

DETERMINATION

Complainants: Office of the Protective Commissioner ("OPC") on behalf of Ms RM ("the Complainant")

Member: Lender ("Member")

Date: 16 April 2008

I have reached the following Determination in the case of the Complainant and the Member.

DETERMINATION

The Complainant's claim against the Member has not been made out and I declare the complaint closed¹.

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.²

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.

¹ Rule 79 of the Third Edition Rules of the Credit Ombudsman Service

² Clause 2.4 of the Guidelines to the Credit Ombudsman Service Rules

Chronology

1. On 7 July 2005, the Complainant applied to borrow \$65,000 from the Member to purchase a property ("the Narromine property") for \$112,500.
2. The balance of the funds required to purchase the Narromine property was made up of \$44,000 provided by the Complainant's mother (who also obtained a loan from the Member) and \$7,000 from the NSW Government's First Home Owner Grant.
3. The Complainant stated on her loan application that she was in receipt of a Centrelink Single Parenting Payment of \$1,861.60 per month.
4. On 2 September 2005, the Member offered the Complainant a loan in the amount of \$65,000, for a term of 30 years and an initial monthly repayment of \$447.
5. On 11 October 2005, the Complainant exchanged contracts on the Narromine property.
6. On 17 October 2005, the Complainant accepted the Member's loan offer and completed a declaration confirming that she had obtained independent legal advice.
7. The Complainant obtained independent financial advice from Mr JOM, a financial counsellor, on 27 and 31 October 2005. The advice stated that the Complainant would not be able afford to repay the proposed loan and that she would be at a high risk of not meeting the repayments as they fell due.
8. The loan settled on 13 December 2005 and fell into arrears on or about March 2006.
9. The OPC was appointed on 18 July 2006 to manage the financial affairs of the Complainant.
10. At the request of the OPC, the Member voluntarily withheld default action.
11. In its letter of 14 November 2006, the Member noted that four months had elapsed since the appointment of the OPC (and that the loan was by then more than 8 months in arrears), and requested that loan payments recommence immediately.

12. In its response to the Member dated 1 December 2006, the OPC indicated that it was considering relying on section 70(1) of the Consumer Credit (NSW) Code ("the Code") as a defence to any action by the Member to enforce its mortgage.
13. In that response, the OPC also proposed that the matter should be settled by the sale of the Narromine property, followed by the proceeds of the sale being disbursed according to the following priorities:
 - (a) the sale costs to be deducted from the proceeds;
 - (b) the Complainant to recover her contribution of \$72,000;
 - (c) the repayment to the Member of an amount necessary to repay the loan (it is unclear if this was intended to include accrued interests and costs); and
 - (d) and any surplus to be returned to the Complainant.
14. The Member advised the OPC on 1 February 2007 that their proposal was unacceptable and made a counter proposal on 10 April 2007 whereby the Complainant (through the OPC) would be able to sell the property herself. This was on the condition that the Complainant commenced making repayments (not exceeding 30% of her gross income) until such time as the property was sold. On the sale being completed, the Member would credit the loan with one half of all interest charges that had been levied to date and waive further interest charges for a 3 month period.
15. The OPC rejected this proposal on 15 May 2007 and referred the case to COSL on 18 May 2007. (A further offer to resolve the complaint was made by the Member on 7 February 2008, but the OPC rejected some of the terms of the offer on 28 February 2008).
16. COSL closed the complaint on 11 September 2006 on the basis that the OPC had not responded to its communications, but indicated to the OPC that it would consider re-opening the case under special circumstances. The OPC had been unable to respond in any substantive way to COSL as the interim Financial Management Order in relation to the Complainant had lapsed, but an application for continuing the Order had been made to the Guardianship Tribunal and was awaiting a hearing.
17. The Guardianship Tribunal re-appointed the OPC as Financial Manager of the Complainant's estate on 8 October 2007 and the OPC sought to have the case re-opened. COSL re-opened the case on 20 December 2007.
18. By 10 January 2008, the loan was more than \$20,000 in arrears, with no repayments having been made since July 2006. Further, since the property had been vacant for more than 60 days, it was no longer covered by insurance.

