the second loan were clearly set out in the loan agreement. The Complainants would therefore have been in a position to determine if they could afford the repayments.

It appears that, given the Complainants had entered into a contract to purchase the Brunkerville property (and this occurred even before the second loan was approved by the lender), they found themselves in a difficult position of having to settle on the Brunkerville property without having first sold the Bass Hill property. In other words, the Complainants placed themselves in a position where they needed the second loan to settle on the Brunkerville property. It seems to me that they cannot now say that they suffered loss as a result of the second loan having been provided to them.

Unfortunately for the Complainants, the sale of the Bass Hill property was a long drawn out affair and it was not until 4 July 2006 (some 27 months later) that the property was finally sold at a significant discount to their original asking price. Their predicament was compounded by their refusal to rent out the Bass Hill property during this time for various reasons.

#### *Business purpose declaration*

The Complainants signed a business purpose declaration on 30 October 2003 indicating that the second loan was to be applied wholly or predominantly for investment or business purposes (or both purposes). A loan is presumed conclusively not to be provided wholly or predominantly for personal, domestic or household purposes if a borrower provides such a declaration.<sup>5</sup>

Although the Complainants contend that the second loan was always intended for personal, domestic or household purposes, they have not sufficiently explained why they willingly signed the business purpose declaration, apart from alleging that they did not have ample time to review the documents.

While there is evidence that, after the first meeting with Mr K, the Complainants instructed their solicitor to prepare a contract for sale of the Bass Hill property, there is nothing to indicate that this was conveyed to Mr K. [There is an email from the Complainants referring to the second property as their "new home", but I do not consider this significant given that the content of the email was about fees and not the purpose of the loan.]

I therefore do not accept the Complainants' assertion that Mr K "mischievously put the loan through as an investment loan so that the lending proposal would satisfy the lender's approval criteria" or that he used "imaginative figures of rental income and assets that don't exist".

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<sup>4</sup> Toll (FGCT) Pty Ltd v Alphapharma Pty Ltd 92004) HCA 52; 219 CLR 165; 79 ALJR 129; 211 ALR 342 (11 November 2004), at 47.

<sup>5</sup> Section 11(2) Consumer Credit (NSW) Code.

The Credit Industry Advisor (see below) has suggested that had Mr K been aware that the Complainants intended to sell the Bass Hill property and move into a new property, Mr K could have arranged for "a bridging loan and relieved the Complainants of the repayment burden until their house was sold".

I consider that, on the balance, neither Mr K nor the Member knew or had reason to believe that the loan was for a purpose other than investment. Accordingly, I am satisfied that the business purpose declaration is effective.<sup>6</sup>

Consequently, I consider that the Consumer Credit (New South Wales) Code does not apply to the second loan.

### *Commissions*

I am also satisfied that the Consumer Credit Administration Act 1995 (NSW) does not apply to the second loan. This Act only applies in relation to credit contracts that are regulated by the Consumer Credit (NSW) Code. As noted above, I consider that the business purpose declaration given by the Complainants was effective and this had the effect of excluding the application of the Consumer Credit (NSW) Code.

Furthermore, neither Mr K nor the Member acted as agent on behalf of the Complainants, and neither of them was therefore a person engaged in finance broking within the meaning of the Consumer Credit Administration Act 1995 (NSW).<sup>7</sup> There was also, as I understand it, no commission paid or payable by the Complainants.<sup>8</sup>

I consider that the Member was not required, under clause 33 of the MFAA Code, to disclose any fee or commission that might have been paid by or to the Member in connection with the loans. The Statement of Interpretation adopted by MFAA Board on 27 May 2003 states that: "Where the member is a mortgage manager or aggregator who distributes loans through sub-originators, and the mortgage manager or aggregator does not deal directly with the relevant customer, that member will not need to make a disclosure under clause 33".

I note that the loan contract between the Complainants and the lender, discloses that a commission in the form of a management fee was payable by the lender to the Member for the introduction of the credit business.

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<sup>6</sup> Under section 11(3) Consumer Credit (NSW) Code, a declaration is ineffective if the credit provider or a person associated with the credit provider or a finance broker (or a person acting for a finance broker) knew, or had reason to believe, at the time the declaration was made that the credit was in fact to be applied wholly or predominantly for personal, domestic or household purposes.

<sup>7</sup> Under section 3, "finance broker" means a person who engages in finance broking.

<sup>8</sup> Under section 3, a "commission" includes any fee, charge, reward or other remuneration that is (a) *paid or payable by the client* of a finance broker for the finance broking on behalf of the client, and (b) retained by the finance broker. Under section 4C(4), a finance broker must not demand, receive or accept any commission in respect of finance broking engaged in on behalf of a client if the finance broker has failed to enter into a finance broking contract.

