IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2016-404-002125
[2017] NZHC 1167

UNDER	Section 100A Commerce Act 1986
IN THE MATTER	of a case stated by the Commerce Commission relating to the Harmoney Limited transaction and ss 5, 6 and 7 of the Credit Contracts and Consumer Finance Act 2003
BETWEEN	COMMERCE COMMISSION Applicant
AND	HARMONEY LIMITED Respondent

Hearing: 3 February 2017

Appearances: S J Mills QC, A D Luck and J D Cairney for Applicant
A R Galbraith QC, A M Callinan and S A Comber for Respondent

Judgment: 31 May 2017

JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 31 May 2017 at 11.30 am
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar

Date……………………….

Introduction

[1] Peer-to-peer lending is a form of lending under which an intermediary operating through a web-based platform matches lenders and borrowers. The intermediary contracts separately with each; the lenders and borrowers do not enter into a direct contract with one another.

[2] In New Zealand peer-to-peer lending is regulated by the Financial Markets Conduct Act 2013 (FMCA). The FMCA is directed towards the protection of the investors/lenders and does not provide specific protection for borrowers. The Credit Contracts and Consumer Finance Act 2003 (CCCFA), which was enacted to protect the interests of borrowers under credit contracts, does not refer to peer-to-peer lending. The Commerce Commission has brought a case stated for the purpose of clarifying the application of the CCCFA to peer-to-peer lending.

[3] The Commission's case focuses on peer-to-peer lending transactions facilitated by Harmoney Ltd, which is licensed under the FMCA to operate a web-based peer-to-peer lending platform. One of the fees that Harmoney charges borrowers is a "platform fee". The Commerce Commission considers that the "platform fee" falls within the definition of a "credit fee" under the CCCFA. If so, the CCCFA would require that the fee not be unreasonable. The Commission's case poses questions about this fee and other aspects of peer-to-peer lending transactions effected through Harmoney's platform. The answers could result in the Commission taking enforcement proceedings against Harmoney.

[4] Harmoney has applied to strike out the case stated on the ground that it falls outside the scope of the relevant empowering legislation, s 100A of the Commerce Act 1986 and s 113(g) of the CCCFA. It says that a case stated under these provisions is limited to "pure" questions of law and cannot extend to mixed questions of fact and law, which is the nature of the questions posed by the Commission.

[5] The Commission says that the questions are ones of law and, further, that this Court only has jurisdiction to strike out a case stated through its inherent jurisdiction, which ought not to be exercised in this case. If necessary, it invites the Court to permit the Commission to amend the case stated.

The case stated procedure under the Credit Contracts and Consumer Finance Act 2003

The Credit Contracts and Consumer Finance Act 2003

[6] The CCCFA was introduced in 2003 to replace the Hire Purchase Act 1971 and the Credit Contracts Act 1981 and to respond to the changes in consumer transactions that had occurred subsequent to those two Acts. It is directed primarily towards consumer transactions involving credit contracts, consumer leases and buy-back transactions.

[7] One of the concerns that the CCCFA sought to address was the difficulty faced by consumers in obtaining redress against creditors who breached statutory obligations. Although the amount involved for an individual debtor could make legal action uneconomic, individual cases collectively could represent a significant sum. A major aspect of the legislative reform was to make the Commerce Commission responsible for enforcing the CCCFA and enable it to bring proceedings on behalf of either individual borrowers or classes of borrowers. This was expected to enhance the prospects of borrowers obtaining redress for breaches and incentivise lenders to comply.

[8] The Commission's role and functions under the CCCFA are set out in s 111:

> (1) The role of the Commission under this Act is to promote compliance with this Act.
>
> (2) The functions of the Commission, in relation to this Act, are to —
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> (a) monitor trade practices in credit markets, consumer lease markets, and buy-back transaction markets; and
>
> (ab) monitor the conduct of creditors and creditors' agents in the exercise of their rights under Part 3A and under the relevant credit contract; and]
>
> (ac) issue infringement notices for infringement offences; and
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> (b) take prosecutions in relation to breaches of this Act; and
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> (c) take civil proceedings under this Act (including proceedings under Part 5); and
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> (d) make available appropriate information for the guidance of consumers, creditors, [debtors,] lessors, transferees, and

other interested persons in relation to promoting compliance with this Act.

(3) Nothing in this Act imposes on the Commission any duty or obligation to take any proceedings under this Act or to exercise any power conferred by this Act in respect of any particular person.