What the Complainant says

According to the complaint and subsequent information provided by the OPC:

1. The Complainant is a person with a mental disability and not reasonably able to protect her interests. The OPC initially asserted that she was on a Centrelink Disability Support Pension at the time she entered into the loan and that the Member would have been aware of this (the OPC subsequently retracted the assertion).
2. The Complainant received independent financial advice from a financial counsellor to the effect that she could not repay the loan without substantial hardship. This advice was made known to the Member prior to the settlement of the loan.
3. The Member made no further inquiries of its own to satisfy itself that the Complainant could service the loan and proceeded to provide her with the loan despite the financial advice received by the Complainant.
4. The Complainant's income (at the time she entered into the loan) of \$1,877.68 per month (or less than \$470 per week), was insufficient to service a loan for \$65,000 and provide food and clothing for her and her 3 dependant children.

According to the Australian Bureau of Statistics, the average weekly expenditure for total goods and services in 2003-2004 was between \$438.94 and \$1,127.89. The absolute minimum cost of feeding a family of four would be \$250 per week. Once the loan payment of over \$115 per week was deducted, the Complainant was left with a sum of about \$100 per week to pay for utilities, council rates, etc.

5. As at 20 November 2006, the Complainant's income was reduced to \$1,160 per month, and by 18 May 2007, it was \$948.80 per month.
6. If the Complainant had continued to live in rental accommodation, she would have continued to receive rental assistance and would not have had to pay for council rates, water rates or property maintenance costs.
7. \$44,000 of the funds required to purchase the Narromine property was provided by the Complainant's mother, who also obtained a loan from the Member for this purpose. The loan was secured by the (mother's) family home. Effectively, the whole of the purchase price for the purchase of the property was funded by loans advanced by the Member. Accordingly, the Complainant not only stood to lose the property she was purchasing, but also any future potential inheritance, as well as the current home of her children (who now live with the Complainant's mother).

The Member, on the other hand, was fully secured and it was in their interest to advance the loan against the advice of Mr JOM, the financial counsellor.

8. Although the OPC subsequently acknowledged that it was not in a position to provide evidence as to the Member's knowledge of the Complainant's disability, it maintains that the Member was nonetheless "aware that (she) was a social security recipient who had consulted a financial counsellor who advised her that she could not afford the loanThe advice was known to [the Member] who proceeded to provide her with a loan she could not afford to service."³ Consequently, the Member knew or ought to have known that the Complainant did not have the capacity to repay the loan.
9. The credit contract was unjust in the circumstances under section 70 of the Code, and a Court would likely waive all interest charges payable under the loan, leaving the Member with only the principal amount advanced (\$65,000).
10. Accordingly, the Complainant is seeking the following alternative resolutions:
 - (a) a waiver by the Member of the credit charges incurred by the Complainant and the repayment to the Member of \$65,000; or
 - (b) for the loan transaction to be set aside, but for the Complainant to make restitution to the Member for an amount of \$65,000; or
 - (c) the Member reimburse the Complainant her contribution to the purchase of the property, the First Home Owner Grant and interest paid on the loan, and for the Member to recover the debt from the proceeds from the sale of the property.

What the Member says

According to the Member:

1. It did not know, nor had it reason to believe, that the Complainant was suffering from a disability at the time the loan contract was entered into. The Member was first advised that the Complainant had health concerns on 27 June 2006, more than 6 months after the loan was advanced.
2. The Complainant's Centrelink Income Statement obtained by the Member for the purpose of assessing her loan application showed that she was on a Sole Parent Income (and had been since 12 September 2003), and not a Disability Support Pension (contrary to what the OPC initially asserted).
3. Even though the Complainant listed three dependents on her loan application, her Centrelink Income Statement only listed two dependants. Enquiries by the Member indicated that the Complainant's eldest child was in the

³ OPC's letter to COSL dated 12 March 2008

permanent care of her mother and, accordingly, she only had two dependants when she submitted her loan application.

