IN THE HIGH COURT OF NEW ZEALAND
REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2016-404-002125
[2018] NZHC 1107

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

Hearing: 25 October 2017

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

Judgment: 18 May 2018

JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 18 May 2018 at 4.00 pm
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar

Date……………………….

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Introduction

[1] Harmoney Ltd (Harmoney) operates a web-based platform that matches people wanting to borrow money with investors who want to lend money, commonly known as peer-to-peer lending.[1] The loan contracts arranged through the platform are credit contracts for the purposes of the Credit Contracts and Consumer Finance Act 2003 (CCCFA). Under the loan contracts Harmoney's sister company, Harmoney Investor Trustee Ltd (HITL) is the named creditor as a bare trustee for the investors.

[2] Harmoney charges borrowers a fee, known as the Platform Fee, to arrange the loans. The Commerce Commission contends that this fee is a credit fee under the CCCFA[2] and therefore subject to the requirement that it not be unreasonable.[3] Harmoney maintains that the Platform Fee is akin to a brokerage fee and is not captured by the CCCFA.

[3] This proceeding is a case stated brought by the Commission to establish whether the Platform Fee is a credit fee.

The case stated

[4] The case stated poses three questions by reference to a specimen loan arranged through the Harmoney website as it operated until December 2015.[4]

[5] The loan was documented in five key documents:

(a) The "Administration Deed" records the relationship between Harmoney and HITL. The parties are Harmoney and HITL. Slightly different versions were in use before and after October 2015.

(b) The "Investor Agreement" sets out the terms on which the investor may access and use the Harmoney website. The parties are the investor, Harmoney and HITL.

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1 Harmoney is a licensed intermediary under the Financial Markets Conduct Act 2013.

2 Section 5, definition of "credit fee".

3 Section 41.

4 Since December 2015, Harmoney has changed how it calculates the Platform Fee (moving from a fee based on the amount borrowed to a flat fee) but the change does not alter the relevance of the questions to the issue, which is whether this fee, however it is charged, is a credit fee for the purposes of the CCCFA.

(c) The "Borrower Agreement" sets out the terms on which the borrower may access and use the Harmoney website. The parties are the borrower, Harmoney and HITL. It is a term of the Borrower Agreement that the borrower pays the Platform Fee.[5]

(d) The "Loan Disclosure" provides disclosure of the information about the loan before the loan contract comes into existence, as required by the CCCFA.[6] There were slightly different versions in use prior to and after November 2015.

(e) The "Loan Contract", which comes into existence automatically after the Loan Disclosure is sent to the borrower. The parties are the borrower and HITL (with HITL said to be acting through Harmoney as its agent).

[6] The Commission and Harmoney agree on the following summary of the key elements of a transaction effected through the Harmoney website:

> (a) Prior to any Lending Transaction, a prospective borrower was first required to register with Harmoney.[7] Harmoney would then receive, consider and approve applications for registration in accordance with its eligibility criteria. Harmoney performed various tasks including receiving and assessing loan applications and undertaking credit checks.
>
> (b) If the borrower wanted to take out a loan, he or she was required to complete a loan application.[8] The loan application process was designed to assess a borrower's credit grade, which in turn was used to determine the applicable interest rate and the maximum Loan Amount. The borrower then selected an agreed Loan Amount (between the maximum and a minimum of at least $1,000) and chose whether to repay the loan over a 36 or 60 month term (provided that the borrower could afford to make repayments over a 36 month term).
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> (c) Once a loan entered the online marketplace, investors decided whether or not to fund the Loan through placing an order.[9] Investors made orders in $25 increments – referred to as "notes" – for each investment until the loan was fully funded.[10]

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5 Clause 20.
6 Section 17.
7 Borrower Agreement, cl 5.
8 Borrower Agreement, cl 12.
9 Investor Agreement, cl 12(b).
10 Investor Agreement, cl 12(b).

(d) Investors paid the amount they wanted to invest into an 'investor account'. Harmoney held the investor account in trust for investors whose funds had been deposited into that account.[11]

(e) Once there were sufficient orders to fully fund the loan listing (or to offer funding of a lesser amount which the borrower nonetheless agreed to accept), Harmoney transferred the investor funds from the investor account to an 'advance account', a separate bank account held by the Trustee on trust for investors.[12]

(f) Harmoney would then transfer the loan principal to the borrower's nominated account.[13] The borrower did not sign a Loan Contract, as the contract was stated to come into existence immediately after Harmoney provided a Loan Disclosure.[14] From that point, the Trustee held the loan on trust for the benefit of investors.[15]

(g) Settlement of a loan would occur within one business day after Harmoney provided the Loan Disclosure.[16] At Settlement, Harmoney would deduct from the Loan Amount an amount equal to the Platform Fee (outlined below) and transfer it to Harmoney's own account. Harmoney would pay the balance of the Loan Amount to the borrower's nominated account.[17] The Documents state that these fund transfers were to be made by Harmoney "at the direction of the Trustee, as authorised by the Borrower".[18]

(h) 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 and Fees Section."[19] The Borrower Agreement defined the 'Loan' as "the total amount lent or to be lent by the Trustee" to the borrower.

(i) Following settlement, the borrower had an obligation to make all of the loan repayments specified in the Loan Disclosure[20] to a 'Collections Account' held in the name of the Trustee as trustee for investors.[21] Interest accrued on the whole of the Loan Amount, which included the Platform Fee.

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11 Investor Agreement, cl 12(a).
12 Investor Agreement, cl 12(b).
13 Investor Agreement, cl 14(a)(i).
14 Borrower Agreement, cl 17.
15 Investor Agreement, cls 11 and 15(b).
16 Borrower Agreement, cl 18; Loan Contract, cl 5.
17 Borrower Agreement, cl 19.
18 Borrower Agreement, cl 19(b). See also Loan Disclosure "Application for Loan" for the Borrower's authorisation to the creditor to transfer the relevant amount to Harmoney.
19 Borrower Agreement, cl 44. The investor agreement describes the fee as the fee owed "in respect of a loan which settles" (cl 73), but little turns on this.
20 Loan Contract, cl 7.
21 Loan Contract, cl 9(c).

(j) Harmoney administered the loan accounts, including by receiving payments and undertaking recovery action. The Documents state Harmoney did this as agent for the Trustee. Harmoney charged a fixed service fee to investors for these services.[22] As at December 2015, this fee was set at 1.25 per cent of the principal and interest payments collected on funds advanced by that investor.

[7] The case stated poses the following questions, which are to be determined on the basis of the agreed summary of facts and key documents:

(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?

(b) Question 2: 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) Question 3: 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?

Statutory context

[8] The CCCFA was enacted to protect consumers, including borrowers under credit contracts. The primary purpose of the CCCFA includes protecting "the interests of consumers in connection with credit contracts".[23] It is also a purpose of the Act to provide "rules about interest charges, credit fees, default fees, and payments in relation to consumer credit contracts".[24] However, the CCCFA pre-dates peer-to-peer lending and does not specifically provide for credit contracts entered into using the kind of service that Harmoney provides.