[9] The procedural powers the Commerce Commission needs to fulfil its functions are imported from the Commerce Act 1986. Section 113 provides that:

The following provisions of the Commerce Act 1986 apply with all necessary modifications:

(a) Sections 15 to 17 (disclosure of financial interests and proceedings of commission);

(b) Section 90 (conduct by servants or agents);

(c) Section 98 (the Commission may require a person to supply information or documents or give evidence);

(d) Sections 98A and 98G (Commission's powers of search and seizure);

(e) Section 99 (powers of Commission to take evidence);

(ec) sections 99B to 99P (assistance to overseas regulators), as if –

(i) references in those sections to completion law were references to consumer credit law; and

(ii) references in those sections to the Minister were references to the Minister of Consumer Affairs:

(f) Section 100 (powers of Commission to prohibit disclosure of information, documents and evidence);

(g) Section 100A (Commission may state a case for opinion of High Court);

(h) Sections 101 (notices) and 102 (service of notices);

(i) Section 103 (offences);

(j) Section 104 (determinations of Commission);

(k) [repealed]

(l) Section 106 (proceedings privileged);

(m) Section 106A (judicial notice);

(n) Section 109 (Commission may prescribe forms).

(emphasis added)

[10] Section 100A(1) of the Commerce Act, which is imported by s 113(g), provides that:

> The Commission may at any time state a case for the opinion of the Court on any question of law arising in any matter before it.

The Harmoney peer-to-peer lending model

[11] In order to understand the Commission's case stated and the basis for Harmoney's strike out application, some description of how Harmoney's platform operates is necessary. Harmoney describes its platform as on online market. Borrowers apply online, explaining their circumstances and the purpose of the loan being sought. They are screened for creditworthiness and assigned an interest rate that reflects their risk profile. Harmoney also sets a maximum loan amount and repayment period.

[12] Prospective lenders register online and enter into an Investor Agreement. They deposit funds into a trust account held by Harmoney. They can then view information relating to loan applications and select which loans to invest in and the amount of their investment. Loans are made in fractions, or "notes", of $25 so that more than one lender may fund a particular loan. Lenders place "orders" for the number of "notes" they wish to lend. Once there are sufficient orders to fund a particular loan, Harmoney transfers the investors' funds to an "Advance Account" held in the name of a trustee, Harmoney Investor Trustee Ltd, whose relationship with Harmoney is governed by an Administration Deed.

[13] The Trustee holds the funds on trust for the investors. At that point no loan contract yet exists; a contract comes into existence immediately after disclosure has been provided to the investors as required by the FMCA. Harmoney provides that disclosure. It says that it does so as the Trustee's agent but the Commission says that it does so on its own account. Once the disclosure has been made the Trustee holds the loan and the Loan Contract as bare trustee for the investors.

[14] It is a term of the Loan Contract that the borrower will pay a platform fee for the use of Harmoney's platform. The Trustee deducts that fee from the amount of the loan and pays it to Harmoney before transferring the loan money to the borrower. Under the Loan Contract the borrower must make repayments to the Trustee.

Repayments are received by the Trustee in a collection account. From that account the Trustee disburses money owing to Harmoney for investor fees and then pays the balance out to the investors/lenders.

The case stated

[15] The case stated centres on the five documents associated with the loan:

(a) "Investor Agreement" containing terms as between the investor, Harmoney and the Trustee.

(b) "Borrower Agreement" containing terms as between the borrower, Harmony and the Trustee.

(c) "Loan Contract" containing terms as between the borrower, Harmoney and the Trustee.

(d) "Loan Disclosure" in respect of the specific loan.

(e) "Administration Deed" containing terms as between Harmoney and the Trustee setting out the nature of their relationship.

[16] In the case stated the Commission poses the following questions and records the parties' respective positions:

(a) Question 1: Is the "credit contract", as defined in s 7 of the CCCFA, comprised of a number of the documents operating together, or just the Loan Contract?

It is common ground between the Commission and Harmoney that a credit contract exists. The Commission asserts that it comprises the Borrower Agreement, the Loan Contract and the Loan Disclosure together. Harmoney contends that it comprises only the Loan Agreement.

(b) Question 2: Is there a transaction that is in substance or effect a "credit contract" within the meaning of s 7(2) of the CCCFA?

The Commission contends that the credit contract comprising the three documents referred to above results in a transaction that is in substance and effect a credit contract within the meaning of s 7(2) of the CCCFA. Harmoney does not accept that s 7(2) applies at all, given its acceptance that a credit contract exists.

(c) Question 3: Which entity or entities are the "creditor(s)" for the purposes of the CCCFA, as defined in s 5 of the CCCFA?

The Commission asserts that both Harmoney and the Trustee are creditors for the purposes of the CCCFA. Harmoney maintains that only the Trustee is a creditor, and even then as a bare trustee for the investors.

(d) Question 4: Is the Harmoney platform fee a "credit fee" as defined in s 5 of the CCCFA?

The Commission contends that the platform fee is a credit fee. Harmoney disagrees.

(e) Question 5: Is the Harmoney platform fee an "establishment fee" as defined in s 5 of the CCCFA?

The Commission contends that the platform fee is an establishment fee. Harmoney disagrees.

Is the case stated within the bounds of the empowering legislation?