4. The Member provided the loan to the Complainant under a lending program in partnership with the NSW Department of Housing (DOH). These types of loans are commonly made to Centrelink recipients.
5. When the Member assesses the serviceability of low and medium income applications, it observes the serviceability guidelines issued by the DOH, while also assessing each application on its merits.
6. The serviceability guidelines require new loan repayments not to exceed 30% of an applicant's gross income, and the combined new and existing credit commitments not to exceed 35% of an applicant's gross income.
7. One of the special conditions of the loan approval was that the Complainant obtain independent legal advice before entering into the loan contract. The Complainant did so.
8. The other special condition was for the Complainant to obtain independent financial advice (which, as it turned out, indicated that the Complainant's financial commitments exceeded 55% of her income). The financial advice was, however, inconsistent with the Member's own assessment of the Complainant's financial commitments as a percentage of her income.
9. Upon receipt of a copy of Mr JOM's financial advice to the Complainant, the Member wrote to the Complainant's solicitor requesting them to forward the Complainant's income details and financial commitments that were provided to Mr JOM. The information was never provided to the Member.
10. The Complainant advised the Member in writing that she rejected the financial advice and informed the Member that Mr JOM had arrived at his recommendation by scribbling a few personal details on a piece of paper without having regard to her bank statements or income statements.
11. The Complainant also confirmed in a statement to the Member that she was able to afford the loan repayments without putting herself into financial difficulty and that she "strongly" wished to proceed with the loan.
12. The loan application completed by the Complainant indicated that her income was \$1,861.50 per month. The only ongoing credit commitment declared by the Complainant on the loan application was a credit card with a balance of \$1,800 and monthly payment of \$26. Based on the credit card limit being \$2,500, the Member calculated the monthly repayment to be \$75 (notional maximum credit card payment).
13. The Member obtained bank statements for a period in excess of six months and observed no apparent ongoing credit commitments other than the credit card. The Member also obtained a copy of the Complainant's credit report and credit card statements.
14. The results of the Member's assessment of the Complainant's loan application were as follows:

- (a) actual loan repayments were \$447 per month or 24.01% of the Complainant's income;
 - (b) notional repayments were \$539 per month (notional repayments are calculated using a rate of interest 2% higher than the actual rate of interest) or 28.95% of the Complainant's income; and
 - (c) notional repayments plus notional maximum credit card payments were \$614 per month or 32.98% of the Complainant's income.
15. In view of the above, the Member was satisfied that the Complainant had the capacity to repay the loan without substantial hardship.
16. The Member rejected the OPC's proposed settlement of 1 December 2006 on the basis that the proposal did not require the Complainant to make any repayments pending the sale of the property. Furthermore, the Complainant's contribution did not amount to \$72,000, as asserted by the OPC, but rather \$51,000, being the \$44,000 provided by her mother and \$7,000 in the form of the First Home Owners grant.

Key Issue

The relevant question in the present case is whether, at the time the Complainant entered into the credit contract, the Member knew, or could have ascertained by reasonable inquiry of the Complainant, that she could not pay in accordance with its terms or not without substantial hardship.

Relevant considerations

In making a Determination in accordance with Rule 73 of the Rules 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 circumstances⁴.

Reason for decision

The reasons for my decision are set out below:⁵

⁴ COSL Rule 49

⁵ Under COSL Rule 89, any Determination Settlement is required to be in writing and include a statement of reasons.

Section 70 of the Consumer Credit (NSW) Code

I consider that, because the credit contract is regulated by the Code, the most appropriate framework within which to consider the complaint is section 70 of the Code.