This does not appear to assist Mr K in discharging the obligation under clause 33 of the MFAA Code. The Statement of Interpretation adopted by MFAA Board states that where the Member is a mortgage manager who distributes loans through sub-originators, then the relevant disclosure will be made by the sub-originator who deals with the customer.

It is, however, arguable that clause 33 was not intended to cover a person who only deals with white label products. In such cases, the rationale for disclosing commissions is not as compelling, since (a) the person only sells one product and does not purport to seek out the most appropriate product from a panel of lenders; and (b) there is no prospect of receiving, or being influenced by, different levels of commission from different lenders or for different products.

I also consider that any failure by Mr K to disclose a commission, whether or not required under the MFAA Code, did not cause a direct loss to the Complainants for which they are entitled to be compensated.<sup>9</sup>

#### *Duties under the MFAA Code of Practice*

On the basis that Mr K was not acting as an agent for the Complainants, neither Mr K nor the Member was a 'residential loan Member' within the meaning of clauses 21A and 24 of the MFAA Code. A 'residential loan Member' is a Member *who acts for a party* to a transaction which involves or may involve the provision of credit secured by way of mortgage over residential real estate'.<sup>10</sup>

#### *Mr K's alleged recommendations*

The Complainants have provided conflicting statements as to whether they accepted and relied on the recommendations allegedly made by Mr K.

In their letter of 11 July 2005, the Complainants state that they trusted the recommendations made by Mr K and therefore signed the first loan application of 1 September 2003. In their letter of 22 December 2005 they again indicated that they were "guided solely by the recommendation and advice provided by [Mr K] in [his] capacity as [the Complainants'] mortgage broker".

However, in their letter of 11 July 2005, the Complainants contradict their earlier statement which appears in the same letter and say that they never agreed to the recommendation by Mr K not to sell their Bass Hill property and instead invest in a property outside Sydney.

Furthermore, in their letters of 22 December 2005, 2 March 2006 and 30 June 2006, the Complainants indicate that they rejected the recommendation made by Mr K to purchase an investment property and always maintained that their objective was to sell the Bass Hill property and purchase a new primary residence outside of Sydney.

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<sup>9</sup> COSL Rules 14 and 57.

<sup>10</sup> Clause 21A requires such a Member to only suggest or recommend to a loan applicant arrangements for mortgage finance that the Member genuinely and reasonably believes is appropriate to the needs of the applicant. Clause 24 requires a residential loan Member to make such enquiries as are necessary to determine an applicant's capacity to repay the proposed loan.

I consider that the Complainants did not rely on the recommendations allegedly made by Mr K and that the latter is not responsible for any loss that the Complainants claim they incurred as a result of the recommendations.

#### *Financial planning advice*

The investment advice allegedly provided by Mr K is not of a kind that would come within the definition of 'Member Services' for the purpose of COSL's Rules. 'Member Services' include financial products and financial services *directly incidental to the credit negotiated, arranged, provided or managed by the Member*.<sup>11</sup> COSL's Practice Note 03.12.03 specifies what financial products and financial services will be deemed to be directly incidental to a loan or credit facility negotiated, arranged, provided or managed by a Member.<sup>12</sup> None of those are of the nature of the investment advice allegedly provided by Mr K.

If Mr K had in fact provided financial planning advice without holding an Australian Financial Services licence, this is a matter that the Complainants may wish to pursue with the Australian Securities and Investments Commission.

#### *Standards of good practice in the credit industry*

COSL sought the advice of the Credit Industry Advisor on 11 September 2006. The Credit Industry Advisor is a person appointed in a particular case from a panel of experienced and qualified credit industry operatives. The function of the Credit Industry Advisor is to provide COSL with advice on what is regarded as good practice in the credit industry having regard to the particular circumstances of a particular complaint.<sup>13</sup>

The question put to the Credit Industry Advisor was whether it was common practice for the undrawn balance to be noted in the savings section of a loan application form where the form did not provide for a specific space to note the undrawn balance.

The Credit Industry Advisor indicated that the Mr K's noting of the undrawn balance as 'savings' in the assets and liability section of the loan application met the generally accepted standards of good practice in the credit industry. It was common practice in the industry.

The Advisor also suggested that as the Member and lender had been involved in the first loan, they would have been well aware of the actual loan balance of the first loan when the second loan application was submitted by Mr K.

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<sup>11</sup> 'Member Service' is defined in Rule 92 of the COSL Rules (2<sup>nd</sup> Edition) as the services provided by a mortgage broker, finance broker, aggregator, or other person who (whether as principal, employee, agent or independent contractor), as an intermediary, negotiates or arranges credit for or on behalf of a consumer, or by a credit provider or mortgage manager, and includes financial products and financial services *directly incidental to the credit negotiated, arranged, provided or managed by the Member*.