[17] In general terms the case stated procedure has been described as "a form of consultation by a tribunal with the Court in order to obtain an answer on a point of law".[1] In *Crequer v Chief Executive of the Ministry of Social Development* Gendall J examined the historical use and development of the case stated procedure and observed that:[2]

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1 *Commissioner of Inland Revenue v G* (1995) 19 TRNZ 724 (HC) at 726, citing *Harris, Simon & Co v Manchester City Council* [1975] 1 WLR 100 (QB), cited in *Crequer v Chief Executive of the Ministry of Social Development* [2015] NZHC 1602, [2015] NZAR 1395 at [21].

2 At [20].

> As to the purpose of such a mechanism, it is quite straight forward. It stems from a desire to ensure that the legal interpretation of inferior Courts and tribunals is correct.

[18] The case stated procedure is frequently used as a form of appeal. But there are also numerous enactments that allow the case stated procedure to be used other than by way of appeal. This fact is recognised by r 21.4 of the High Court Rules which specifically refers to appeals and references from tribunals.

[19] As Mr Galbraith QC, for Harmoney, pointed out, the majority of enactments that permit the use of the case stated procedure do so in the context of a statutory body exercising a quasi-judicial function. He also correctly observed that the wording of s 100A, referring to a question "arising in any matter before" the Commission, connotes a quasi-judicial context, which is consistent with the quasi-judicial functions that the Commission exercises under the Commerce Act.

[20] But the Commerce Commission does not exercise a quasi-judicial function under the CCCFA. Having regard to the new role of the Commission under the CCCFA and the broad purposes of that Act, it must have been contemplated that the case stated procedure would be available other than in the quasi-judicial context. Mr Galbraith acknowledged this but argued, nevertheless, that the case stated procedure under s 113(g) was intended to have a more restricted use. He suggested, for example, that it might properly be used by the Commission to fulfil its function under s 111(2)(d) of providing guidance on the application of the CCCFA. In that context a case could properly be stated on a question of general statutory interpretation for enforcement proceedings.

[21] A restrictive approach to the scope of s 100A runs counter to the view taken by MacKenzie J in *Commerce Commission v Orion New Zealand Ltd* with which I respectfully agree.[3] The case was brought in the context of the Commission's regulatory functions under the Commerce Act relating to "regulated goods and services" (electricity lines companies). The questions asked related to whether one section of the Commerce Act should be read subject to another and the point from which the statutory time frames should run. MacKenzie J was concerned as to the appropriateness of the case stated procedure, given that the answer to the first

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[3] *Commerce Commission v Orion New Zealand Ltd* [2013] NZHC 1181, (2013) 13 TCLR 610.

question could not actually affect Orion's position and, depending on when the Commission made its decision, the second question might not become material either. The Judge said:[4]

> As a general rule, where declaratory relief is sought, the Court is reluctant to deal with abstract or hypothetical questions.[5] I do not think that general rule should necessarily be applied under s 100A. Nor do I consider that a restrictive approach should, as a general rule, be taken as to what is a question of law arising in a matter before the Commission. The Commission is empowered to state a case for the opinion of the Court on any question of law arising in any matter before it. The utility of this procedure would be diminished if a restrictive approach were taken to the exercise of the jurisdiction.

[22] The scope of the case stated procedure under 100A Commerce Act, when exercised pursuant to s 113(g) CCCFA, is informed by the relevant text and in light of its purpose, as required by s 5 of the Interpretation Act 1999. The purpose of s 113 generally is to provide the Commission with the procedural tools it needs to discharge its functions. I do not accept that the words "any matter arising before it" need to be read down. I consider that the case stated procedure was intended, in the context of s 113(g) of CCCFA, to equip the Commission with the means of consulting the Court on matters of law that arise in the course of its investigations so that it can discharge its obligations more effectively and economically.

[23] One of the Commission's functions is deciding whether enforcement proceedings are warranted. Mr Galbraith argued that, whatever the possible uses of the case stated procedure under the CCCFA it ought not be used against a specific party as a substitute for enforcement proceedings. Whilst I agree with that submission, I do not accept that the Commission is precluded from stating a case to clarify a point for the purposes of determining whether enforcement proceedings should be taken, nor that doing so would be using the procedure as a substitute for enforcement proceedings.

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4 At [12].

5 Citing *New Zealand Insurance Co Ltd v Prudential Assurance Co Ltd* [1976] 1 NZLR 84 (CA) at 85 and *Gazley v Attorney-General* (1995) 8 PRNZ 313 (CA).