The outcomes sought by the Complainant are only available (pursuant to section 71 of the Code) if, after having regard to the provisions of section 70, there was an unjustness at the time, and in the circumstances in which, the loan was entered into.

In determining whether the credit contract in the present case is unjust, the public interest and all the circumstances of the case are to be taken into account⁶.

In a recent Court of Appeal decision relating to the Contracts Review Act 1980 (NSW), it was held that there was a public interest in treating contracts as unjust where the lender lent money without regard to the ability of the borrower to make repayments; in the knowledge that adequate security was available in the event of default, at least where the security is the sole residence of the borrower; and where the borrower could not demonstrate an ability to reasonably protect their own interests.⁷

However, as noted below, the facts of the present case and the evidence provided by both parties do not suggest that the credit contract entered into by the Complainant was contrary to public interest.

Section 70(2) of the Code sets out a number of factors that may also be taken into account, the more relevant of which for the present purposes are:

- (a) whether the Complainant was reasonably able to protect her own interests because of her age or physical or mental condition⁸;
- (b) whether and, if so, when the Complainant obtained independent legal or other expert advice⁹;
- (c) whether the Member took measures to ensure that the Complainant understood the nature and implications of the transaction and, if so, the adequacy of those measures¹⁰; and
- (d) whether at the time the credit contract was entered into, the Member knew, or could have ascertained by reasonable inquiry of the Complainant at the time, that she could not pay in accordance with its terms or not without substantial hardship¹¹.

⁶ Section 70(1) Consumer Credit Code

⁷ Perpetual Trustee Company Limited v Albert and Rose Khoshaba [2006] NSWCA 41, per Basten JA

⁸ Section 70(2)(f)

⁹ Section 70(2)(h)

¹⁰ Section 70(2)(k)

¹¹ Section 70(2)(l)

It should be noted that none of the above factors are, by themselves, conclusive of unjustness. They merely indicate considerations that a Court may take into account when determining if there was unjustness at the time and in the circumstances in which the loan was entered into.

Complainant's ability to protect her own interest - section 70(2)(f)

I note that the OPC has not provided, or is not in a position to provide:

- evidence that the Complainant was suffering from a disability at the time she entered into the loan; or
- evidence of the Member's knowledge of the Complainant's alleged disability at the time she entered into the loan.

The Member asserts that, at the time the Complainant entered into the loan, it was not aware or made aware that she was suffering from a disability. The loan application completed by the Complainant noted that she was in receipt of a Centrelink Sole Parent Income, not a Disability Support Pension. A copy of the Complainant's Income Statement issued by Centrelink and dated 7 July 2005 confirms this.

Accordingly, the information available to me does not support the OPC's assertion that, at the time the Complainant entered the credit contract:

- (a) she suffered from a disability;
- (b) she was unable to protect her own interests; or
- (c) the Member was aware of her alleged disability.

I do appreciate, however, the OPC's difficulty in piecing together the background to this matter and the circumstances in which the loan was advanced, without the benefit of instructions from [the Complainant]¹².

Independent legal or other advice – section 70(2)(h) and (k)

The Member has provided COSL with a copy of the Certificate of Independent Legal Advice dated 17 October 2005, which the Complainant received before she entered into the credit contract.

A financial counsellor, Mr JOM, provided the Complainant with a report, dated 3 November 2005, indicating that, in his opinion, the Complainant could not afford the loan repayments. More specifically, Mr JOM stated that:

¹² OPC's letter to COSL of 23 January 2008

"On receiving income and expenditure details from [the Complainant] it is my opinion that [she] can not afford the repayments in regards to the specified mortgage. [The Complainant's] financial commitments exceed 55% of her income this means that she would be overcommitted on the loan and at high risk of not meeting payments as they fall due. [The Complainant] would also be at risk of living below the satisfactory living standards."