[9] Peer-to-peer lending was included in the review of securities law that led to the Financial Markets Conduct Act 2013 (FMCA). In its 2010 review the Ministry of

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22 Investor Agreement, cl 53(a).

23 Section 3(1). Although protection of consumers in connection with credit contracts has been a purpose of the Act since enactment, it was not the primary purpose of the Act until amendments were made to it in 2015.

24 Section 3(3)(c).

Economic Development described the nature of peer-to-peer lending, which clearly had potential benefits for consumers:[25]

> Person-to-person lending services (also referred to as peer-to-peer lending or "social lending") allow investors to lend money to individual borrowers, with the service acting as a "matchmaker". Whereas traditionally such loans would be made by relatives, friends and other associates of the borrower without any intermediation, the Internet allows for a much wider range of potential lenders to be matched to the borrower.

[10] There were, however, barriers to peer-to-peer lending in New Zealand because the borrower would be an "issuer" for the purposes of the Securities Act 1978 and Financial Reporting Act 1993. This would require the borrower, usually a private individual receiving a relatively small sum of money, to register a prospectus, produce an investment statement and file annual audited financial reports.[26] It was considered that for peer-to-peer lending services to work it was preferable for the service itself, rather than the borrower, to be regulated.[27] Peer-to-peer lending services would therefore be permitted in New Zealand, subject to regulation under the FMCA.

[11] The "market services" now regulated under the FMCA include "acting as a provider of prescribed intermediary services".[28] Peer-to-peer lending is a prescribed intermediary service.[29] The regulation of peer-to-peer lending services is subject to sub-pt 5 of pt 6 of the FMCA, under which the licensee must ensure that there is a client agreement governing the service provided.[30] Specifically, these agreements must include provision for how investor money is received and dealt with[31] and the charges payable by an investor under the service.[32] Notably, there is no requirement for an independent trustee to hold investor money and no reference to charges payable by borrowers.

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25 Ministry of Economic Development *Review of Securities Law Discussion Paper* (June 2010) at [31].
26 At [33].
27 At [34].
28 Financial Markets Conduct Act 2013, ss 6 and 386.
29 Financial Markets Conduct Regulations 2014, reg 185(1)(b).
30 Financial Markets Conduct Regulations 2014, reg 223 confirms that the client agreement requirements in sub-pt 5 of pt 6 of the Act apply to prescribed intermediary services. Regulation 228 lists particulars which a client agreement must provide.
31 Financial Markets Conduct Regulations 2014, reg 228(c).
32 Financial Markets Conduct Regulations 2014, reg 228(f).

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?

[12] The parties agree that a loan facilitated through the Harmoney website is a credit contract for the purposes of s 7 of the CCCFA. They disagree on which document(s) constitute the credit contract. It is relevant to establish the constituent parts of the credit contract because the Loan Contract, under which credit is provided, does not impose the obligation to pay a Platform Fee; that arises under the Borrower Agreement.

[13] Under s 6 of the CCCFA "credit" is defined as:

> In this Act, unless the context otherwise requires, **credit** is provided under a contract if a right is granted by a person to another person to–
>
> (a) defer payment of a debt; or
>
> (b) incur a debt and defer its payment; or
>
> (c) purchase property or services and defer payment for that purchase (in whole or in part).

[14] Section 7 relevantly defines a "credit contract" as follows:[33]

> (1) In this Act, unless the context otherwise requires, **credit contract** means a contract under which credit is or may be provided.

[15] The Commission says that the credit contract comprises all of the Borrower Agreement, the Loan Contract and the Loan Disclosure. Mr Mills QC, for the Commission, argued that these documents are all essential to the provision of credit and should be regarded as a single contract. Harmoney's response is that, on orthodox principles of contractual interpretation, only the Loan Contract satisfies the definition of credit contract.

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[33] Question one is to be determined only by reference to the definition under s 7(1) rather than the extended definition under s 7(2): *Commerce Commission v Harmoney* [2017] NZHC 1167 at [54]–[56].

A contract may be comprised of more than one document

[16] It is not in dispute that two or more instruments may be construed as a single contract.[34] Whether that is the position in any given case is a matter of interpretation. I do not regard the use of singular "contract" in s 7(1) as precluding a finding that a credit contract comprises more than one document.

[17] Mr Mills relied heavily on *Smith v Chadwick* [35]and *Manks v Whiteley*[36] for the proposition that a number of documents are to be treated as a single contract where they are executed close in time so that, having regard to the nature of the transaction, they are to be properly viewed as a single instrument. Neither *Smith v Chadwick* nor *Manks v Whiteley* were contract cases and both pre-date modern principles of contractual interpretation. Mr Galbraith QC, for Harmoney, submitted that they are not to be regarded as statements of substantive principle but rather of interpretation.

[18] *Smith v Chadwick* concerned an action for deceit, the plaintiff having purchased shares in a company on the strength of a prospectus and the question being whether a circular provided later could be regarded as a contemporaneous document and read together with the prospectus for the purpose of interpreting the prospectus. Jessel MR referred to "the doctrine as to contemporaneous documents" as resting on the following proposition:[37]

> … when documents are actually contemporaneous, that is, two deeds executed at the same moment, a very common case, or within so short an interval that having regard to the nature of the transaction the Court comes to the conclusion that the series of deeds represents a single transaction between the same parties, it is then that they are all treated as one deed; and, of course, one deed between the same parties may be read to shew the meaning of a sentence, and be equally read, although not contained in one deed, but in several parchments, if all the parchments together in the view of the Court make up one document for this purpose.

[19] *Manks v Whiteley* was a case in equity. An owner of land had given two mortgages over it. When pressed for payment by the first mortgagee the owner agreed to sell the property to his daughter in return for her arranging repayment of the debt to

34 HG Beale (ed) *Chitty on Contracts* (32nd ed, Sweet & Maxwell, London, 2015) vol 1 at [13-069]; citing *Duke of Bolton v Williams* (1793) 2 Ves 138 (Ch); *Harrison v Mexican Rail Co* (1875) 19 LR Eq 358; and *Stott v Shaw* [1928] 2 KB 26.

35 *Smith v Chadwick* (1882) 20 Ch D 27 (CA).

36 *Manks v Whiteley* [1912] 1 Ch 735 (CA).

37 *Smith v Chadwick* (1882) 20 Ch D 27 (CA) at 62–63.

the first mortgagee and forgiving a debt owed to her. A third party agreed to advance the money required to repay the first mortgagee and to take the place of the first mortgagee. Although the discharge of the first mortgage, transfer of the property and new first mortgage to the third party could have been effected by a single deed, three separate deeds were executed.