[24] Nor do I accept that the case stated procedure is precluded in relation to a specific party. Both *Orion* and the other comparable case, *Securities Commission v Contributory Mortgage Investments*, concerned specific parties.[6] It is true, of course, that those cases were brought in the context of the relevant regulator's quasi-judicial function but I do not see that fact as a reason to treat a case stated under s 113(g) differently. Concerns about the usual right of a defendant to adduce evidence are misplaced because if there truly are disputed facts, the case stated procedure will not be appropriate.[7]

[25] This leads to the third objection to the case stated, that it depends on disputed facts. Under Part 21 of the High Court Rules it is for the Commission to determine what information is necessary to include in the case stated.[8] Harmoney says that the Commission's factual summary, whilst correct as far as it goes, is incomplete for the purpose of answering the questions posed and should therefore be regarded as disputed. It is concerned about the risk of issue estoppel in relation to future enforcement proceedings. Mr Galbraith argued that the interpretation of the statutory provisions that apply to peer-to-peer lending and the documents used in the lending transactions should be informed by a full understanding of the character of the peer-to-peer lending regime. He was particularly critical of the Commission's failure to provide any evidence or documentation relating to the FMCA licensing process (which Harmoney considers relevant to the Commission's assertion that it is operating as a creditor) and documents showing how the website operates.

[26] Mr Mills QC, for the Commission, does not accept that the facts are incomplete but suggested that some of the questions could be re-framed so that they are preceded by the words "on the basis of the documents and the factual summary" in order to provide further clarity regarding the settled facts upon which the case stated was advanced. Whilst it is open to the Commission to amend its case stated, doing so would not be effective to remove any genuine factual issue. In this regard, Dobson J's observation in *Contributory Mortgage Investments* is apt:[9]

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6 *Securities Commission v Contributory Mortgage Investments Ltd* HC Wellington CIV-2008-485-792, 19 November 2008 (decided under s 69O of the Securities Act 1978).

7 *Sayer v Commissioner of Inland Revenue* (1998) 12 PRNZ 471 (HC) at 474.

8 High Court Rules, r 21.9.

9 At [9].

> The terms of 69O(3) appear to be mandatory. However, the Court is not required to determine questions of fact wrongly characterised as a question of law. The Court must always remain in control of its own processes, and a contention on behalf of the Commission that a question of law has been posed cannot bind the Court to treat it as such. Nor can the section require the Court to answer a question where factual uncertainty or complexity is likely to render an answer conducive to confusion rather than clarification of the law.

[27] Nor do I accept the Commission's argument that there would be no prejudice to Harmoney because it could seek to defend subsequent proceedings by identifying material facts not before the Court on the case stated and showing why those facts should lead to a different result. If the same point of law arises in a future case the answer produced in the case stated may very well bind the parties.[10]

[28] I accept that if, objectively, the facts relied on by the Commission are incomplete for the purposes of answering the questions, they ought to be regarded as disputed, in which case the case stated procedure will be inappropriate. Whether that is the case, though, depends on the nature of the questions, the issue to which I turn next.

The case stated procedure under s 100A is limited to questions of law

Identifying questions of law

[29] Harmoney characterises the questions posed by the Commission as mixed questions of fact and law and therefore not amenable to the case stated procedure under s 100A. I do not accept this argument.

[30] The Supreme Court of Canada's decision in *Canada (Director of Investigation and Research) v Southam Inc* offers a straightforward explanation of the difference between mixed questions of fact and law and questions of law which has been relied on in New Zealand:[11]

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[10] *Joseph Lynch Land Company Ltd v Lynch* [1995] 1 NZLR 37 (CA); *Arbuthnot v Chief Executive of the Department of Work and Income* [2007] NZSC 55, [2008] 1 NZLR 13 at [29]-[30]. See also *Link Technology 2000 Ltd v Attorney-General* [2006] 1 NZLR 1 (CA) at [52]-[54], citing *Arnold v National Westminster Bank plc* [1991] 2 AC 93 (HL), for the proposition that inclusion of additional material will prevent an issue estoppel from arising only where that material was not reasonably available in the previous proceedings.

[11] *Canada (Director of Investigation and Research) v Southam Inc* [1997] 1 SCR 748 at [35], cited in *Nixon v Walker* HC Auckland CIV-2007-404-1372, 13 July 2007 at [25], and *Shell (Petroleum Mining Company Ltd) v Vector Gas Contracts Ltd* [2014] NZHC 31 at [43].

> Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what "negligence" means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact. I recognise, however, that the distinction between law on the one hand and mixed law and fact on the other is difficult. On occasion, what appears to be mixed law and fact turns out to be law, or *vice versa*.

[31] Although the expression "mixed question of fact and law" is often used in New Zealand, such a question is more accurately described as a question of application (i.e. of the law to the facts); as the Supreme Court pointed out in *Bryson v Three Foot Six Ltd* the application of the law to the facts does not actually mix fact and law.[12] The Court of Appeal expressed this same concept in slightly different terms in *R v Vaihu* when it said that "the legal consequences of facts as found by a Judge have long been regarded as a conventional question of law".[13]

[32] Nor is it correct to say that such questions cannot be the subject of challenge or a case stated based on a question of law. The real issue is whether, in the application of the law to the facts under review, there is an identifiable question of law.

