

## DETERMINATION

**Complainants:** Mr and Mrs S ("Complainants")

**Member:** A broker ("Member")

**Date:** 2 March 2009

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I have reached the following Determination in relation to a complaint made by the Complainants about the Member.

### DETERMINATION

I find that the Complainants are entitled to be compensated in an amount of \$2,340.

#### Ombudsman's approach

The role of the Ombudsman is to investigate and resolve complaints in accordance with the Rules of the Credit Ombudsman Service Limited ("COSL"). In doing so, the Ombudsman is not bound by any legal rules of evidence and may inform itself about the complaint and all matters relating to it in such manner as he considers appropriate. The Ombudsman relies substantially on, and may draw inferences and conclusions from, available written material, particularly material which was created contemporaneously with events.<sup>1</sup>

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 planned to purchase a vacant block of land in Beeliar ("Beeliar property"). The purchase contract indicated that settlement would occur within 60 days of the date of the contract.

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<sup>1</sup> COSL Guideline 2.4, 2<sup>nd</sup> Edition

2. The purchase contract provided for a rebate of 3% of the purchase price if the Complainants were able to obtain finance approval within 14 days and settle within 30 days, of the contract date.

*Pre-approval*

3. The Complainants first approached the Member in August 2006 about the likelihood of obtaining finance to purchase the Beeliar property. The Member had assisted the Complainants on previous occasions with their finance requirements.
4. The Member's representative was not available at the time, and arrangements were made for the Complainants to meet with him on his return.
5. In early September the Complainants discussed their finance options with the Member's representative. It appears that he was made aware of the rebate clause at this time and that the Complainants would be away on holidays between 22 September 2006 and 8 October 2006.

*Application for standard variable loan*

6. On 15 September 2006, the Member sent St George Bank information relating to the Complainants' proposed loan structure. The proposal included a summary of the Complainants' total borrowings and the properties offered to secure those borrowings.
7. In response to the Member's letter, St George Bank faxed the following advices to the Member:
  - (a) On 18 September 2006, St George Bank confirmed receipt of the loan application for a standard variable rate loan.
  - (b) On the same day, St George Bank sent the Member a request for further documents. As the Complainants were existing St George Bank customers, St George Bank advised that they would obtain the Complainants' financial information from the Complainants' last loan application (some six months previously), but St George Bank would require an updated loan application and updated rental estimates for the Complainants' investment properties. I refer to this fax as the 'St George rental estimates request'.
  - (c) On 19 September 2006, St George Bank advised that they were not able to obtain the Complainants' previous loan application. As a consequence, St George Bank required a full loan application to be completed along with the Complainants' "income details in full for assessment". I refer to this fax as the 'St George income details request'.
8. In a letter to the Complainants dated 19 September 2006, the Member stated that 30 days should be sufficient time to arrange finance for the purchase. The Member enclosed a copy of a request from St George Bank and the loan application, and requested the Complainants complete and return the loan application. It is not clear from the information available to me whether the

Member's letter enclosed the St George rental estimates request or the St George income details request, but the letter itself made no reference to the rental statements.

9. On 19 September 2006, the Complainants completed, signed and returned the loan application to the Member.

*Purchase contract signed*

10. The Complainants signed the Contract for Sale on 22 September 2006 prior to leaving for their holiday. (However, the Complainants dated the contract as 25 September 2006.) The vendor signed and dated the contract on 26 September 2006.
11. The Complainants notified the Member that they would be on holiday from 22 September 2006, and departed on that date.
12. The vendor advised the Complainants by letter dated 26 September 2006 that the contract was conditional on the Complainants obtaining finance approval by 26 October 2006, with settlement by 27 November 2006.
13. The letter also outlined the conditions required to obtain the 3% rebate, namely, that the contract was to be made unconditional by 10 October 2006 and settled by 26 October 2006. Included in the letter was a pro-forma document which, when signed by the Complainants, would render the contract unconditional.