The information made available to me does not disclose the method adopted by Mr JOM in his assessment; nor does it disclose the income and expenditure details provided by the Complainant to Mr JOM. His conclusion that the Complainant's financial commitments would exceed 55% of her income is at variance with the Member's assessment of the Complainant's financial commitments as a percentage of her income.

The Member asserts that, on receipt of a copy of the financial advice, it asked the Complainant's solicitor on 23 November 2005 to provide it with the Complainant's income details and financial commitments that were provided to Mr JOM. However, the information was not provided to the Member.

The Member has provided COSL with a copy of a statement, dated 25 November 2005, made by the Complainant and her mother indicating that the Complainant rejected Mr JOM's advice:

"[Mr JOM] told us that we could not afford the loan.

We feel that we can comfortably afford to repay the loan and totally disagree with [Mr JOM's] appraisal of our situation.

He did not look at any of our Bank statements or proof of income.

All he did was scribbled on a piece of paper how much he estimated that the home loan would cost we feel that seeing this particular planner was a waste of time...

We hereby state that we are able to afford the loan repayments without putting ourselves into financial difficulty.

We strongly wish to proceed with the home loan and would like the loan settled as soon as possible"

There is no suggestion, and it has not been alleged, that the Member prompted the Complainant to provide the above statement. I accept that the statement was made voluntarily.

I note that the OPC contends that the Member should not have relied on the statement, as the Complainant was 'incapable of managing her financial affairs' at that time, but, 'like most borrowers applying for loans, desperately wanted the loan'.

However, as no evidence has been provided to demonstrate that the Complainant suffered from a mental disability at the time the loan was entered into, I accept that the Member was entitled to rely on the Complainant's statement.

I also note that the Complainant had committed to the purchase of the Narromine property by exchanging contracts on the property 16 days before she received financial advice from Mr JOM.

I accept the Member's evidence that, in agreeing to advance the loan, it also took into account the fact that the Complainant had exchanged contracts and expected to forfeit her deposit if she was unable to settle on the property.

Capacity to repay – section 70(2)(1)

The OPC is of the view that the Complainant's income of \$1,877.68 per month (or less than \$470 per week) was insufficient to service a loan for \$65,000 and provide food and clothing for her and her 3 dependants.

The OPC is not, however, able to provide evidence of the Complainant's actual expenses at the time the loan was entered into (17 October 2005) in order to show that she did not have the capacity to service the loan at that time. (The OPC was only able to advise COSL of the Complainant's recurring monthly expenses as at 20 November 2006, some 12 months after the loan was entered into).

The OPC has also advised that it is not in a position to provide information about the Complainant's assets and liabilities at the time she took out the loan. This is understandable in the circumstances, but does not suggest to me that the Complainant's financial position at the relevant time was other than as represented to COSL by the Member.

The Member advises that when it assesses the serviceability of low and medium income applications, it is their policy to follow the serviceability guidelines issued by the New South Wales Department of Housing, while also assessing each application on its merits. It might be noted that the Member is a Co-operative Housing Society.¹³

The serviceability guidelines require that the new loan repayments not exceed 30% of an applicant's gross income and that the combined new and existing credit commitments not exceed 35% of their gross income.

The Complainant indicated on the loan application that her income was \$1,861.50 per month. The only ongoing credit commitment declared by the Complainant on the loan application was a CBA credit card with a balance of \$1,800 and monthly payment of \$26. The CBA credit card limit was \$2,500 and, based on this limit, the Member calculated the monthly repayment would be \$75 (notional credit card monthly payment).

¹³ The aim of a co-operative housing society is to provide housing finance to low and moderate income home buyers. In 1956, co-operative housing societies were given access to Commonwealth/State Housing Agreement funds to lend to low income families as part of the federal government's housing policy. A housing cooperative will consider providing loans to people with a negative credit history, Centrelink recipients, and 'gifted' deposits.

In a letter dated 11 March 2008, the Member advised that it had obtained the Complainant's bank statements over a period of more than six months and it observed no apparent ongoing credit commitments other than the CBA credit card.