<sup>12</sup> Under COSL Practice Note 03.12.03, the following financial products and services will for the purposes of the COSL Rules be regarded as directly incidental to the loan or credit facility negotiated, arranged, provided or managed by the Member: redraw facilities; "mortgage minimizer" products; stand-alone deposit accounts; credit card products; lenders' mortgage insurance products; deposit bonds; house and contents insurance; and consumer credit insurances; credit management advice (not being "financial product advice" as defined in the Corporations Act 2001).

<sup>13</sup> COSL Policy Guideline 6

While I am not bound by the advice of the Credit Industry Advisor, I am persuaded that Mr K's manner of describing the undrawn balance of the first loan as savings was not a breach of good practice in the credit industry.

#### *Unjust contract*

Given that the second loan is not regulated by the Consumer Credit (NSW) Code, I am not able to consider whether the loan was unjust within the meaning of that Code<sup>14</sup>.

Although the Consumer Credit (NSW) Code does not apply in the Complainants' circumstances, cases potentially involving improvident lending may be examined according to concepts of misleading and deceptive conduct<sup>15</sup>, as well as unconscionability under statute<sup>16</sup> or the general law.

#### *Misleading and deceptive conduct*

The law prohibits a person from engaging in conduct that is misleading or deceptive or is likely to mislead or deceive<sup>17</sup>. From the information available to me, however, there is nothing to suggest that either Mr K or the Member engaged in misleading and deceptive conduct.

#### *Unconscionability under statute*

The law also prohibits a person, in trade or commerce, from engaging in conduct that is, in all the circumstances, unconscionable.<sup>18</sup>

In determining whether a person has engaged in such conduct, a Court may have regard to a number of factors, including: the relative strengths of the bargaining positions of the parties; whether the consumer was able to understand the loan and related documents; and whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer.

I note that the Complainants were reasonably educated (the wife being a teacher) and had every opportunity to seek legal or financial advice if they wished to. There is nothing to suggest that they entered the transaction other than willingly and without undue influence.

I accept that the Complainants understood the nature and effect of the second loan, and in particular, that they knew they were legally responsible for the repayments.

Consequently, I am unable to accept that Mr K or the Member engaged in unconscionable conduct under the relevant provisions of the Fair Trading Act (NSW)<sup>19</sup> 1987 or the ASIC Act (2001).<sup>20</sup>

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<sup>14</sup> Section 70(2)(l) of the Consumer Credit (NSW) Code allows the re-opening of an unjust contract

<sup>15</sup> Section 42 Fair Trading Act (NSW) 1987; section 12DA(1) ASIC Act 2001

<sup>16</sup> Section 43 Fair Trading Act (NSW) 1987; section 12CB ASIC Act 2001

<sup>17</sup> See footnote 15 above

<sup>18</sup> See footnote 16 above

<sup>19</sup> See footnote 16 above

<sup>20</sup> See footnote 16 above

### *Unconscionability under the general law*

A contract will not be unjust merely because it was not in the Complainants' interests to enter into it, or because the Complainants could not perform when called upon to do so.<sup>21</sup>

Furthermore, there is nothing to suggest that the Complainants were under a special disability or disadvantage known to Mr K or the Member which Mr K took advantage of unconscientiously.<sup>22</sup>

Importantly, the second loan was not in relation to the Complainants' sole asset<sup>23</sup> and there does not appear to have been an indifference on the part of Mr K or the Member as to the Complainants' ability to service the loan.

### *Undue influence*

There appears to be no suggestion that the Complainants' will was overborne by Mr K or the Member, and I am unable to see any evidence of undue influence.<sup>24</sup> Indeed, the Complainants made it very clear that they rejected Mr K's alleged recommendations.

### **Conclusion**

In view of the above, I find that neither Mr K's nor the Member's conduct was such as to have caused the Complainants to suffer a loss for which they are entitled to be compensated.

Dated 27 August 2007

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

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<sup>21</sup> *Esanda Finance Corp Ltd v Tong* (1997) 41 NSWLR 482, 491 (Handley JA); *West v AGC (Advances Ltd)* (1986) 5 NSWLR 610 at 620 per McHugh JA at 621-622

<sup>22</sup> *Commonwealth Bank v Amadio* (1983) 151 CLR 447, approved in *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* [2003] HCA 18

<sup>23</sup> *Elkofairi v Permanent Trustee Co Ltd* [2002] NSWCA 413; *Perpetual Trustees Co Ltd v Khoshaba* (2006) NSWSC 41.

<sup>24</sup> See footnote 22 above