*Rental information*

14. In a fax dated 3 October 2006, St George Bank requested further information from the Member:
  - (a) rental income from the Complainants' Brusselton property;
  - (b) rental income from the Complainants' Secret Harbour property and the stage of its construction; and
  - (c) information regarding the Complainants' ANZ loan.
15. The Complainants returned from their holiday on the evening of 8 October 2006 and spoke to the Member the following morning. The Member advised them that St George required their updated rental income.
16. The Complainants sent the Member a brochure containing information on the rental estimates for the Brusselton property. The brochure was not sufficient for St George Bank's purposes.
17. The Complainants claim that the Member did not contact them again after their telephone conversation of 9 October 2006, until 18 October 2006. However, the Member states that it contacted the Complainants between 9 October 2006 and 18 October 2006 to advise them that the brochure for the Brusselton property was insufficient for St George Bank's purposes. When the Complainants contacted the Member on 9 October 2006, they provided the

Member with a contact number for the property manager for the Brusselton property, so that the Member could obtain the required information directly.

18. The Complainants state that on 9 October 2006, the Member advised them that they could advise the vendor of the Beeliar property that the contract could be treated as unconditional. This was done on 9 October 2006.
19. On 10 October 2006, the Member requested and received from the Complainants updated rental estimates for the Complainants' Maddington property.
20. Between 9 and 17 October 2006, the Member states that they contacted the property manager for the Brusselton property on three occasions, attempting to organise the rental estimates for the Brusselton property. However, during this period the property manager was not available as he was changing job locations. The Member was able to contact the new manager on the third attempt.
21. On 17 October 2006, the Member emailed the property manager for the Brusselton property instructions on the wording required for the rental estimates for the Brusselton property.
22. On 18 October 2006, the Member called the Complainants to advise them that he was still waiting on the rental estimates from the property manager. Following the Member' telephone call, the Complainants contacted the property manager to ensure that the requested rental estimates would be provided promptly.
23. On 19 October 2006, the property manager sent the Member the rental estimates for the Brusselton property in the requested format.
24. Rental estimates for the Maddington, Brusselton and Secret Harbour properties were sent to St George Bank on 19 October 2006. On the fax, the Member advised that the purchase price was "At \$390,000 less 3% disc if settle prior to 30/10/06".
25. The rental estimates were lower than expected and the serviceability of the loan became an issue – it required approval by a St George Bank WA Manager, or in his absence, head office in Sydney.
26. To prevent further delays the Member made a special request to St George Bank for a "Relocation – No End Debt" loan to be approved. The relocation loan did not require an income assessment, but was not ordinarily available on purchases of vacant land where no building contract was in place.

### *Valuation*

27. In a fax dated 25 October 2006, St George Bank confirmed conditional approval of the relocation loan and advised that they would be arranging the valuations for the Beeliar, Bibra Lake and Brusselton properties:
  - (a) On 25 October 2006, the Beeliar and Bibra Lake properties were valued.
  - (b) On 26 October 2006, the Brusselton property was valued.

### *Settlement*

28. The opportunity to take advantage of the 3% rebate on the Beeliar block expired on 26 October 2006.
29. St George Bank sent formal approval of the relocation loan for \$410,000 to the Member on 1 November 2006. This was forwarded to the Complainants on the same day.
30. On 2 November 2006, the loan documents were posted to the Complainants.
31. On 14 November 2006, the Complainants faxed an advice to the Member advising that they had decided to deal with St George Bank directly.
32. On 23 November 2006, the purchase of the Beeliar property settled.

### **Disputed events**

There are a number of events that have been disputed by each party.