[20] Problems arose because none of the parties except the mortgagor knew of the second mortgage and there was a dispute over whether the second mortgagee's interest should take priority ahead of the new first mortgagee. Fletcher Moulton LJ noted the transaction could have been effected by a single deed and referred to:[38]

> … the principle that where several deeds form part of one transaction and are contemporaneously executed they have the same effect for all purposes such as are relevant to this case as if they were one deed. Each is executed on the faith of all the others being executed also and is intended to speak only as part of the one transaction, and if one is seeking to make equities apply to the parties they must be equities arising out of the transaction as a whole. It is not open to third parties to treat each one of them as a deed representing a separate and independent transaction for the purpose of claiming rights which would only accrue to them if the transaction represented by the selected deed was operative separately. In other words, the principles of equity deal with the substance of things, which in such a case is the whole transaction, and not with unrealities such as the hypothetical operation of one of the deeds by itself without the other.

[21] *Smith v Chadwick* was not cited in *Manks v Whiteley* and the latter is better viewed as an application of equitable principles rather than contractual interpretation. Both decisions have, however, been applied in New Zealand in the contractual context though not with any degree of analysis.[39] In *Attorney-General v Forestry Corp of New Zealand Ltd*, Williams J applied *Manks v Whiteley* but without discussion as to its effect and treated the issue as one of interpretation of the documents rather than the various documents being treated as a single contract:[40]

> The Court takes the view that all four of the documents should be so read, interpreted conformably with each other and as if executed contemporaneously.

[22] The Court of Appeal, although allowing the appeal, thought that Williams J had not identified the real issue and decided the case on the basis of only one of the

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38 *Manks v Whiteley* [1912] 1 Ch 735 (CA) at 754–755.
39 See for example, *Attorney-General v Forestry Corp of New Zealand Ltd* [2001] 3 NZLR 172 (HC) at [63]; *Eaton v LDC Finance (in rec)* [2012] NZHC 1105 at [289]–[290].
40 *Attorney-General v Forestry Corp of New Zealand Ltd* [2001] 3 NZLR 172 (HC) at [64].

documents.[41] The only reference to *Manks v Whiteley* was made during the Court's summary of the appellant's submissions.[42]

[23] The other case that Mr Mills relied on was Fogarty J's decision in *Eaton v LDC Finance Ltd (in rec)*.[43] Citing *Smith v Chadwick*, *Manks v Whiteley* and *Attorney-General v Forestry Corp of New Zealand Ltd*, but without any discussion of them, Fogarty J rejected an argument that a general security agreement should be read independently of the associated funding agreement:[44]

> This is commercial nonsense and inconsistent with the basic principles of the law of contract that where two agreements are signed for the one transaction, each agreement dependent upon the other so that neither of those agreements would be signed but for the other, the two are to be read as one.

[24] Whilst uncontentious, Fogarty J's statement did not consider the basis for the principle referred to.

[25] I find the most helpful explanation of the New Zealand position to be the Court of Appeal's decision in *Buckley & Young Ltd v Commissioner of Inland Revenue* relied on by Mr Galbraith:[45]

> While the nomenclature used by the parties is not decisive, it is the legal rights and duties created by the transaction into which the parties entered and as ascertained by ordinary legal principles, taking into account surrounding circumstances, that must be determined. Thus, while it is legitimate to take into account surrounding circumstances and to refuse to be blinded by terms employed in documents, the documents themselves may be brushed aside only if and to the extent that they are shams, in the sense of not being bona fide in inception or of not having been acted upon, and are only used in whole or in part as a cloak to conceal a different transaction …
>
> A deed or other instrument must be construed as a whole and, if the transaction is embodied in a number or complex of interrelated agreements, then all the agreements must be considered together and one may be read to explain the others.

[26] This statement is consistent with the current approach to contractual interpretation.[46] The mere fact that several documents relevant to the same transaction

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41 *Attorney-General v Forestry Corp of New Zealand Ltd* [2003] 1 NZLR 721 (CA) at [43].
42 At [46].
43 *Eaton v LDC Finance Ltd (in rec)* [2012] NZHC 1105.
44 At [288].
45 *Buckley & Young Ltd v Commissioner of Inland Revenue* [1978] 2 NZLR 485 (CA) at 490.
46 See *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60]–[63].

are executed in proximity to one another does not necessarily mean that they should be treated as a single contract. The issue is whether that is the proper conclusion to draw given the nature of the transaction and the context in which it is entered into.

Which document or documents constitute the credit contract?

[27] Harmoney maintains that only the Loan Contract allows a borrower to "incur a debt and defer payment" in accordance with the definition of "credit" in s 6. However, on its face, the Loan Contract is merely a standard form contract under which the borrower agrees to borrow an amount that is not specified, for a term that is not specified, at a rate that is not specified.

[28] The amount of the loan, and its term and the interest rate are, self-evidently, required for certainty of contract. They are also pieces of "key information" required by s 17(1) of the CCCFA to be disclosed either before or immediately after the credit contract is made. This information is found only in the Loan Disclosure which includes, as part of the Initial Unpaid Balance (the total amount being borrowed), the "amount to be paid to Harmoney Ltd to cover Platform Fee". The Initial Unpaid Balance attracts interest at the specified rate. The Platform Fee therefore forms part of the amount for which payment is deferred.

[29] The Loan Disclosure is referred to in cls 4, 6 and 7 of the Loan Contract:

> 4. Loan: The Trustee agrees to advance the Loan Amount specified in the Loan Disclosure to you for the term so specified, on and subject to the terms of this Loan Contract.
>
> …
>
> 6. Interest: Interest will accrue on the outstanding amount of the Loan at the interest rate specified in that Loan Disclosure, on the basis of a 365 day year. It is payable by you monthly in arrears (and will be added to the amount owing).
>
> 7. Repayment: You must pay all loan repayments specified in the Loan Disclosure comprising all payments of principal and interest, to Harmoney (as agent for the Trustee) on the repayment date specified in the Loan Disclosure.

[30] "Loan", as used in cls 4, 6 and 7 of the Loan Contract, is defined in that document as:

Loan means the total amount lent or to be lent by the Trustee to you under this Loan Contract, as set out in the Loan Disclosure (whether credited to your bank account or otherwise applied for your benefit); and where applicable includes the amount of all compounded and capitalised interest.

[31] The term "Loan Amount", used in cl 4 of the Loan Contract, is not defined in the Loan Contract but, rather, in the Borrower Agreement:

"Loan amount" means, as the context requires:

(a) The amount that a Borrower wishes to borrow (inclusive of the amount of the Platform Fee payable on the Loan) as set out in the relevant Loan Listing; or

(b) Or the total amount of the Loan at Settlement (inclusive of the amount of the Platform Fee deductible by Harmoney at Settlement) as set out in the Loan Disclosure.

[32] Although Harmoney argues that the Loan Disclosure is not part of the credit contract because it merely fulfils the statutory requirement for initial disclosure of key information in relation a particular loan, it also acknowledges that the Loan Disclosure is, in practical terms, the vehicle through which the specific terms of an individual loan is recorded. Since those terms cannot be found in the Loan Contract document, the Loan Disclosure must form part of the contract.

