IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2016-404-002125
[2017] NZHC 2421

	BETWEEN	COMMERCE COMMISSION Plaintiff/Respondent
	AND	HARMONEY LIMITED Defendant/Applicant

Hearing: 27 September 2017

Appearances: J Every-Palmer QC, J D Cairney and A D Luck for Plaintiff/Respondent
A R Galbraith QC and A M Callinan for Defendant/Applicant

Judgment: 3 October 2017

JUDGMENT OF VENNING J

This judgment was delivered by me on 3 October 2017 at 4.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date..........

Solicitors: Meredith Connell, Auckland
Simpson Grierson, Auckland
Copy to: J Every-Palmer QC, Wellington
A R Galbraith QC, Auckland

The application

[1] The Commerce Commission (the Commission) has brought a case stated against Harmoney Limited (Harmoney). It is before the Court for determination on 25 and 26 October 2017. Harmoney seeks to strike out the case stated as an abuse of process. It is the second time Harmoney has sought to strike the proceeding out.

General background

[2] As Courtney J explained in her decision on the first strike out application, peer-to-peer lending is a form of lending under which an intermediary operating through a web-based platform matches lenders and borrowers.[1] The intermediary contracts separately with each; the lenders and borrowers do not enter into a direct contract with one another.

[3] 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. Harmoney is licensed under the FMCA to operate a web-based peer-to-peer lending platform.

Procedural background

[4] The Commission brought a case stated to clarify the application of the CCCFA to peer-to-peer lending in general and in relation to Harmoney's structure in particular. Harmoney is the largest operator in the market.

[5] 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 stated poses questions about this fee and

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1 *Commerce Commission v Harmoney* [2017] NZHC 1167 at [1].

other aspects of peer-to-peer lending transactions effected through Harmoney's platform.

[6] Harmoney first applied to strike out the case stated on the ground that it required the determination of mixed questions of fact and law and so fell outside the scope of the case stated procedure.

[7] Courtney J concluded that:

> [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) [of the CCCFA].

[8] The Judge accepted that three of the five questions (as amended) were appropriate for the case stated procedure. The remaining two questions were not permissible because they would require determination of factual questions before the relevant rule could be applied.

[9] Following Courtney J's decision the questions that remain for determination on 25 and 26 October 2017 are:

(a) 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?

(b) On the basis of the documents and the factual summary, which entity or entities are the creditor(s) for the purposes of the CCCFA, as defined in s 5 of the CCCFA?

(c) On the basis of the documents and the factual summary, is the Harmoney platform fee a "credit fee" as defined in s 5 of the CCCFA?

[10] On 25 August 2017 the Commission filed a separate proceeding against Harmoney (CIV-2017-404-1970), (the enforcement proceeding).

Harmoney's current application

[11] Harmoney says that all relevant issues in the claim will be determined in the enforcement proceedings. The questions of law in the case stated as amended are now wholly duplicated by those proceedings. While Mr Galbraith QC accepted that the case stated procedure may be available to the Commission he argued that did not prevent the Court acting to control its processes. The case stated proceedings should be struck out as an abuse of process.

The Commission's response

[12] The Commission says that it is in the interests of justice for the case stated proceeding to be heard first. There is no prejudice to Harmoney and no abuse as the enforcement proceeding has been stayed. Striking out the case stated is not required.

Discussion

[13] The application to strike out is made under r 15.1(1):

> **15.1 Dismissing or staying all or part of proceeding**
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> (1) The court may strike out all or part of a pleading if it—
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> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
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> (b) is likely to cause prejudice or delay; or
>
> (c) is frivolous or vexatious; or
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> (d) is otherwise an abuse of the process of the court.

[14] In the present case Harmoney relies on 15.1(1)(b) and (1)(d) in particular. Although Harmoney's application suggested that, as an alternative to striking out the case stated, the Court might stay the case stated proceedings, the reality is that if the case stated proceedings were stayed, there would be nothing left to be determined after the enforcement proceedings were finally determined. If Harmoney succeeds on this application, the case stated proceedings would be struck out.

Prejudice or delay

[15] There is no basis to strike out or stay the proceeding on grounds of prejudice or delay under r 15.1(1)(b). While there will be an additional cost to Harmoney in disputing the case stated proceeding that is not sufficient to support strike out. In *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* the Court of Appeal said that to strike out on the basis of r 15.1(1)(b) requires an element of impropriety and abuse of the Court's process.[2] Typically that will involve unnecessary prolix proceedings, scandalous proceedings, unintelligible pleadings or irrelevant matters. None of those features apply to the Commission's case stated.

[16] There will be only a very limited delay in the progress of the enforcement proceedings if the case stated proceedings are heard first. The enforcement proceedings have only recently been filed and, although stayed, are at a very preliminary stage. Any fixture in them is likely to be 12 to 18 months away. By contrast, the preparation is effectively complete for that case stated fixture scheduled for 25 and 26 October 2017.

[17] Mr Galbraith suggested that there may be further delay associated with appeals from the case stated decision. That may be so but against that, depending on the outcome of the case stated proceedings the ambit of the enforcement proceedings will at the least be refined.