The oral statements allegedly made by each party were not reduced to writing nor supported by any other written material. I am unable to verify their accuracy because COSL does not have the power to subpoena witnesses or take evidence on oath or cross-examine witnesses.<sup>2</sup> Only a court can do this. It is nonetheless open to me to consider, on balance, whether such statements were made having regard to other information provided by the parties and to subsequent conduct of the parties that may be consistent with the statements being made.<sup>3</sup>

The events that are disputed are as follows:

1. Each party's account of whether and if so, when, telephone calls were made to the other or to a third party. In particular:
  - (a) communications by telephone between the Member and the Complainants between 9 October and 18 October 2006;

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<sup>2</sup> COSL Rule 67, Third Edition Rules

<sup>3</sup> COSL Guideline 3.4, Second Edition

- (b) the Member's telephone calls to the property manager for the Brusselton property; and
  - (c) telephone communications between the Member and the vendor of the Beeliar property.
2. The extent of the income details that were requested by the Member from the Complainants.
  3. The Member allegedly guaranteeing that the finance would be approved in time for the Complainants to obtain the rebate. The Complainants rely on a letter from the Member dated 19 September 2006, but I consider that the wording of that letter falls far short of a guarantee of finance approval. The Member asserts that it confirmed that finance could be organised for the property settlement within 60 days of the date of the purchase contract, but that no guarantee was made in relation to achieving settlement within 30 days in order to obtain the rebate.
  4. Information regarding the intended sale of the Complainants' Bibra Lake property.

### **Information inconsistencies**

I also note that, in relation to two issues, the Complainants have provided inconsistent information during the course of COSL's investigation.

The first inconsistency relates to whether the Complainants would have proceeded with purchase of the property if they had known that they would not have been able to obtain the 3% rebate.

In their letter to us dated 6 December 2007, the Complainants state that they would not have proceeded with the loan unless finance was able to be obtained and they were able to make a "cash offer".

[Generally the term "cash offer" means that finance is not required as the purchaser has sufficient funds to complete the purchase. However, it appears that the Complainants have used the term "cash offer" to refer to the purchase contract becoming unconditional.]

However, while the Complainants maintain that the purchase contract was made unconditional on 9 October 2006 with the expectation that settlement would take place within the 30-day period, the Complainants have not specifically indicated that they would not have proceeded with the purchase of the property if they were unable to settle in time to obtain the rebate.

Further, it appears that, based on information received from St George Bank regarding loan serviceability, the Member confirmed that the Complainants could go ahead and make the purchase contract unconditional (in an attempt to obtain the rebate), as they would still be able to obtain settlement within 60 days even if settlement was not able to take place within the 30 day period set out in the purchase contract for the rebate.

A further inconsistency in the information supplied by the Complainants is in relation to the type of loan the Complainants sought. The Complainants assert in their original complaint of 29 January 2007 that they initially sought a short-term loan as their main residence, the Bibra Lake property, was on the market for sale.

The Complainants then later assert in their fax of 6 December 2007 that they always wanted a standard variable loan, and that they never requested a bridging loan. As a result of entering into a bridging loan, the Complainants claim that they had to sell their Maddington property and were on a higher interest rate than if they had been on a standard variable loan.

The Member has confirmed the Complainants' statement as set out in their original complaint. The Member has provided additional information indicating that a bridging loan was not available for the purchase of a vacant block of land through St George Bank unless a building contract was also in place. Therefore, the Complainants were initially only able to obtain a standard variable loan through St George Bank.

The Member was only able to later obtain the bridging loan for the Complainant by special request. The Member further states that it understood that the Complainants were happy to change their application to a bridging loan under the circumstances, as their residential property was on the market for sale at that time.

### **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 circumstances<sup>4</sup>.

Where relevant, the application of these to the facts of the present case is discussed below.

### **Key Issues**

The relevant questions in the present case are:

1. whether the loss suffered by the Complainants is of a type for which I can award compensation under the COSL Rules;
2. whether the loss can be attributed to an act or omission of the Member;
3. whether the loss was reasonably foreseeable; and

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<sup>4</sup> COSL Rule 49, 3<sup>rd</sup> Edition

4. whether the Complainants contributed to the loss or had the opportunity to avoid their loss but did not do so.

## **Findings**

1. *Compensation can be awarded for opportunity loss*

The Complainants are seeking compensation for the loss of \$11,700, being the 3% rebate that they would have been entitled to had the property purchase settled within 30 days of the date the purchase contract was entered into.