[33] I do not, however, consider that the Borrower Agreement forms part of the credit contract. The Borrower Agreement is the source of the obligation to pay the Platform Fee and specifies that the Borrower must borrow the amount of the fee as part of the loan and pay the fee out of the loan monies:

12. If you want to take out a Loan using the Service, you must complete a Loan Application in which you nominate:

(a) the proposed Loan Amount; …

The proposed Loan Amount and any lesser amount which you will accept must each be expressed as a multiple of $25. *The amount you apply for will include an amount equivalent to the Platform Fee that you must pay Harmoney if you obtain the Loan.*

…

18. Your loan will be Settled before or on the next Business Day after Harmoney has provided you with the Loan Disclosure for it.

19. At Settlement, Harmoney will:

a. collect the funds that make up the Loan Amount from the Participating Investors and deposit the Loan Amount in the Advance Account; and

b. acting at the direction of the Trustee, as authorised by you:

i. deduct an amount equivalent to the Platform Fee from the Loan Amount and transfer it to Harmoney's own account (in satisfaction of your obligation to pay that Platform Fee to Harmoney) and

ii. transfer the balance of the Loan Amount to your Nominated Account.

20. *You must pay Harmoney a Platform Fee for arranging each Loan made to you using the Service. The Platform Fee will be calculated at Harmoney's rate (As notified on the Website under the "Interest Rates and Fees" section …*

(emphasis added)

[34] However, the Borrower Agreement also covers general matters that are beyond the necessary scope of specific credit contracts such as eligibility to register, limitation of liability and resolution of disputes. It exists independently of the Loan Contract in the sense that a Borrower could register with the service but never take out a loan. So although the Borrower Agreement creates an obligation to pay the Platform Fee, in the event of a loan being given it does not provide credit in the sense of deferring payment of that debt. That is a consequence only of the Loan Contract/Loan Disclosure. There is no basis on which to construe the Borrower Agreement as part of the Loan Contract.

[35] The answer to question one, therefore, is that the Loan Contract and the Loan Disclosure together form the credit contract.

Question 2: 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?

The issue

[36] HITL is the only creditor named in the Loan Contract. However, it is common ground that there may be more than one creditor in relation to a loan and that the trustee or nominee of a creditor may be regarded as a creditor.

[37] The investors must be creditors because, although not named as such in the Loan Contract, it is they who have the beneficial right to the loan repayments and the

named creditor (HITL) is stated to be a bare trustee for them. The issue between the parties, however, is whether Harmoney is also a creditor.

[38] Whether Harmoney is a creditor is relevant to the Commission's contention that the Platform Fee is a "credit fee" under s 5 of the CCCFA because "credit fee" is defined as a fee or charge:

> ….. 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 …

and a "creditor" is:

> … a person who provides, or may provide, credit under a credit contract; and if the rights of that person are transferred by assignment or by operation of law, includes the person for the time being entitled to those rights.

[39] The Commission contends that Harmoney is a creditor because it controls HITL and therefore has effective control over the provision of credit. Specifically, it is Harmoney that has the power to exercise the creditor's rights, to dismiss HITL and to appoint a new trustee/creditor in its place. Therefore, regardless of how the parties are described in the relevant lending documents, Harmoney is either the sole or a joint principal with HITL in the provision of credit.

[40] Harmoney does not accept this analysis. It maintains that HITL is the sole named creditor, properly appointed by the investors to act as a bare trustee for them and that Harmoney only ever acts as HITL's agent.

Relevant principles

[41] The parties' respective arguments raise issues of both trust and agency law. I start with the concept of bare trustee, HITL's stated role. A bare trustee is generally accepted as one whose only obligation is to hold an asset and transfer it at the direction of the beneficiary. *Laws of New Zealand* defines a bare trustee as:[47]

> … a person who holds property in trust for the absolute benefit and at the absolute disposal of other persons who are of full age and sui juris in respect of it, and who has personally no present beneficial interest in it and no duties to perform in respect of it except to convey or transfer it to persons entitled to

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[47] *Laws of New Zealand* Trusts (online ed) at [12], citing *Christie v Ovington* (1875) LR 1 Ch D 279; *Morgan v Swansea Urban Sanitary Authority* (1878) 9 Ch D 582.

> hold it, and he or she is bound to convey or transfer the property accordingly when required to do so.
>
> (footnotes omitted)

[42] In *CGU Insurance Ltd v One.Tel Ltd* the High Court of Australia said:[48]

> The trustee of a bare trust has no interests in the trust assets other than those which exist by reason of the office of trustee and the holding of legal title. Further, the trustee of a bare trust has no active duties to perform other than those which exist by virtue of the office of the trustee, with the result that the property awaits transfer to the beneficiaries or awaits some other disposition at their direction. One obligation of a trustee which exists by virtue of the very office is the obligation to get the trust property in, protect it, and vindicate the rights attaching to it. That obligation exists even if no provision of any statute or trust instrument creates it. It exists unless it is negated by a provision of any statute or trust instrument.

[43] As I discuss later, many of the tasks associated with the administration of a loan under a Loan Contract would require HITL to perform duties beyond those of a bare trustee as that understood from the authorities cited. I proceed, therefore, with the following observation made by Randerson J in *Burns v Steel* in mind:[49]

> Although consideration of whether the trustees are "bare trustees" may be helpful in some contexts, there is a risk of becoming overly concerned with nomenclature to the point where the nature of the duties and discretions of the trustees may be obscured. Where the expression "bare trustee" is used in statute, the courts are of course obliged to give some meaning to it. But in the absence of a statutory reference of this kind, the real task is to ascertain the nature and extent of the trustees' obligations and discretions by reference to the terms of the instrument establishing the trust, assessed in the context of all the relevant surrounding circumstances and the obligations imposed on trustees by the general law or by statute.

[44] I turn next to the relevant aspects of agency law: the parties' own description of their relationship, the significance of control over the agent and the concept of the undisclosed principal. The last was not identified as such in submissions but is, in my view, the legal consequence of the Commission's argument regarding Harmoney's control over HITL.

[45] I start with the generally recognised attributes of agency, *Bowstead & Reynolds on Agency* says:[50]

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48 *CGU Insurance Ltd v One.Tel Ltd (in liq)* [2010] HCA 26, (2010) 242 CLR 174 at [36].

49 *Burns v Steel* [2006] 1 NZLR 559 (HC) at [62].