[18] On the first question, the Commission seeks an answer to whether the credit contract under s 7 of the CCCFA is comprised of a number of documents or just the loan document. In the enforcement proceeding the Commission pleads that each contract contains terms set out in:

- the borrower agreement;
- the loan contract; and
- the loan disclosure;

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[2] *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 at [89].

and that each one is a credit contract. Harmoney says the credit contract is the loan contract.

[19] On the second question the Commission seeks an answer as to which entity is the creditor for the purposes of the CCCFA. In the enforcement proceedings the Commission pleads that both Harmoney and Harmoney Investor Trustee Limited (HITL) are creditors. Harmoney argues that only HITL is a creditor.

[20] On the third question the Commission asks whether the Harmoney platform fee is a credit fee as defined in s 5 of the CCCFA. In the enforcement proceedings the Commission pleads the platform fee is a credit fee.

[21] In addition, in the enforcement proceedings the Commission pleads in the alternative to the point raised by the first question, that each contract is a credit contract in substance or effect.[3] The Commission also pleads that the platform fee is an establishment fee and that the platform fee is unreasonable. Finally the enforcement proceedings pleads that consumers have suffered loss or damages.

[22] The Commission has suggested that if the outcome of the case stated is adverse to it, it may not pursue the enforcement proceedings further. Mr Galbraith made the point that the Commission has made no commitment not to run the argument the relevant documents are a credit contract in substance and effect even if unsuccessful on the questions in the case stated. He submitted that counted against the utility of the case stated proceedings.

[23] Mr Galbraith also submitted the case stated will be of limited value given it is confined to legal argument, and it will be specific to Harmoney's documents. He questioned whether the case stated would have the wider application that the Commission argued for. None of the six other licence peer-to-peer operators have shown any interest in being involved in the proceeding. The Commission could identify only one peer-to-peer operator which may have a similar structure.

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3 *Harvey v DBR* HC Auckland CIV-2010-404-7052, 2 December 2010.

[24] Mr Galbraith next submitted that if the case stated proceedings were allowed to continue there was a risk of inconsistent decisions by the Court. He noted that there was the usual risk associated with preliminary questions, namely that what might appear to be the shortest route may in the long-term be the longest way home.

[25] This is not a situation of a preliminary question. The case stated procedure follows the procedure provided for by s 113(g) of the CCCFA which incorporates s 100A of the Commerce Act 1986.

[26] The answers to the second and third questions posed by the case stated are likely to be determinative of the pleadings in the enforcement proceedings that are directed at the same issues. To that extent I agree with Mr Every-Palmer QC that at the very least the ambit of the enforcement proceedings will be significantly refined by the outcome of the case stated proceedings.

[27] Further, if the Commission succeeds on the first question and establishes that the credit contract is comprised of the documents operating together then that will be determinative of the related pleading in the enforcement proceeding for example. If on the other hand the Commission fails on that argument in the case stated while it would still be open for the Commission to argue in the alternatively that each contract is a credit contract in substance or effect the outcome of the case stated will inform whether that is a viable argument.

[28] The only practical disadvantage in proceeding with the case stated is the additional cost that Harmoney will incur. However, the costs of the case stated proceeding have largely already been incurred. The case is effectively ready to go to hearing. It will only involve one or at most two days hearing. If ultimately Harmoney is successful then it will be entitled to a contribution at least towards its costs.

[29] There is insufficient prejudice or delay to the ultimate determination of the issues between the Commission and Harmoney for the application to succeed on the basis of r 15.1(1)(b).

Abuse of process

[30] Mr Galbraith relied on the *Henderson* principle to support his submission that the case stated proceedings were an abuse of process under r 15.1(1)(d) and the Court should strike them out.[4] He submitted it was an abuse of process to have two sets of proceedings which dealt with the same issue before the Court.[5]

[31] The classic statement of the law by Wigram V-C from *Henderson* is:[6]

> In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special-case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

[32] The *Henderson* principle is a form of res judicata. The application of res judicata was recently considered by the UK Supreme Court in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd*.[7] In that case Lord Sumption who delivered the leading judgment of the Court identified the following types of res judicata:

(a) cause of action estoppel;

(b) estoppel – based on the ruling in *Conquer v Boot* which prevents the recovery of further damages;[8]

(c) merger;

(d) issue estoppel;

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4 *Henderson v Henderson* (1843) 3 Hare 100, [1843-60] All ER Rep 378.
5 *Otis Elevator Co Ltd v Linnell Builders Ltd* (1991) 5 PRNZ 72 (HC).
6 *Henderson v Henderson* above n 4, at 382. .
7 *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160, [2013] 4 All ER 715, at [18].
8 *Conquer v Boot* [1928] 2 KB 336, [1928] All ER Rep 120.

(e) the *Henderson v Henderson* principle; and

(f) the more general procedural rule against abusive proceedings, which Lord Sumption considered may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger.