Under the COSL Rules, we are able to consider two types of loss:

- (a) direct loss; and
- (b) indirect losses as approved by the COSL Board, for example opportunity loss.

While the 3% rebate is not a direct financial loss, it may be considered an opportunity loss because the loss was the opportunity to obtain a rebate.

Under COSL Guidelines 7.3 (Second Edition), a claim for opportunity loss may be considered if COSL is satisfied that, because of the conduct of the Member, the Complainants have been deprived of money that would otherwise have been paid to them.

It appears certain that had the settlement of the property been completed on time (26 October 2009), the Complainants would have been able to obtain the 3% rebate.

Therefore, I am satisfied that the Complainants' loss is an opportunity cost that COSL can consider under its Guidelines.

2. *Loss can be attributed to an act or omission of the Member*

I consider that when the Member received the completed loan application from the Complainants, it was on notice that the application was not accompanied by the rental estimates requested by St George, and that it was incumbent on it to have followed this up before the Complainants went on holiday. By not having done so, the Member can be regarded as having breached its duty of care.

## Agency

A broker (like the Member) will normally be regarded as an agent of the Complainant (not the lender) when arranging a loan for the Complainant, even if the broker might also receive a commission from the lender.<sup>5</sup> The fact that the broker might have completed the lender's forms or arranged for the signing of documents is not conclusive of an agency to the lender.<sup>6</sup>

The relationship of proximity between agent and principal gives rise to the duty of care in tort. This relationship of proximity derives from the agent assuming responsibility for the performance of the agency, and reliance by the principal on the agent to apply its knowledge and skill in the performance of the services.<sup>7</sup> In such circumstances, it is reasonably foreseeable that the failure by the agent to attain the standard required in assuming the responsibility may cause loss to its principal.

## MFAA Code

I also note that the MFAA Code of Practice, to which the Member subscribes as a condition of its membership of the MFAA, provides that:

*Clause 27. A Member must always keep an applicant informed of all relevant information known to the Member relating to a proposed loan to the extent that that information applies to the applicant.*

*Clause 35. A Member must act with all due skill, care and diligence in their Mortgage Industry dealings.*

*Clause 38. A Member must take all reasonable steps to ensure that the finance applied for is obtained and property settlement completed in a timely fashion.*

## WA Finance Brokers Code of Conduct (2001)

Similarly, clause 3.5 of the Finance Brokers Code of Conduct (2001), enacted pursuant to the Finance Broker Control Act 1975 (WA), provides that a finance broker must exercise reasonable skill, care and diligence when conducting or carrying on the business of a finance broker.

## Reasonable skill and care

However, the duty to exercise reasonable skill and care does not necessarily mean that a particular result will be achieved.

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<sup>5</sup> Custom Credit Corporation Ltd v Lynch [1993] 2 VR 469; Octapon Pty Ltd v Esanda Finance Corporation Ltd, unreported; SCT of NSW (Cole J); 3 February 1989.

<sup>6</sup> Brainwhite v Worcester Works Finance Ltd (1969) 1 AC 552 at 577, per Lord Upjohn.

<sup>7</sup> Hawkins v Clayton (1988) 164 CLR 539 at 578 per Deane J; Waimond Pty Limited v Bryne (1989) 18 NSWLR 642 at 653 per Kirby P.

So in *Greaves & Co (Contractors) Ltd v Baynham, Meikle & Partners*,<sup>8</sup> it was held that:

*“ [T]he law does not usually imply a warranty that the [professional] will achieve the desired result, but only a term that he will use reasonable care and skill. The surgeon does not warrant that he will cure the patient. Nor does the solicitor warrant that he will win the case”.*

Again in *Auburn Municipal Council v ARC Engineering Pty Ltd*<sup>9</sup>:

*“[I]t is of the very nature of contracts of professional employment that they are not contracts to achieve a particular result”*

That is not to say of course that a professional is not obliged to achieve a result where he or she gives a clear undertaking and receives consideration to do so. In such a case, the professional will be liable for a failure to perform the undertaking even if all reasonable skill and care has been taken.<sup>10</sup>

However, as I have noted earlier, I am satisfied that the Member did not undertake or guarantee that the finance would be approved in time for the Complainants to obtain the rebate.