50 Peter Watts and FMB Reynolds *Bowstead and Reynolds on Agency* (21st ed, Sweet & Maxwell, London, 2018) at [1-001].

> Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party.
>
> In respect of the acts to which the principal so assents, the agent is said to have authority to act; and this authority constitutes a power to affect the principal's legal relations with third parties.
>
> Where the agent's authority results from a manifestation of assent that he should represent or act for the principal expressly or impliedly made by the principal to the agent himself, the authority is called actual authority, express or implied. But the agent may also have authority resulting from such a manifestation made by the principal to a third party; such authority is called apparent authority.
>
> A person may have the same fiduciary relationship with a principal where he acts on behalf of that principal but has no authority to affect the principal's relations with third parties. Because of the fiduciary relationship such a person may also be called an agent.
>
> (footnotes omitted)

[46] On this statement, an agency relationship will usually exist where a person, the principal, consents to another, the agent, acting on his or her behalf so as to affect his or her relations with third parties, while the agent consents to such. As stated in *Bowstead*, the justification for the agent's power is the principal's unilateral manifestation of willingness to have his or her legal position changed by the agent.[51]

[47] An agent's powers cannot extend beyond those of its principal and, conversely, a principal must be legally capable of undertaking the tasks that it delegates to its agent.[52] So the tasks of an agent can only be those that, in the absence of an agent, the principal could undertake itself.

[48] One factor relevant to determining whether an agency relationship exists is the parties' decision to explicitly "label" their relationship as such (or to expressly label the relationship as not one of agency). In *South Sydney District Rugby League*

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51 At [1-006].

52 Peter Watts and FMB Reynolds *Bowstead & Reynolds on Agency* (21st ed. Sweet & Maxwell, London, 2018) at [2-006]–[2-007].

Football Club Ltd v News Ltd the Federal Court of Australia, considering a clause purporting to obviate a relationship of (among others) principal and agent, said: [53]

> It is legitimate for parties to avoid the "unwanted consequences" of a particular category of legal relationship by seeking to cast it in a form that takes it outside that category of relationship … But whether or not they are successful in achieving that end does not depend simply upon whether, in an express provision of their agreement, they attribute or deny to their relationship a particular legal character … The parties cannot by mere device of labelling, no matter how genuinely intentioned, either confer a particular legal character on a relationship that it does not possess or deny it a character that it does possess.

[49] However, the Court went on to recognise the importance of the parties' decision to label their relationship a particular way:[54]

> Save where an express labelling provision is shown to be a sham, the provision itself (as a manifestation of the parties' intent) must be given its proper weight in relation to the rest of their agreement and such other relevant circumstances as evidence the true character of their relationship. This may lead to its being disregarded entirely … or to its being given full force and effect … And such will depend upon whether, given the actual incidents and content of the relationship (ie "the factual relation") to which the parties have consented, they have consented "to a state of fact upon which the law imposes the consequences which result from agency" …

[50] The other relevant factor, central to the Commission's case, is the extent to which the principal controls its ostensible agent. This factor is not necessarily determinative. The Court in *South Sydney* considered that although control by the principal over the agent is typical of, and indeed might support a finding of, a relationship of agency, the "acting on behalf of" or "representative" characteristic of an agency relationship must still be discernible between the parties before the Court will recognise the relationship as such.[55] Therefore control is not, in itself, a necessary feature of agency, but a factor from which an agency relationship might be inferred in combination with other factors.

[51] However, even if an agent cannot be controlled in the performance of its obligations, its principal invariably retains the ability to terminate the agency. The

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[53] *South Sydney District Rugby League Football Club Ltd v News Ltd* [2000] FCA 1541 at [134].

[54] At [135]. In *Alliance Craton Explorer Pty Ltd v Quasar Resources Pty Ltd* [2013] FCAFC 29 at [55], the Federal Court of Australia said that whether a disclaiming clause is effective will depend on whether, given the actual incidents and content of the relationship, the parties have nonetheless consented to what is in substance an agency relationship.

[55] At [137].

power to revoke appointment is, with limited exceptions always assumed to exist.[56] In *Bowstead* it is noted that:[57]

> *It is common to regard control by the principal as a defining characteristic of agency* … This notion has obvious relevance in employment law, where it can be treated as an identifying characteristic of the employment relationship and hence to the vicarious liability of an employer for an employee. *In agency in general, however, it plays a more limited role* … Agents will often not accept control by the principals as to the manner in which they act, and some will only accept instructions to act in accordance with usages of their own market. Others may be authorised only to do specific things. *In many such situations the principal's only control lies in his power to revoke the authority, power which agency law assumes that he has at all times. It might seem therefore that control is not a significant feature of the internal relationship, except insofar as the relationship by definition posits a person, the principal, giving authority, and the agent's duty to obey instructions if he wishes to continue as agent. Nevertheless, if the principal gives up all control of his supposed agent the relationship is only doubtfully one of agency.*
>
> (emphasis added)

[52] Finally, the principles relating to the undisclosed principal. The authors of *Bowstead* define an undisclosed principal as "a principal whose existence **as such** is not known to the party at the time of the transaction in question".[58] The authors comment that the term is reserved for cases where the third party does not intend to deal with a principal at all and intends to deal with the agent personally.[59] Ordinarily it is the principal alone who risks the consequences of being sued on a contract entered into on its behalf by its agent. However, this is not so where the agent contracts with a third party without disclosing the principal on whose behalf the agent is acting. In *Siu Yin Kwan v Eastern Insurance Co Ltd*, Lord Lloyd summarised the law as follows:[60]

> For present purposes the law can be summarised shortly. (1) An undisclosed principal may sue and be sued on a contract made by an agent on his behalf, acting within the scope of his actual authority. (2) In entering into the contract, the agent must intend to act on the principal's behalf. (3) The agent of an undisclosed principal may also sue and be sued on the contract. (4) Any defence which the third party may have against the agent is available against

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56 *Angroves's Pty Ltd v Bailey* [2016] UKSC 47, [2016] 1 WLR 3179 at [6]–[10].

57 Peter Watts and FMB Reynolds *Bowstead & Reynolds on* Agency (21st ed, Sweet & Maxwell, London, 2018) at [1–018].

58 Peter Watts and FMB Reynolds *Bowstead & Reynolds on Agency* (21st ed, Sweet & Maxwell, London, 2018) at [1-039(4)] (emphasis added).

59 Peter Watts and FMB Reynolds *Bowstead & Reynolds on Agency* (21st ed, Sweet & Maxwell, London, 2018) at [1-041].

60 *Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 2 AC 199 (HL) at 207.

> his principal. (5) The terms of the contract may, expressly or by application, exclude the principal's right to sue and his liability to be sued. The contract itself (or the circumstances surrounding the contract), may show that the agent is the true and only principal.

The terms of the Investor Agreement and Loan Contract

[53] Mr Galbraith submitted that HITL's primary function is to act as a bare trustee to hold the investors' legal interest in the loans, that this structure is for the benefit of investors and there are sound commercial, legal and regulatory reasons for it. Whilst the FMCA and its regulations do not require the appointment of a trustee (bare or otherwise) to safeguard the interests of the investors, I accept that there are commercial benefits in having an entity interposed between the borrower and the investors.[61] They include centralisation of the individual advances that form a single loan, protection from the solvency risk of Harmoney's own trading operation, ease of arranging tax affairs, and shielding the identity of individual lenders from borrowers. However, investors require more than a passive repository for their assets; the loans must be administered, money disbursed, repayments monitored and defaults dealt with. But such activities are not consistent with the obligations of a bare trustee.