[33] During the course of his judgment Lord Sumption referred to the comments of Lord Bingham in *Johnson v Gore Wood* that:[9]

> '*Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. … It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.'

[34] Lord Sumption concluded that res judicata and abuse of process are juridically very different. Res judicata is a rule of substantive law, while abuse of process is a concept which informed the exercise of the court's procedural powers. They are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. The purpose made it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive.[10]

[35] Harmoney's argument is essentially that the two sets of proceedings are an abuse of process as they are duplicative. In both *Otis Elevator Co Ltd v Linnell Builders Ltd* and *Cowley v Shortland Publications Ltd* the Court applied the principle that it was prima facie vexatious to have two proceedings before the Court

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9 *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd*, above n 7, at [24] citing from *Johnson v Gore* Wood [2001] 1 All ER 481.

10 At [25].

that sought the same relief.[11] However, in both cases there was a direct duplication of the issues, albeit in different proceedings. The present case is different. The nature of the two sets of proceedings are different. The relief sought is different. The procedure is different. Under s 111 of the CCCFA the Commission has a number of functions under the Act including to take civil proceedings. Section 113(g) of the Act provides that s 100A, the section providing for the Commission to state the case for opinion of the High Court, applies to the Commissioner's powers under the CCCFA. The enforcement proceedings raise issues that cannot be raised in the case stated proceedings.

[36] While there are some issues common to both, in the overlap on the three questions of law, the important distinction between the two sets of proceedings is that they seek different relief.

[37] Mr Galbraith suggested that in her judgment Courtney J had acknowledged that the case stated procedure should not be used instead of the enforcement proceedings. The Judge said:[12]

> [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.

[38] However, the Judge was not suggesting that the Commission had to choose between pursuing the case stated or the enforcement proceedings. Indeed the Judge contemplated that the Commission might first issue case stated proceedings and then, depending on the outcome of those proceedings, could pursue enforcement proceedings. That is effectively what the Commission intends to do.

[39] The enforcement proceedings were only filed on 25 August 2017 to avoid the possibility of limitation arguments. The Commission has agreed to them being

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11 *Otis Elevator Co Ltd v Linnell Builders Ltd*, above n 5; and *Cowley v Shortland Publications Ltd* (1991) 5 PRNZ 76

12 *Commerce Commission v Harmoney*, above n 1, at [23].

stayed. Mr Every-Palmer advised that the Commission had considered the possibility of exploring a tolling agreement. The Commission considered there were issues with the legislation and Harmoney might not have agreed in any event. Ultimately the Commission considered it was not practical and the better course was to issue the enforcement proceedings and have them stayed.

[40] There was some debate between the parties as to whether Harmoney engaged in the case stated proceeding or whether it was effectively left with no option but to answer the proposed case stated by the Commission and to that extent was forced to engage. Nothing turns on that particular issue for the purposes of this strike out. If Harmoney's point is a sound one and the proceedings are an abuse then they should be struck out even if Harmoney had previously agreed to participate in them.

[41] The decision to strike out is a discretionary decision. I consider that the significant and determinative feature in this case is that the two sets of proceeding are different in nature and character. The Commission cannot raise in the case stated proceedings the issues it wishes to raise in the enforcement proceedings. As noted Courtney J concluded that it would have been open for the Commission to proceed to use the case stated procedure to inform whether to take enforcement proceedings.

[42] Mr Galbraith submitted if both sets of proceedings had been issued on the same day the Court would not have permitted that and would have struck one out. However another way of looking at it is that the Commission could have pursued the case stated proceeding to conclusion and, having concluded them within time, could then have issued enforcement proceedings. The second set of enforcement proceedings would not have been struck out as duplicative in those circumstances.

[43] The enforcement proceedings were not issued to vex Harmoney or to avoid finality in the lis between the Commission and Harmoney. They have only been issued to avoid limitation defences. There is no improper purpose or apparent abuse. Transposing the comments of Lord Bingham in *Johnson v Gore Wood* it would be wrong to hold that because the issues raised by the questions could have been raised

in the enforcement proceedings that the case stated proceeding is necessarily abusive.[13] That would be too dogmatic an approach.

[44] Also, there are proper public interests in the case stated proceeding. While the exact form of documentation may only be used by Harmoney and perhaps one other participant in the market the Court's interpretation of the documentation in the case stated proceedings will inform members of the public and other participants who may wish to participate in the market as to the scope of permissible activity. The issue is novel and should be resolved sooner rather than later.

[45] In my judgment, having regard to the difference between the two sets of proceedings, the different objectives of the case stated and enforcement proceedings and the public interest represented by the Commission, it cannot be said the Commission is misusing or abusing the process of the Court by pursuing the cases stated proceedings before pursuing the enforcement proceedings. The remedy to the problem of having two proceedings before the Court is to stay the enforcement proceedings rather than strike out the case stated proceeding.

Result

[46] The application to strike out is dismissed.

Costs

[47] The Commission is to have costs together with disbursements as fixed by the Registrar. Given the confined nature of the hearing I decline to certify for second counsel.

Venning J

[13] *Johnson v Gore Wood*, above n 9.