#### Causation

Responsibility for the Complainants' loss may be imposed on the Member where:

- (a) the Member's conduct made a material contribution to the Complainant's loss;<sup>11</sup> or
- (b) the Member's conduct materially increased the risk of loss to the Complainant.<sup>12</sup>

The Member's act or omission need not be the sole cause of the loss. Indeed, it was not in this particular case. The Member may be responsible for the loss even if its conduct was only one of a number of necessary conditions that caused the loss<sup>13</sup> and even though more had to happen than just the Member's act or omission.<sup>14</sup>

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<sup>8</sup> *Greaves & Co (Contractors) Ltd v Baynham, Meikle & Partners* [1975] 3 All ER 94, per Lord Denning at 103

<sup>9</sup> *Auburn Municipal Council v ARC Engineering Pty Ltd* [1973] 1 NSWLR 513, per Hutley JA at 531

<sup>10</sup> *Barclays Bank plc v Loughen* (1996) 51 Can LR 75; Section 40 Fair Trading Act 1987 (WA); Section 12ED ASIC Act 2001 (Cth)

<sup>11</sup> *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 (what is a material contribution is a question of degree), as approved in *March v Stramare* (1991) 171 CLR 506

<sup>12</sup> *McGhee v National Coal Board*, [1972] 3 All E.R. 1008, per Lord Wilberforce, and accepted in *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22. The latter decision approved the test of "materially increasing risk" of harm, as a deviation in some circumstances from the ordinary "balance of probabilities" test under the "but for" standard.

<sup>13</sup> *March v Stramare* (1991) 171 CLR 506 per Mason CJ, with whom Gaudron and Toohey JJ agreed

<sup>14</sup> *Chapman v Hearse* (1961) 106 CLR 112

It is a question of applying common sense to the facts of a particular case.<sup>15</sup> When it is uncertain whether the Member's act or omission was the cause of or one of the causes of the loss, a value judgment can be made about whether it is appropriate to hold the Member responsible for the loss. For example, it is unlikely that the Member should be responsible for the loss where there was a superseding cause which broke the nexus between the Member's act or omission and the loss incurred by the Complainants.

#### No supervening event

The question therefore arises whether there was one or more subsequent independent events that make it inappropriate for the scope of the Member's liability to extend to the loss incurred.<sup>16</sup>

There were in fact other factors, other than those brought about by the Member and the Complainants that contributed to the Complainant's loss. Specifically:

- (a) St George Bank was not able to obtain the Complainants' financial information from a previous loan application, and therefore required a full loan application and income details to be submitted by the Complainants again;
- (b) The failure of the property manager of the Brusselton property to respond promptly to the Member's requests for the rental estimates;
- (c) The complicated nature of the loan application due to the complex financial circumstances of the Complainants, which included rental income from serviced apartments and a commercial property, and various security properties held; and
- (d) St George Bank requiring its WA Manager to approve the loan application due to the unexpectedly tight loan serviceability, and the WA Manager being on leave. Indeed, had the Complainants proceeded with the standard variable loan, this would have required the loan application to be sent to St George Bank's head office in Sydney for assessment.

However, I do not consider any of these subsequent events were of such a nature as to make it inappropriate for the scope of the Member's liability to extend to the loss incurred.<sup>17</sup> They would have had to be of such a nature as to have severed the link between the Member's act or omission and the loss of the rebate (eg, an "act of God", a third party's deliberate or negligent conduct).