[54] The contractual documents describe HITL's role as that of a bare trustee but, inconsistently, require it (through Harmoney as its agent) to undertake the actual administration of the loans. Under the Investor Agreement the investor appoints HITL as trustee to "hold [the] loan on a bare trust" for the investor.[62] The investor and HITL agree that:[63]

> You [the investor] appoint the Trustee as trustee in respect of your interests in the Advance Account, every Loan Contract relating to a Loan in which you Participate, every such Loan and the Collection Account, all on and subject to the terms of this agreement. The Trustee accepts this appointment.

and:[64]

> You [the investor] direct and authorise the Trustee:

[61] There are references in Harmoney's written submission alluding to the requirements of its FMCA licence, but no specific details were provided and given the limited nature of the case stated I make no assumptions about this aspect.
[62] Investor Agreement, cl 11.
[63] Investor Agreement, cl 13.
[64] Investor Agreement, cl 14.

> (a) if any Loan Listing in respect of which you have placed an Order is Fully Funded, to:
>
> (i) *Enter into the relevant Loan Contract*; and
>
> (ii) Apply funds held for you in the Advance Account equivalent to the Order Amount towards settling that Loan,
>
> by way of investing those funds in the Loan for your benefit; and
>
> (b) *to appoint Harmoney as its agent as provided in clauses 23 and 23.*
>
> (emphasis added)

[55] Clauses 23 and 24 require Harmoney to act as HITL's agent in relation to all aspects of the loan administration, including opening and transacting the Advance Account, concluding all Borrower Agreements on HITL's behalf (in addition to entering into the Borrower Agreements as principal), concluding all Loan Contracts, advancing all loans, including by settling them, administering all loans, opening and transacting the Collections Account and transferring funds held in the Collections Account to the Investor Account, dealing with instances of arrears and taking recovery action if necessary.[65]

[56] Likewise, under the Loan Contract HITL is said to act as a bare trustee only (through Harmoney as its agent):[66]

> The Trustee enters into this Loan Contract as bare trustee for the benefit of the Participating Investors, and not in any other capacity. …

[57] Although HITL's role under both the Investor Agreement and Loan Contract is stated to be that of a bare trustee, the tasks it purports to delegate to Harmoney are not those of a bare trustee because they require the active management of the loans, including the disbursement of funds, disclosure of key information and enforcement of the terms of the loan in the event of default. The Investor Agreement and Loan Contract therefore appear to require the investor to appoint HITL as a bare trustee on terms that require it to engage Harmoney to undertake tasks that HITL itself could not undertake in that capacity.

[58] Further, and central to the Commission's case, is the fact that although investors purport to "appoint" HITL as trustee for their interests, they cannot control

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[65] Investor Agreement, cls 23 and 24.

[66] Loan Contract, cl 1.

HITL. Instead, it is Harmoney that has control over HITL including the power to terminate HITL's appointment:

> 18. You [the investor] acknowledge that the Trustee acts as trustee in respect of the Service. You agree that you are not entitled (whether alone or together with any other Participating Investors) to:
>
>   (a) give the Trustee a direction that is inconsistent with this agreement;
>
>   (b) call for the transfer of all or any share of any Loan in which you participate or the relevant Loan Contract to (or as directed by) you;
>
>   (c) terminate the trust of any such Loan and Loan Contract; or
>
>   (d) discharge or replace the Trustee or appoint any person as trustee of such trust in addition to the Trustee.
>
> …
>
> 20. Harmoney can in its discretion replace the Trustee. Any such change will not affect your rights and obligations under this agreement or in respect of any funds or property held on trust for you. The replacement Trustee will have the same rights and obligations as the Trustee it replaces, without further action being necessary.

[59] Finally, the Commission also argues that Harmoney has reserved to itself powers in relation to the Loan Contract which makes it clear that Harmoney is a party to the Loan Contract. Under the Borrower Agreement:

> 21. Harmoney may from time to time introduce new types of fees to be charged in connection with the Service or under Loan Contract …
>
> …
>
> You must pay Harmoney any such fees at the rate (as specified on the Website under the "Interest Rates & Fees" section from time to time), in such manner as Harmoney may notify you. …

[60] Mr Galbraith submitted that, insofar as Harmony may set new fees under the Loan Contract, it does so only in its capacity as HITL's agent. I do not accept this submission. The Borrower Agreement makes it clear that Harmoney's power is exercised by it, for its benefit. Although HITL does have power under the Loan Contract to change the terms of the contract relating to fees that power is different and

more limited; HITL may only introduce a new fee if that "is considered necessary as a result of a legal or regulatory development".[67]

[61] These inconsistencies suggest that either HITL is more than a bare trustee or that it is, in fact, the agent of Harmoney, whose business it is actually undertaking. In my view, the key to resolving the inconsistencies that emerge from the Investor Agreement and Loan Contract as to Harmoney's and HITL's respective roles lies in the terms of the Administration Deed. This document precedes any specific Investor Agreement and Loan Contract but records the roles that Harmoney and HITL each assume in relation to those later contracts.

The Administration Deed

[62] The background recital to both versions of the Administration Deed state that:

> The parties enter into this deed to provide that:
>
> (a) the Trustee will act as bare trustee in making and holding loans for the benefit of participating investors through a peer-to-peer lending platform provided by Harmoney; and
>
> (b) Harmoney will act as the Trustee's agent in making such loans and in administering such loans and their proceeds
>
> on and subject to the terms of this deed.

[63] An immediate point to note is the dissonance between HITL's role as a "bare trustee" in the recital and Harmoney's stated obligations as its agent. It refers to HITL as being engaged to act "as trustee" for investors but identifies obligations that go well beyond the mere holding of either the money or the chose in action that is the loan, as a bare trustee would.

[64] Clause 1.1 of the earlier version of the Deed provided that:

> 1.1 **Engagement of Trustee:** Harmoney engages the Trustee to provide the following trustee services in respect of the Service to act as trustee for Investors (in accordance with their respective interests) in respect of:
>
> (a) amounts which they have lent through the Service to fund Loans;
>
> (b) entering into Loan Contracts and making Loans under them; and

[67] Loan Contract, cl 14.

(c) receiving and applying the Loan Repayments and any other payments payable under a Loan Contract.

[65] Clause 1.1 of the amended Administration Deed is slightly different in its opening words and also adds a further sub-paragraph:

> 1.1 **Engagement of Trustee:** Harmoney engages the Trustee to act as trustee for investors (in accordance with their respective interests) in respect of:
>
> …
>
> (d) Administering all Payment Protect Plans arising under Loan Contracts, as more fully set out in the Investor Agreements from time to time.

[66] The slight difference in cl 1 between the versions does not, in my view, substantively alter the terms on which HITL was engaged. The later version appears to limit HITL's engagement to "act as trustee" but the terms of cls 1.2 and 1.3 make it clear that the obligations being assumed by HITL in cl 1.1 are the same, whether they are described in cl 1.1 as "trustee services" or merely as being "to act as trustee".