In its letter of 9 July 2007, the Member also advised that it obtained a copy of the Complainant's credit report and credit card statements.

The Member advises that even though the Complainant listed three dependents in her loan application, her Centrelink Income Statement only listed two dependants. Subsequent enquiries by the Member indicated that the Complainant's eldest child was in the permanent care of her mother and, accordingly, she only had two dependants at the time she submitted her loan application.

I am of the view that the Member made reasonable enquires both of the Complainant and independent of the Complainant at the time she entered into the loan, and satisfied itself that she would be able to make the loan repayments without hardship.

Furthermore, the Member's assessment of the Complainant's loan application suggested that:

- (a) actual loan repayments would be \$447 per month or 24.01% of the Complainant's income;
- (b) notional repayments would be \$539 per month (notional repayments are calculated using a rate of interest 2% higher than the actual rate of interest) or 28.95% of the Complainant's income; and
- (c) notional repayments plus notional credit card monthly payments would be \$614 per month, or 32.98% of the Complainant's income.

Consequently, the Member's assessment of the Complainant's loan application was within the serviceability guidelines issued by the New South Wales Department of Housing, and the Member was satisfied that the Complainant had the capacity to repay the loan without substantial hardship.

Lending or serviceability guidelines

The OPC makes the valid point that just because a lender determines under its own lending guidelines or policy that a loan is affordable does not make it so.¹⁴ However, in the present case, the lending guidelines issued by the NSW Department of Housing appear to be conservative.¹⁵

I stress that it is not the role of COSL to determine the adequacy of its Members' lending guidelines. This is a commercial consideration for which COSL is precluded from considering under its Rules¹⁶.

¹⁴ OPC's letter to COSL of 23 January 2008

¹⁵ The Member provided evidence that, under a major bank's lending criteria, the Complainant was potentially eligible for a maximum loan in excess of \$78,000 (as opposed to the \$65,000 loan advanced to the Complainant by the Member).

¹⁶ COSL Rules 34(g) precludes COSL from considering a complaint about a member's commercial judgment about lending or security for a loan eg. the member's assessment of lending risk, or of financial

In any case, it might be noted that there is no authority for the proposition that a departure by a lender from its own internal guidelines is determinative of unjustness.

Justice Heydon held in *Conley v Commonwealth Bank of Australia*¹⁷:

"... a breach of lending guidelines by itself would not bring the matter within the Contracts Review Act. But the existence of lending guidelines ...suggests that there was a level beyond which..... it was not prudent to lend."

This point was made again by Chief Justice Spigelman¹⁸:

"... departure from the guidelines ...[is] a relevant consideration in the determination of 'justness' ...[but] such departure ...[is] not, of itself, entitled to significant, let alone determinative weight... at least in a case where the departure from the guidelines is not evidence of departure from prudent lending practice."

More generally, a lending guideline is a lender's internal document. It is not disclosed to borrowers, it does not form part of the contract between the parties and it is not a document prepared in order to discharge its duties to a borrower.

As noted above, it may provide some evidence of what steps a reasonable lender may think were prudent to take. Failure to comply with those steps may be some evidence of failure to comply with the implied term, "but such a conclusion must be approached with care" because a lending guideline may serve a number of other purposes, such as training staff in internal procedures and protecting the lender's financial interests. "It simply is not possible for a borrower to prove its case by proving the contents of the lending manual and a breach of its procedures."¹⁹

Foreseeability - Section 70(4)

In determining whether a credit contract is unjust, a Court is not to have regard to any injustice arising from circumstances that were not reasonably foreseeable when the contract was entered into.

Information made available to COSL suggests that after the Complainant entered into the credit contract, her Centrelink payments were reduced as a result of her changed domestic circumstances - she was no longer the carer of the children.