[33] In *Edwards v Bairstow*, on the question of what amounts to an error of law, Lord Radcliffe said:[14]

> I think that the true position of the court in all these case can be shortly stated. If a party to a hearing before commissioners expresses dissatisfaction with their determination as being erroneous in point of law, it is for them to state a case and in the body of it to set out the facts that they have found as well as their determination. I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. *If the case contains anything ex facie which is bad law and which bears on the determination, it is, obviously, erroneous in point of law. But without any misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant*

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12 *Bryson v Three Foot Six Ltd* [2005] NZSC 43, [2005] 3 NZLR 721 at fn 23, referring to the discussion in Timothy Endicott "Questions of Law" (1998) 114 LQR 292.

13 *R v Vaihu* [2010] NZCA 145 at [23].

14 *Edwards v Bairstow* [1956] AC 14 at 36.

> *law, could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there too, there has been an error in point of law.* I do not think it much matters whether this state of affairs is described as one in which there is no evidence to support the determination, or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three.
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> (emphasis added)

[34] In *Commissioner of Inland Revenue v Walker*, Gresson P, citing *Edwards v Bairstow*, said:[15]

> It was contended that as the judgment appealed from amounted to findings of fact or inferences of fact, it was as such unassailable upon an appeal in law. I do not accept that contention since the proper construction of the statute is involved which is necessarily a matter of law.

[35] Observing that the question as to what are matters of fact and what are matters of law is often difficult and the subject of conflicting decisions, the Judge noted the following observation by Lord Parker in *Farmer v Cotton's Trustees* that:[16]

> The views from time to time expressed in this House have been far from unanimous, but in my humble judgment where all the material facts are fully found and the only question is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, the question is one of law only.

[36] Gresson P considered this to be "the only reasonable view" and later added:[17]

> There is also difficulty in determining at what stage inferences from primary facts cease to be inferences of fact and become inferences of law. But even where an appeal is limited to an appeal in law, a mixed question of law and fact is assailable as a matter of law.

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15 *Commissioner of Inland Revenue v Walker* [1963] NZLR 339 (CA) at 353.

16 *Farmer v Cotton's Trustees* [1915] AC 922 (HL) at 932, cited in *Commissioner of Inland Revenue v Walker*, above n 15, at 353 – 354.

17 At 354, citing *Commissioners of Inland Revenue v Lysaght* [1928] AC 234 (HL) at 241, and *Great Western Railway Co v Bater* [1922] 2 AC 1 (HL) at 12. See also *Fitzpatrick v Inland Revenue Commissioners* [1994] 1 WLR 306 at 327. Followed in *Impact Manufacturing Ltd v Accident Rehabilitation and Compensation Insurance Corp* HC Wellington AP266/00, 6 July 2001; *Spencer v District Court at Wellington* HC Wellington CIV-2006-485-1601, 5 October 2007; *Accident Compensation Corp v White* [2005] NZAR 110 (HC); *Millin v Accident Compensation Corp* [2016] NZHC 1287; *Beveridge v Accident Compensation Corp* [2016] NZHC 511.

[37] That a mixed question of fact and law is amenable to review even where the only available ground is error of law was affirmed by the House of Lords in *Fitzpatrick v Inland Revenue Commissioners*.[18]

[38] In New Zealand, the answer to the problem of identifying a question of law where the first instance tribunal is charged with fact finding and the only ground of challenge is error of law is most clearly articulated in the Supreme Court's decision in *Bryson*. The case concerned an appeal arising from a decision of the Employment Court. The critical question was whether there existed a contract of service. In the employment context this question has long been established as being a question of fact, save in exceptional cases. The only ground of appeal was error of law. Blanchard J, writing for the Court, said that, other than in cases where the relationship was dependent solely upon the construction of a document (a recognised question of law):[19]

> … the task which the lower Court is engaged upon is the application of the law to the facts before it in the individual case. It involves a question of law only when the law requires that a certain answer be given because the facts permit only one answer …
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> An ultimate conclusion of a fact-finding body can sometimes be so unsupportable – so clearly untenable – as to amount to an error of law; proper application of the law requires a different answer. That will be the position only in the rare case in which there has been, in the well-known words of Lord Radcliffe in *Edwards v Bairstow*, a state of affairs "in which there is no evidence to support the determination" or "one in which the evidence is inconsistent with and contradictory of the determination" or "one in which the true and only reasonable conclusion contradicts the determination". Lord Radcliffe preferred the last of these three phrases but he said that each propounded the same test.

[39] In the context of a case stated under s 100A, which proceeds on undisputed facts, there is no question of error. The procedure is simply a means by which the Commission can obtain the advice of the High Court on a question of law. A question that requires the Court to determine whether undisputed facts fall within the scope of an enactment is a question of law for this purpose.