[67] Clauses 1.2 and 1.3 both describe the obligations undertaken by HITL under cl 1.1 as "trustee services":

> 1.2 **Acknowledgement by Trustee:** the Trustee acknowledges and agrees that it will provide the trustee services described in clause 1.1 exclusively to Harmoney and will not at any time during the term of this deed provide the same or similar services to any other person.
>
> 1.3 **Fees payable to Trustee:** Harmoney will pay the Trustee such fees (plus GST, if any) for the trustee services described in clause 1.1 as the parties may from time to time agree.

[68] Clause 1.4 also refers to HITL's agreement to perform "the services contemplated by the deed", specifically referring to cl 1.1. Its agreement to do so is recorded as dependent on Harmoney agreeing, in turn, to act as HITL's agent in performing those same services:

> 1.4 **Acceptance by Trustee:** The Trustee accepts the engagement described in clause 1.1, in reliance on Harmoney's undertaking to act as the trustee's agent in relation to the Loan Contracts, the Loans, and the proceeds of the Loans as set out in this deed. The Trustee acknowledges and agrees that, in performing the services contemplated by this deed, it will not have any ownership rights in any of the Data at any time.

[69] It is an irresistible inference that Harmoney could and would engage HITL to undertake these tasks only if Harmoney itself was responsible for the performance of them. This suggests that, prior to HITL engaging Harmoney as its agent under the Investor Agreement and Loan Contract, Harmoney had already engaged HITL as its agent to provide the very service that would involve it engaging Harmoney at a later point.

[70] This conclusion is consistent with the provisions at the heart of the Commission's argument relating to Harmoney's right to terminate HITL's appointment. Under cl 12.1(a) Harmoney can "at any time and in its absolute discretion replace the Trustee or terminate the Trustee's appointment". However, HITL has no right to terminate Harmoney's appointment.

[71] Mr Galbraith submitted that HITL could revoke Harmoney's authority in the event of a "Harmoney Servicer Default" (defined as either the appointment of a liquidator to Harmoney or Harmoney ceasing to hold a licence for the service under the FMCA for five business days). I do not interpret cl 12.3(a), which provides for Harmoney's replacement in the event of a Harmoney Servicer Default, in that way. Clause 12.3 simply provides that a replacement "will be appointed". If it were intended that HITL had that power one would expect it to be expressly stated; it is too important a power to have been left unsaid, particularly since it would not be a necessary implication. If the Harmoney Servicer Default is liquidation then the liquidator could be expected to exercise the power. There is no specific provision as to who would take the step of replacing Harmoney in the event of Harmoney ceasing to hold a licence, but there is no basis on which to conclude that HITL would have that right.

[72] The Commission also relied on the fact that HITL was required by cl 13.1(a) to irrevocably appoint Harmoney its attorney to do anything HITL agreed to do under the Administration Deed or any related document and transfer assets held on trust by it to a replacement trustee in the event of its appointment as trustee being terminated. As already discussed, agency law (with limited exceptions) does not recognise an appointment that is irrevocable. Harmoney sought to overcome this issue by acknowledging that the appointment must, as a matter of law, be regarded as revocable. This response misses the point; whether HITL can revoke the power of

attorney granted to Harmoney under cl 12 does not alter the fact that, ultimately, Harmoney holds the power to terminate HITL's appointment and that power would continue to exist even if HITL were to revoke Harmoney's appointment under cl 12.3(b).

[73] The consensual undertakings necessary for the creation of an agency relationship are clearly set out in the Administration Deed. In my view, the fact that the Administration Deed allows Harmoney to terminate HITL's appointment and does not allow HITL to terminate Harmoney's appointment is consistent only with HITL being Harmoney's agent, not the other way around. HITL's appointment of Harmoney as its agent under the Investor Agreement does not represent the whole picture because, before HITL engaged Harmoney, Harmoney had already engaged HITL to act as its agent. Their respective roles under the Loan Contract can only be understood against that background.

[74] Looked at in this way, it can be seen that Harmoney's services extend beyond mere matchmaking. It provides a nominal creditor (HITL) to hold the loans as a bare trustee for investors. It does so by delegating that task to HITL, with whom investors contract, unaware of Harmoney's role. Harmoney also undertakes the full administration of the loans and does so by authorising HITL to contract with investors on the basis that HITL will engage Harmoney to undertake the work. The investors believe they are contracting with HITL; in fact, Harmoney is an undisclosed principal to the contract.

[75] The answer to question 2 is that the investors, Harmoney and HITL are all creditors under the credit contract.

Question 3: On the basis of the Documents and the factual summary, is the Harmoney Platform Fee a "credit fee" as defined by s 5 of the CCCFA?

[76] Harmoney accepts that if it is found to be a creditor, the Platform Fee is a credit fee. On my previous conclusions, the Platform Fee is therefore a credit fee. For completeness, however, I deal with the Commission's argument that the Platform Fee would be a credit fee regardless of Harmoney's status as a creditor.

[77] The starting point for this argument would (relevantly) be the purpose of the CCCFA to protect the interests of consumers in connection with credit contracts.[68] In its previous form the CCCFA had as a specific purpose "to provide rules about … fees". In its current form, the Act "provides for rules about … fees" "to achieve the purposes" of the Act.[69] Thus, the making of rules about fees charged in relation to consumer credit contracts was and still is a means of protecting the interests of consumers in relation to such contracts. I do not accept Harmoney's submission that the relative novelty of peer-to-peer lending should preclude the usual application of the CCCFA.

[78] Section 5 defines "credit fees" as:

> 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, and –
>
> …
>
> (b) does not include –
>
> (i) interest charges:
>
> …

[79] From 6 June 2015, the definition of credit fee was extended to include, among other types of fees:

> (v) Fees and charges payable as referred to in section 45 if the other person, body, or agency referred to in that section is an associated person of the creditor.

[80] Section 45 applies to fees and charges payable by a debtor for an amount payable or to reimburse an amount paid by the creditor to another person. Where two companies have the same holding company within the meaning of s 5 of the Companies Act 1993, they will be "associated" for the purposes of that part of the definition of credit fee.[70]

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68 Section 3(1).
69 Section 3(3)(c).
70 Credit Contracts and Consumer Finance Act 2003, s 8A(1)(d)(iv).

First limb: a fee payable "under a credit contract"

[81] Harmoney says that the Platform Fee is not "payable under" the credit contract because the obligation to pay the fee arises under the Borrower Agreement and is charged for Harmoney performing services under that agreement. Its argument is that, although the principal amount lent under the Loan Agreement includes the amount required to cover the Platform Fee, that is merely a mechanism for payment of the fee and does not make it "payable under" the credit contract. Rather, the term "payable under a credit contract" must remain referable to whether the payment is made under the credit contract in a substantive rather than mechanistic sense. It tests its interpretation by inviting consideration of what the position would be if Harmoney had required payment of the Platform Fee in a different way e.g. by cash. Mr Galbraith argued that there was no reason that a change in the mechanism for payment should make a difference as to whether Harmoney's fee was regulated under the CCCFA.