Based on the OPC's letter of 18 May 2007, the Complainant's income was, as at 20 November 2006, \$1,160 per month. By 18 May 2007, her income was further reduced to \$948.80 per month.

or commercial criteria, or of character; the member's decision to refuse the loan application or to approve it on conditions; the member's loan interest rates; or the member's policy to require mortgage insurance.

¹⁷ [2000] NSWCA 101

¹⁸ *Perpetual Trustee Company Limited v Albert and Rose Khoshaba* [2006] NSWCA 41

¹⁹ *National Australia Bank Ltd v Meeke & Anor* [2007] WASC 11 (19 January 2007)

I am unable, however, to take into account these reductions in income because I consider that they were not reasonably foreseeable by the Member at the time the credit contract was entered into²⁰.

Grounds other than section 70(2) Credit Code

Cases involving alleged improvident lending may also be examined according to concepts of misleading and deceptive conduct²¹, as well as unconscionability under statute²² 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 deceive²³. From the information available to me, however, there is nothing to suggest that the Member engaged in misleading and deceptive conduct.

Unconscionability under relevant statute

The law also prohibits a person, in trade or commerce, from engaging in conduct that is, in all the circumstances, unconscionable.²⁴

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.

An inequality of bargaining power is not a special disadvantage or disability in itself for the purposes of determining unconscionability. It will be relevant, however, in a case where a party makes unconscientious use of their superior position or bargaining power to the detriment of a party who suffers from some special disability or is placed in some special situation of disadvantage.²⁵ There is no evidence in the present case that the Member took unconscientious advantage of the Complainant (or that the Complainant was in a position of disadvantage or disability at the time the loan was entered into).

I accept that the Complainant understood the nature and effect of the loan at the time she entered into it, and that she knew she was legally responsible for the repayments.

²⁰ Section 70(4) Consumer Credit (NSW) Code

²¹ Section 42 Fair Trading Act (NSW) 1987; section 12DA(1) ASIC Act 2001

²² Section 43 Fair Trading Act (NSW) 1987; section 12CB ASIC Act 2001

²³ Section 42 Fair Trading Act (NSW) 1987; section 12DA(1) ASIC Act 2001

²⁴ Section 43 Fair Trading Act (NSW) 1987; section 12CB ASIC Act 2001

²⁵ *Gerald Cassegrain & Co Pty Limited & Ors v Commonwealth Development Bank of Australia Limited & Ors* [2002] NSWSC (965); *Commonwealth Bank v Amadio* (1983) 151 CLR 447

The Complainant sought and obtained independent legal advice and financial advice as required by the Member as a precondition to the granting of the loan. There is nothing to suggest that the Complainant entered the transaction other than willingly and without undue influence from the Member, her mother or any one else.

Consequently, I am unable to accept that the Member engaged in unconscionable conduct under the relevant provisions of the Fair Trading Act (NSW)²⁶ 1987 or the ASIC Act (2001).²⁷

Other grounds of unconscionability

A credit contract will not be unconscionable merely because it was not in the Complainant's interests to enter into it, or because the Complainant could not perform when called upon to do so.²⁸

Furthermore, a credit contract will not generally be unjust if the lender was not aware of the improvidence of the transaction to the borrower. However, the lender can be held accountable if the circumstances are such that it ought to have suspected something untoward.²⁹

I accept that Mr JOM's adverse financial advice was taken seriously by the Member because the Member:

- attempted to ascertain the method adopted by Mr JOM in his assessment of the Complainant's financial position;
- made the necessary enquiries of the Complainant and checked her bank and credit card statements; and
- ensured it followed its lending guidelines.

Furthermore, to be unconscionable, the Complainant must have been in a position of special disadvantage or disability known to the Member³⁰ which it took advantage of unconscientiously.³¹

No evidence has been presented to show that the Complainant suffered from a mental disability at the time the loan was entered into. The fact that the Complainant was a Centrelink recipient at the time the loan was entered into may suggest that she was in a position of special disadvantage. I find no evidence, however, that the Member took unconscientious advantage of such a special disadvantage.