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<sup>15</sup> March v Stramare (1991) 171 CLR 506 per Mason CJ (with whom Gaudron and Toohey JJ agreed)

<sup>16</sup> 'it is a sound principle that where a person has, by breach of duty of care, created a risk, and injury occurs within the area of that risk, the loss should be borne by him unless he shows that it had some other cause.' - McGhee v National Coal Board (72 UKHL)

<sup>17</sup> McGhee v National Coal Board, [1972] 3 All E.R. 1008

3. *Loss was reasonably foreseeable*

For the Member to be liable to the Complainant for the loss of the rebate, the loss must not have been too remote. The loss will be too remote if:

- (a) the Complainant incurred a loss in circumstances where the particular loss was not foreseeable or where the loss was of a greater extent than was foreseeable;<sup>18</sup> and/or
- (b) the Complainant incurred a loss in circumstances which were different from what could have been foreseen, although the particular loss may well have been foreseeable.<sup>19</sup>

The loss will not be too remote:

- (i) if the loss is of such a kind as a reasonable person would have foreseen;<sup>20</sup> and
- (ii) if it is appropriate that the scope of the Member's liability extend to the loss caused<sup>21</sup> (for example, the loss is not of a different kind of loss altogether from what was foreseeable).

The crucial question is whether the loss of the particular kind was, at the time of contract formation, within the Member's contemplation.<sup>22</sup>

Based on the information available to me, it appears that the Member was advised of the 3% rebate when the Complainants first met with it in September 2006, prior to the Member arranging finance or the Complainants signing the purchase contract. The loss was also of such a kind as a reasonable person would have foreseen.

The loss of the rebate was, at the time of contract formation, something which was reasonably foreseeable as a "serious possibility", or a "real danger", or "on the cards", or "not unlikely"<sup>23</sup>

I am therefore satisfied that the loss was not too remote and was foreseeable.

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<sup>18</sup> Nader v Urban Transit Authority of NSW (1985) 2 NSWLR 501

<sup>19</sup> Doughty v Turner Manufacturing Company [1964] 1 All ER 98

<sup>20</sup> Wagon Mound 1 (Overseas Tankship (U.K.) Ltd. v. Morts Dock and Engineering Co. Ltd. [1961] 1 All E.R. 404; [1961] A.C. 388; [1961] 2 W.L.R. 126

<sup>21</sup> Doughty v Turner Manufacturing Company [1964] 1 All ER 98

<sup>22</sup> C Czarnikow Ltd v Koufos [1969] 1 AC 350; Hadley v Baxendale (1854) 9 Ex 341

<sup>23</sup> Alexander v Cambridge Credit Corporation Ltd [1987] 9 NSWLR 310, per McHugh JA at pp 917-918

4. *The Complainants contributed to the loss*

In its letter to the Complainants of 19 September 2006, the Member asked the Complainants to confirm the dates that they would be away so the documents would be ready for forwarding to St George Bank. As has been noted, the Complainants only provided the Member with the completed loan application and not their full income details or rental estimates. The Complainants say that the Member had acted for them on prior occasions (the last time being some six months earlier), and should have had in his possession all the information he required for the loan application.

I consider that the Member would not have had, and the Complainants ought to have known that the Member did not have, all the relevant information.

For example, construction of the Brusselton property had not been completed and no rental estimates would have been available to the Member.

Furthermore, the Complainants were investors and it is not unreasonable to assume that their income receipts and financial circumstances in general may have changed, even in a six month period.

Even assuming that the Member's letter to the Complainants dated 19 September 2006 only enclosed the St George income details request and did not include the St George rental estimates request (which the Member denies), and even given the Member's letter to the Complainants did not specifically request rental details of their properties, it is difficult to accept that the Complainants, who appear to be reasonably sophisticated investors of some business acumen, would not have realised that a request for "income details in full for assessment" by a prospective lender (in this case, St George) would necessarily include rental estimates of their properties.

Although the Complainants confirmed the dates that they would be away, surprisingly they did not also provide the Member with their contact details while away. Considering they were going to be away for 17 days from 22 September to 8 October 2006, it was incumbent on them to ensure that they were contactable by the Member, particularly since the 3% rebate would only be available if the purchase contract was made unconditional (that is, finance was approved) by 10 October 2006 (ie. two days after they returned from their holidays), and the loan was settled by 26 October 2006.