[40] Before leaving this issue I note the development of a more flexible approach in the United Kingdom to the categorisation of questions of fact and law as a result

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18 *Fitzpatrick v Inland Revenue Commissioners*, above n 17.
19 *Bryson*, above n 12, at [21] and [26].

of the decisions of the House of Lords in *Moyna v Secretary of State for Work and Pensions* and *Serco Ltd v Lawson*.[20] In *Serco* Lord Hoffman, responding to a submission that a tribunal's conclusion was a finding of fact which the Employment Appeal Tribunal and the House of Lords had no jurisdiction to disturb, said:[21]

> Like many such decisions, it does not involve any finding of primary facts (none of which appear to have been in dispute) but an evaluation of those facts to decide a question posed by the interpretation which I have suggested should be given to s 94(1) … Whether one characterises this as a question of fact depends, as I pointed out in *Moyna v Secretary of State for Work and Pensions*, upon whether as a matter of policy one thinks that it is a decision which an appellate body with jurisdiction limited to errors of law should be able to review.

[41] Writing extra-judicially in his capacity as Senior President of Tribunals about the 2007 restructuring of the UK tribunal system, Lord Carnwath referred to the development in *Moyna* as suggesting that questions of categorisation (law or fact) could be looked at in a more flexible way than previously.[22] He observed that:[23]

> The idea that the division between law and fact should come down to a matter of expediency might seem almost revolutionary. However, the passage did not attract any note of dissent or caution from the other members of the House. That it was intended to signal a new approach was confirmed in … *Lawson v Serco Ltd* …
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> … it seems now to be authoritatively established that the division between law and fact in such classification cases is not purely objective but must take account of factors of "expediency" or "policy". Those factors include the utility of an appeal, having regard to the development of the law in the particular field, and the relevant competencies in that field of the tribunal of fact on the one hand, and the appellate court on the other. Secondly, even if such a question is classed as one of law, the view of the tribunal of fact must be given weight.

[42] In *Southam* the Supreme Court of Canada expressed a view consistent with this approach:[24]

> For example, the majority of the British Columbia Court of Appeal in *Pezim*, *supra*, concluded that it was an error of law to regard newly acquired information on the value of assets as a "material change" in the affairs of a company. There was common ground in that case that the proper test was

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20 *Moyna v Secretary of State for Work and Pensions* [2003] UKHL 44, [2003] 1 WLR 1929 at [25]–[27]; *Serco Ltd v Lawson* [2006] UKHL 3. See also the discussion by Lord Carnwath, writing extra-judicially in his capacity as Senior President of Tribunals.

21 At [34] (citations omitted).

22 Robert Carnwath "Tribunal Justice – a New Start" [2009] PL 48 at 61 – 64.

23 At 63.

24 At [36]–[37].

> whether the information constituted a material change; the argument was about whether the acquisition of information of a certain kind qualified as such a change. *To some extent, then, the question resembled one of mixed law and fact. But the question was one of law, in part because the words in question were present in the statutory provision and questions of statutory interpretation are generally questions of law, but also because the point in controversy was one that one might potentially arise in many cases in the future*: the argument was about kinds of information and not merely about the particular information that was at issue in that case …
>
> By contrast, the matrices of facts at issue in some cases are so particular, indeed so unique, that decisions about whether they satisfy legal tests do not have any great precedential value … In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact … Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.
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> (emphasis added)

[43] I have not needed to consider whether this more flexible approach is appropriate in NZ; the established principles suffice. The development is, however, of interest because of the obvious policy considerations that arise in relation to enactments such as the CCCFA.

The Commission's case stated – does it raise identifiable questions of law?

[44] Harmony argued that the questions posed in the case stated do not raise questions of law. First, it says that the questions are not questions about the legal interpretation of statutory terms but rather whether certain facts (selected by the Commission) fall within the legal interpretation of the statutory terms. I do not accept this submission; as I have discussed already, questions involving the application of the law to facts may produce a question of law that is amenable to review or a case stated.

[45] Secondly, Harmoney argues that the questions require the interpretation of contractual documents, which will involve consideration of factual background and are therefore not suitable for a case stated. I do not accept this argument. The established position in New Zealand, affirmed in *Bryson*, is that the construction of a document is a matter of law.[25] Mr Galbraith invited me to depart from that position

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[25] At [20].

on the basis of a decision of the Supreme Court of Canada, *Sattva Capital Corp v Creston Moly Corp*, in which the Court held that because modern principles of contractual interpretation require background facts to be taken into account, a question of contractual interpretation should no longer be viewed as a question of law but rather a mixed question of fact and law.[26]