Although the loan was secured by the Complainant's principal residence,³² there does not appear to have been an indifference on the part of the Member as to the purpose

²⁶ Section 43 Fair Trading Act (NSW) 1987; section 12CB ASIC Act 2001

²⁷ Section 43 Fair Trading Act (NSW) 1987; section 12CB ASIC Act 2001

²⁸ *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

²⁹ *Pasternacki v Correy* [1999] NSWSC 119

³⁰ *Elkafiori v Permanent Trustee Co Ltd* [2002] NSWCA 413

³¹ *Commonwealth Bank v Amadio* (1983) 151 CLR 447, approved in *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* [2003] HCA 18

³² This was a relevant consideration for unjustness in, among other decisions, *Elkafiori v Permanent Trustee Co Ltd* [2002] NSWCA 413, and *Perpetual Trustees Co Ltd v Khoshaba* (2006) NSWSC 41

of the loan or evidence that it was content to proceed on the basis of enforcing the security.³³

Undue influence

There is no suggestion that the Complainant's will was overborne by the Member or any one else, and I am unable to see any evidence of undue influence.³⁴

MFAA Code

The Member subscribes to the Code of Practice of the Mortgage and Finance Association of Australia (MFAA) which is contractual binding on the Member.

As the Member is a lender and not a broker, it is not 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'.³⁵

Consequently, the MFAA Code is not relevant in the present case.

Fairness in all circumstances

The concept of fairness under the COSL Rules applies equally to its members as it does to complainants.³⁶

While the Complainant is in a most unfortunate position, I am mindful that the Member has acted fairly in the circumstances:

- (a) the Member requested the OPC to provide it with financial documents to allow it to consider the Complainant's circumstances with a view to making changes to the credit contract on grounds of financial hardship under section 66 of the Code;
- (b) since 6 February 2007, the Member repeatedly sought evidence from the OPC that would support its allegations that the loan was unaffordable;
- (c) it encouraged the OPC to consider if the Complainant was eligible for assistance under the Mortgage Assistance Scheme, which assistance could have been put towards immediately repaying the loan areas and thereby reducing the interest being charged on the loan;

³³ Perpetual Trustees Co Ltd v Khoshaba (2006) NSWSC 41, per Chief Justice Spigelman

³⁴ Commonwealth Bank v Amadio (1983) 151 CLR 447, approved in Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd [2003] HCA 18

³⁵ 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.

³⁶ Clause 3.3 COSL Guidelines

- (d) it suspended default action at the request of the OPC and desisted commencing legal proceedings when the case was referred to COSL; and
- (e) reminded the OPC on several occasions that the interest accruing under the loan was eroding the Complainant's equity in the property.

Accordingly, it would not be fair on the Member if the sale of the property was further delayed. After all, it is and has been open to the OPC to bring proceedings under section 70(1) of the Code even after the security is discharged.³⁷

In fact, I consider that it is in neither party's interest to delay the sale of the property further.

The OPC also appears to be mindful of this and, in its letter to the Member's solicitors of 22 March 2007, noted that there might be a 'further decline in the property market'; that the 'arrearers continue to accrue on the loan' and that 'the property will have to be sold'.

Yet, regrettably, the parties have so far been unable to agree on the terms of the sale of the property and the priority in which the sale proceeds would be disbursed.

Even if the sale of the property was not now sufficient to repay the loan and accrued interest, the shortfall (that the Complainant would still be bound to meet) would be greater if there was further delay in the sale of the property.

Conclusion

In view of the above, I find the Complainant has not made out her case.

There is no basis to conclude that the loan was unjust at the time it was entered into. Consequently, the outcome sought by the OPC is not available in this forum.

Raj Venga
Credit Ombudsman

³⁷ Section 73(1) Consumer Credit (NSW) Code