[82] I do not accept this submission. The ordinary meaning of "payable" refers to an amount that must be paid. Harmoney referred to a number of dictionary definitions. The New Zealand Oxford Dictionary defines "payable" as: "that must be paid; due", "that may be paid" and "debts owed by a business: liabilities".[71] Collins Dictionary defines the word as: "to be paid", "that is capable of being paid" and "imposing an obligation on the debtor to pay, esp at once".[72]

[83] Although the obligation to pay the Platform Fee arises under the Borrower Agreement, payment is not required until settlement and then it must be by way of deduction from the amount of the loan. It is because the Platform Fee forms part of the loan amount, and therefore attracts interest, that it should be treated differently from the way it would be treated if, for example, it had been payable in cash. If it were payable in cash directly to Harmoney it would not be payable under the credit contract; it would genuinely be a brokerage fee paid to Harmoney for arranging the loan. But the borrower must incur the cost of credit under the Loan Contract and pay the fee from the loan monies. This is not merely mechanical. In ordinary language, the fee is payable under the Loan Contract.

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71 Tony Deverson and Graeme Kennedy (eds) *The New Zealand Oxford Dictionary* (Oxford University Press, South Melbourne, VIC, 2005) at 832.

72 *Collins English Dictionary* (30th anniversary ed, HarperCollins Publishers, Glasgow, 2009) at 1214.

Second limb: a fee payable by the debtor to the creditor "in connection with a credit contract"

[84] I have found that the credit contract comprises both the Loan Contract and the Loan Disclosure and that Harmoney is a creditor under the credit contract. If that were not the case the second limb would not be satisfied. On my ruling, however, the fee is payable by the debtor to the creditor and the only question is whether it is paid "in connection with" the credit contract.

[85] Both parties approached this question on the basis that the expression "in connection with" should be interpreted as Toogood J did in *Commerce Commission v Sportzone Motorcycles Ltd (in liq)*.[73] In that case, Toogood J was considering whether credit fees were unreasonable for the purposes of s 41 of the CCCFA. One of the issues was the meaning of "in connection with" in the definition of credit fee. The Judge held that the fees were unreasonable because (among other reasons) they were not incurred in sufficient connection with the particular transaction.

[86] Toogood J adopted a test articulated in the context of the Income Tax Act 1976 in *Yurjevich v Commissioner of Inland Revenue*.[74] The taxpayer had claimed deductions for the costs of visiting relatives to discuss an objection to a tax assessment. Savage J – commenting on whether such expenses were incurred "in connection with" the preparation, institution or presentation of an objection – said the taxpayer was required to show a link or connection which was sufficiently close and relevant to the preparation, institution or preparation of the objection that it could reasonably be said that the expenditure was incurred in connection with it. The Judge said:[75]

> In my view it would not have been meant by Parliament to include a link or connection that is not sufficiently closely related to some aspect of the objection itself in the context of the income tax legislation.

[87] Applying that test in the context of the CCCFA, Toogood J said:[76]

> To be reasonable, the costs the creditor seeks to recover must be sufficiently close and relevant to the establishment of the particular loan, to the administration and maintenance of the particular loan, or to the actual

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73 *Commerce Commission v Sportzone Motorcycles Ltd (in liq)* [2013] NZHC 2531, [2014] 3 NZLR 355 at [64]–[68].

74 *Yurjevich v Commissioner of Inland Revenue* (1991) 12 NZTC 8,185 (HC).

75 At 8.189.

76 At [66] and [68].

> consequences of the particular default, such that it can reasonably be said that the cost was incurred in connection with or in relation to the relevant matter.
>
> …
>
> While the principle that "in connection with" and "related to" should be given a narrow construction rather than a broader one is capable of relatively straightforward expression, it is less easy to define or prescribe how the principle is to be applied to specific cases. There is no bright line test and at the margins it will be a matter for judgment in the particular circumstances whether there is a sufficiently close and relevant connection or relationship between the fee matter and the cost claimed in respect of it.

[88] The Supreme Court affirmed Toogood J's assessment of the reasonableness of the fee on appeal but clarified the Judge's articulation of the test:[77]

> Much was made of the High Court Judge's use of the term "closely connected" but we do not think that the Judge was proposing an alternative to the statutory test when he used that phrase. Rather, he was applying the test that had been articulated in *Yurjevich v Commissioner of Inland Revenue*, which he considered could be adopted in the present context. The phrase "closely connected" was shorthand for that test. So it was a shorthand phrase to describe the ambit of the costs that can reasonably be included in a fee within the confines of the statutory wording. We do not see the phrase "closely connected" as a substitute for the words of the Act.
>
> (footnote omitted)

[89] In my view, because the Platform Fee must be paid "for arranging each loan" and out of the monies advanced under the Loan Contract, there is a sufficient relationship or connection between the fee and the credit contract to say that the fee is payable in connection with the credit contract.

Third limb: a fee payable by the debtor for the benefit of the creditor in connection with a credit contract

[90] The Commission argues that even if the Borrower Agreement was not part of the Loan Contract and Harmoney was not a creditor, the Platform Fee would still be regarded as a credit fee under the third limb of s 5 because it provides either a direct or indirect benefit to the creditor.

[91] The direct benefit it said to be that the creditor (whether Harmoney or HITL) charges interest on the increased loan amount. But interest is specifically excluded

77 *Sportzone Motorcycles Ltd (in liq) v Commerce Commission* [2016] NZSC 53, [2016] 1 NZLR at [82].

from the definition of credit fee. Interpreting "benefit" so as to include interest would be contrary to the clearly stated ambit of the definition.

[92] The Commission's alternative argument is that the fee provides an indirect benefit to the creditor because, without payment of the fee, HITL would not be able to make the loan nor receive its fee from Harmoney. This is not a viable interpretation. Although it is self-evident that HITL's fee depends on the success of Harmoney's platform, that does not mean that the payment of the fee is *for the benefit* of HITL in its capacity as a creditor (as opposed to Harmoney's agent providing trustee services).

[93] The definition of "credit fees" is designed to capture both payments made to a creditor and payments which, although not specifically made to a creditor are, nevertheless, for the creditor's benefit rather than the payee's benefit; it does not capture every payment that has a positive effect on a creditor.

Result

[94] The answers to the questions posed are:

(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?

Answer: The credit contract comprises the Loan Contract and Loan Disclosure.

(b) Question 2: 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?

Answer: the investors, Harmoney and HITL are all creditors for the purposes of s 5 of the CCCFA.

(c) Question 3: 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?

Answer: Yes.

[95] Counsel may address the issue of costs by memoranda filed on behalf of the Commission within 14 days and on behalf of Harmoney within 21 days. The Commission may reply within 28 days.

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P Courtney J