[46] *Sattva* concerned an appeal against an arbitral award. Rothstein J, writing for the Court, observed that the historical rationale for treating the determination of legal rights and obligations under a written contract as a question of law no longer applied and that some Canadian courts had abandoned the historical approach in favour of treating the interpretation of written contracts as an exercise involving either a question of law or a question of mixed fact and law. The basis for this approach was two-fold; the modern principle of contractual interpretation of taking the factual background to the contract into account in interpreting it and the explanation in *Southam* and *Housen v Nikolaisen* of the difference between questions of law and questions of mixed fact and law.[27] *Southam* and *Housen* were not contract cases but, applying them to the contractual context, Rothstein J said:[28]

> … the historical approach to contractual interpretation does not fit well within the definition of a pure question of law identified in *Housen* and *Southam*. Questions of law "are questions about what the correct legal test is" (*Southam* at para 35). Yet in contractual interpretation, the goal of the exercise is to ascertain the objective intent of the parties – a fact-specific goal – through the application of legal principles of interpretation.
>
> With respect for the contrary view, *I am of the opinion that the historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.*
>
> *The purpose of the distinction between questions of law and those of mixed fact and law further supports this conclusion. One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. It reflects the role of courts of appeal in ensuring the consistency of the law, rather than in providing a new forum for parties to continue their private litigation.* For this reason, *Southam* identified the degree of generality (or "precedential value") as the key difference between a question

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[26] *Sattva Capital Corp v Creston Moly Corp* [2014] SCC 53, [2014] 2 SCR 633.
[27] *Housen v Nikolaisen* 2002 SCC 33, [2002] SCR 235.
[28] At [49]–[52].

> of law and a question of mixed fact and law. The more narrow the rule, the less useful will be the intervention of a court of appeal.
>
> … The legal obligations arising from the contract are, in most cases, limited to the interest of the particular parties. Given that our legal system leaves broad scope to tribunals of first instance to resolve issues of limited application, this supports treating contractual interpretation as a question of mixed fact and law.

[47] Rothstein J did contemplate the possibility that questions of law might arise from cases in which contracts had been interpreted with the benefit of background facts. These included the application of an incorrect principle, the failure to consider a required element of a legal test or the failure to consider a relevant factor. But he warned that courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation:[29]

> … the goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific. The close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare.

[48] Both *Bryson* and *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* (in which the Supreme Court summarised the principles relating to contractual interpretation) pre-dated *Sattva* and *Sattva* appears not to have been judicially considered in any New Zealand or United Kingdom case.[30] It is not for this Court to depart from the Supreme Court's statement on this issue in favour of the *Sattva* approach.

[49] Nor do I necessarily agree with the *Sattva* approach, under which the contractual interpretation is regarded as inherently fact-specific. Under the recognised principles of contractual interpretation the search is for the "meaning which the document would convey to a reasonable person having all the background knowledge that would reasonably have been available to the parties in the situation in which they were at the time of the contract".[31] It is this objective meaning that is

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29 At [55].

30 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60], citing *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL); *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 at [14] per Lord Hoffman; *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988 at [16] per Lord Hoffman; *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8, [2002] 1 AC 251 at [39] per Lord Hoffman.

31 *Investors Compensation Scheme v West Bromwich Building Society*, above n 30, at 912 per Lord Hoffman.

taken to be that which the parties intended.[32] The question is not one of fact and it would be wrong, in my view, to describe it as a fact-specific task.

[50] It is true, of course, that admissible background evidence includes anything that should have been reasonably available to the parties, and this may involve a question about what the parties actually knew. But it is more likely to involve a question of identifying which facts are relevant to the interpretive exercise and an error in categorisation ought not to be regarded as raising a question of fact.[33]

[51] In any event, as Mr Mills pointed out, the case stated does not actually involve a question of contractual interpretation in the sense of ascertaining the parties' presumed intentions; it is concerned with the application of the CCCFA to a transaction that is effected by the documents. The answer may or may not coincide with the parties' presumed intentions as they would be found by considering the relevant background facts. But for the purposes of the CCCFA and the obligations imposed under it, those intentions do not arise for consideration.

The Commission's questions

[52] Question 1 asks: Is the "credit contract", as defined in s 7 of the CCCFA, comprised of a number of the documents operating together, or just the Loan Contract?

[53] The parties agree that a credit contract, as defined in s 7(1), exists. They disagree over which documents comprise the contract. The purpose of question 1 is to identify the contractual documents. It requires the Court to consider the effect of the documents against the statutory definition of "credit" and "credit contract" i.e. the application of the law to the facts. This question is different to the interpretation of the contract for the purposes of ascertaining the intention of the parties in order to resolve a dispute between them. I do not see that contextual material would assist in this enquiry. I find that question 1 is a question of law for the purposes of the case stated and that it can be answered by reference to the material relied on by the Commission.

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32 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*, above n 30, at [60].
33 *Ogilvy & Mather (New Zealand) Ltd v Turner* [1996] 1 NZLR 641 (CA) at 657.

[54] Question 2 asks: Is there a transaction that is in substance or effect a "credit contract" within the meaning of s 7(2) of the CCCFA?