I consider that the Complainants ought to have sought the rental estimates for the Brusselton property themselves before going on holidays on 22 September 2006, rather than asking the Member to obtain them on 9 October 2006 on their return. I understand that this would not ordinarily be within the scope of a broker's role. Furthermore, the broker would not have had the authority to obtain the rental estimates without the Complainants first authorising the managing agent to provide these to the Member. Indeed, as it turned out the Member was not able to obtain the rental

estimates from the property manager of the property until the Complainants intervened on 19 October. This amounted to a further 10 day delay.

I also consider that the Complainants may well have obtained the benefit of the 3% rebate had they sought and obtained the rental estimates before they left on holiday.

I have therefore come to the conclusion that while the Member is ultimately responsible for the loss, the Complainants contributed significantly to, and did not seek to adequately avoid, their loss.

### **Contributory negligence**

The defence of contributory negligence is available where:

- (a) the Complainants failed to take reasonable care for their own safety or the protection of their own interests;<sup>24</sup>
- (b) the negligence of the Complainants was a cause of their loss; and
- (c) the loss that eventuated was within the risk created by the Complainants' conduct.

A claim of contributory negligence is more likely to succeed where:

- the client was well placed to spot or correct the professional's mistake and may have been negligent for not doing so;<sup>25</sup>
- the client aggravated the consequences of the professional's breach of duty;
- the client failed to communicate relevant facts to the professional.<sup>26</sup>

However, the professional and the client do not generally stand on an equal footing. As such, it would be difficult for a professional to avoid all liability by claiming contributory negligence by the client. It is more likely that the client would receive a reduced amount calculated by the percentage that their contributory negligence caused the harm.

In Western Australia, section 4 of the Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947 provides:

*Whenever in any claim for damages founded on an allegation of negligence the Court is satisfied that the defendant was guilty of an act of negligence conducing to the happening of the event which caused the damage then notwithstanding that the plaintiff had the last opportunity of avoiding or could by the exercise of reasonable care, have avoided the consequences of the defendant's act or might*

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<sup>24</sup> The law takes the view that reasonable behaviour includes anticipating the fact that others will be negligent at times. Thus the 'reasonable man' takes account of others' negligent behaviour and if he or she does not, may be contributorily negligent

<sup>25</sup> Daniels v Anderson (1995) 37 NSWLR 438 – in an action against auditors, the client company directors were careless in failing to detect the defalcations of their own employees in the first place

<sup>26</sup> Carradine Properties Ltd v D J Freeman and Company (a firm) (1982) 5 Const LJ 267

*otherwise be held guilty of contributory negligence, the defendant shall not for that reason be entitled to judgment, but the Court shall reduce the damages which would be recoverable by the plaintiff if the happening of the event which caused the damage had been solely due to the negligence of the defendant to such extent as the Court thinks just in accordance with the degree of negligence attributable to the plaintiff.*

Similarly, the effect of the apportionment legislation<sup>27</sup> on the defence of contributory negligence suggests that the Complainants would receive a reduced amount calculated by the percentage that their contributory negligence caused the harm.

The apportionment legislation has not changed the standard of care required for contributory negligence, but in some of the jurisdictions contributory negligence can be assessed at 100%<sup>28</sup>, which previously had been forbidden by the High Court.<sup>29</sup>

Section 5K of the Civil Liability Act 2002 (WA) sets out the standard of conduct against which the Complainants' own conduct is to be measured. It states:

- (1) *The principles that are applicable in determining whether a person is liable for harm caused by the fault of the person also apply in determining whether the person who suffered harm has been contributorily negligent in failing to take precautions against the risk of that harm.*
- (2) *For that purpose —*
  - (a) *the standard of care required of the person who suffered harm is that of a reasonable person in the position of that person; and*
  - (b) *the matter is to be determined on the basis of what that person knew or ought to have known at the time.*

In *Pennington v Norris*<sup>30</sup> the court said that they had to undertake a comparison of the level of culpability in the sense of degree of departure from the standard of the reasonable person.

In *Podrebersek v Australian Iron and Steel Pty Ltd*<sup>31</sup> it was said that it was also important to consider the relevant importance of the acts of the parties in causing the damage, and that the whole conduct of the parties should be considered.

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<sup>27</sup> Civil Liability Act 2002 (WA), and corresponding State and Territory apportionment legislation

<sup>28</sup> It does not appear that in Western Australia, contributory negligence will operate to reduce the liability of the professional to 0% of the loss

<sup>29</sup> *Wynbergen v Hoyts Corporation Pty Limited* (1997) 149 ALR 25

<sup>30</sup> *Pennington v Norris* (1956) 96 CLR 10

<sup>31</sup> *Podrebersek v Australian Iron and Steel Pty Ltd* (1985) 59 ALR 529. The Court of Appeal in *Mackenzie v The Nominal Defendant* (2005) NSWCA 180 held that despite the advent of the civil liability legislation, the approach to apportionment set out in *Podrebersek* remained valid

Consequently, I consider that the compensation payable by the Member should be reduced by 80% to reflect the extent by which the Complainant was responsible for the loss.

### **Fairness in all circumstances**

In the alternative, the same conclusion can be reached by having regard for fairness in all the circumstances.<sup>32</sup>

I consider that fairness is akin to what is just and equitable or what is fair and reasonable. Obviously the parties to the complaint will have their own views as to what might be fair in the circumstances and believe that it is fair and reasonable for them to succeed.

However, according to Kirby P:<sup>33</sup>

*"The words 'just and equitable' and 'responsibility' import elements of opinion which are not susceptible to precise expression of fully reasoned explanation. Yet, the preconditions of the subsection being established [that is, contributory negligence having been found], it is necessary for a court to determine the 'extent' of any 'reduction'. It must do so in terms of a precise formula which exposes the proportion. This is what is done every day in cases where contributory negligence on the part of the plaintiff is established by the defendant. ...*

*[O]pinions as to the requirements of justice and equity in the particular case and as to 'responsibility for the damage' will necessarily differ from one judge to another upon the same facts. The activity engaged in, although judicial, is not normative. It does not lend itself to exactness of mathematical precision."*  
...

In Pope v Lawler,<sup>34</sup> it was observed that:

*"The meaning of the words 'fair and reasonable' is a question of fact. 'Fair' is relevantly defined in The New Shorter Oxford English Dictionary 4th ed (1993) at 907 as 'just, unbiased, equitable, impartial'. 'Reasonable' is defined in the same dictionary at 2496 relevantly as 'within the limits of reason; not greatly less or more than might be thought likely or appropriate'."*

However, the Full Court of the Federal Court<sup>35</sup> has noted that:

*"attempts to achieve a precise definition of words such as 'unreasonable' and 'unfair' are likely to run into difficulty. The legislature has quite deliberately used words of broad content."*

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<sup>32</sup> COSL Rule 49, 3<sup>rd</sup> Edition

<sup>33</sup> Talbot-Butt v Holloway (1990) 12 MVR 70 at 71, 75

<sup>34</sup> Pope v Lawler (1996) 41 ALD 127, per R D Nicholson J at [135] and cited with approval in Lykogiannis v Retailer Employee Superannuation Pty Ltd (2000) 97 FCR 361; National Mutual Life Association of Australasia Limited v Jevtovic [1997] FCA 359; and Briffa v Hay (1997) 75 FCR 562

<sup>35</sup> National Mutual Life Association of Australasia Limited v Campbell (2000) 99 FCR 562, at [571]

I also note that the concept of fairness under the COSL Guidelines applies equally to its members as it does to complainants.<sup>36</sup>

In view of the above, I find that it would also be fair and reasonable in the present case for the Member to compensate the Complainants in an amount of \$2,340, being an 80% discount of the amount claimed by the Complainants.

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

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<sup>36</sup> Clause 3.3 COSL Guidelines