[55] Question 2 does require consideration of the factual circumstances in which the contracts were made. Cases decided in the context of the Credit Contracts Act make this clear; in *O'Connor v Heaslip* for example, Gallen J, considering whether a contract was "in substance or effect a credit contract" (the wording of s 3(4) Credit Contracts Act) said:[34]

> The Credit Contracts Act is designed to ensure that particular relationships do not result in a disadvantage to one party and, in my view, s 3(4) is worded in sufficiently wide terms to ensure that the general purpose of the Act is not evaded by the use of conveyancing devices. The question at issue here is not to be answered by a careful analysis of the legal incidents of the methods used to achieve the particular result, but by looking in the round at the result which was intended and achieved in this case.

[56] In my view answering this question would require a broader understanding of the nature and operation of lending via the Harmoney platform than is provided by the document and the summary contained in the case stated. This is particularly so in relation to the actual effect of the transactions on Harmoney, which makes assertions regarding the effect of its structures. Question 2 is not amenable to a case stated.

[57] Question 3 asks: Which entity or entities are the "creditor(s)" for the purposes of the CCCFA, as defined in s 5 of the CCCFA?

[58] The Commission asserts that, on the documents, both the trustee and Harmoney are creditors under the credit contract. Harmoney maintains that only the trustee is a creditor. It submitted that this question would require the Court to draw inferences (presumably meaning that it would require a finding of fact), pointing out that whilst the Loan Contract provides that the trustee is the lender, the Borrower Agreement provides that it is Harmoney that provides the lending services. Under s 5, however, a creditor means "a person who provides, or may provide, credit under a credit contract". This question turns entirely on the interpretation of the credit contract, which will have been identified in the answer to question 1. It is a question that involves the construction of a document and is a question of law.

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[34] *O'Connor v Heaslip* (1989) 1 NZLR 632 at 637.

[59] Question 4 asks: Is the Harmoney platform fee a "credit fee" as defined in s 5 of the CCCFA?

[60] This question requires the Court to interpret the credit contract. Under s 5 "credit fees" means "fees or charges payable by the debtor under a credit contract, or payable by the debtor to, or for the benefit of, the creditor in connection with a credit contract". Clearly, the question can only be answered by the proper construction of the documents in issue. It is a question of law and permissible.

[61] Question 5 asks: Is the Harmoney platform fee an "establishment fee" as defined in s 5 of the CCCFA?

[62] The platform fee is defined in the Borrower Agreement as "the fee payable by the Borrower to Harmoney for arranging any Loan which settles, as set out on the website under the Interest Rates & Fees Section". Harmoney argued that the fee provided for under the contract ostensibly relates to only one service. In comparison "establishment fee" is defined in s 5 as covering a variety of services, namely, "the fees or charges payable under the credit contract that relate to the costs incurred by the creditor in connection with the application for credit, processing and considering that application, documenting the contract, and advancing the credit; but does not include any fee or charge to the extent that it is a charge for an optional service".

[63] Harmoney's argument was that determining the extent to which the steps for which the Harmoney fee is payable correlate to the services referred to in the statutory definition and would require an enquiry into the facts. I agree that, in one respect, the question raises an issue of fact that would need to be resolved before the question could be answered. There are four aspects to which a fee or charge can relate under the definition of establishment fees: (1) costs incurred by the creditor in connection with the application for credit (2) processing and considering an application (3) documenting the contract and (4) advancing the credit. Whether the fees payable under the Harmoney contract relate to the last three services is a question of construction. No factual finding is necessary. However, determining whether the platform fees "relate to the costs incurred by the creditor in connection with the application for credit" raises a factual question; the documents do not provide any information about the costs incurred by the creditor – what they are for

or how much they are. If nothing is known about the costs incurred by the creditor it is not possible for the Court to determine whether the fees are payable in relation to those costs. As a result, question 5 is not suitable for a case stated.

[64] It follows from these conclusions that questions 1, 3 and 4 are permissible questions for a case stated. Questions 3 and 4 should, however, be amended so that they are prefaced by the words "on the basis of the documents and the factual summary". Questions 2 and 5 are not permissible.

Summary and result

[65] The Commission's case stated essentially seeks to establish the threshold for the application of the CCCFA to peer-to-peer lending arrangements before it considers the position of individual contracts. I am satisfied that doing so is within the intended purpose of the case stated procedure under s 113(g).

[66] I am satisfied that questions 1, 3 and 4 are appropriate for the case stated procedure, though they are to be slightly amended as explained above. Questions 2 and 5 are not permissible because they require determination of factual questions before the relevant law could be applied.

[67] The application to strike out succeeds in relation to questions 2 and 5 only.

[68] Counsel may address the question of costs in memorandum, though since each party has succeeded in part it may be appropriate for costs to lie where they fall.

P Courtney J