

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
TĀMAKI MAKĀURAU ROHE**

**CIV-2019-404-1355  
[2021] NZHC 3136**

UNDER	Parts 1A, 4 and 5 of the Credit Contracts and Consumer Finance Act 2003
BETWEEN	COMMERCE COMMISSION Plaintiff
AND	MOOLA.CO.NZ LTD Defendant

Judgment: 19 November 2021  
(On the papers)

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**JUDGMENT OF BREWER J**

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*This judgment was delivered by me on 19 November 2021 at 4 pm  
pursuant to Rule 11.5 High Court Rules.*

*Registrar/Deputy Registrar*

Solicitors:  
Meredith Connell (Auckland) for Plaintiff  
Simpson Grierson (Auckland) for Defendant

## **Introduction**

[1] The plaintiff commenced a proceeding against the defendant on 8 July 2019. The plaintiff's functions include enforcement of the Credit Contracts and Consumer Finance Act 2003 ("the Act").

[2] The plaintiff pleaded that the defendant, which provides high cost short term personal loans through its websites, breached provisions of the Act requiring (I paraphrase) responsible lender practices in six respects.

[3] In a joint memorandum of counsel dated 28 September 2021, the Court was advised that the parties had reached settlement. The joint memorandum also advised that part of the settlement would require an application to the Court for the making of declaratory orders by consent.

[4] On 29 September 2021, Moore J vacated the trial fixture and made timetabling directions for the filing of amended pleadings upon which the application for declaratory orders would be made.

[5] The plaintiff filed its interlocutory application for declaratory orders on 6 October 2021. This judgment grants the application and makes the declaratory orders sought.

## **Background<sup>1</sup>**

[6] The defendant was one of seven short term lenders whose lending practices were examined during a review by the plaintiff of responsible lending practices of high cost short term lenders in New Zealand. The plaintiff examined the defendant's lending practices relating to credit contracts entered between 6 June 2015 and 30 November 2017.

[7] The plaintiff concluded that the defendant had breached s 9C of the Act in a number of respects. It sued accordingly.

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<sup>1</sup> I take the background facts from the affidavit of Mark John Atwell filed in support of the interlocutory application for declaratory orders.

[8] The plaintiff's second amended statement of claim, filed on 29 September 2021, and the defendant's first amended statement of defence, filed on 1 October 2021, reflect the agreed position, which is that the defendant breached the Act in four ways:

- (a) It failed to make reasonable inquiries of the borrower's circumstances and assess his or her ability to pay the loan back without substantial hardship. While Moola assessed the affordability of a loan using reports that obtain and collate transactions on the Borrower's nominated bank account, the Commission considered this was insufficient.
- (b) It failed to make reasonable inquiries such as to satisfy itself that it was likely that the credit being provided under the credit contract would meet the borrower's requirements and objectives. While Moola required the borrower to select a loan purpose from a drop-down menu when applying for the loan, the Commission considered this was insufficient.
- (c) It failed to exercise the care, diligence and skill of a responsible lender in advertisements for credit in that it sent text messages and emails to borrowers, encouraging them to borrow, that did not contain a risk warning that its loans were not suitable for longer-term or regular borrowing. While Moola's website and online loan application process contained a risk warning that its loans were not suitable for longer-term or regular borrowing, the Commission considered this was insufficient.
- (d) It failed to treat borrowers reasonably and ethically when breaches of the credit contract occurred, in that it would make phone calls to borrowers up to three times per day for 10 working days following default, and frequently contact borrowers in default by text message and/or email for up to 50 days. While Moola would only continue to attempt to contact borrowers until successful contact was made or borrowers requested that it stop, the Commission considered the frequency of contact was still unreasonable.

## **Decision**

[9] In a joint memorandum of counsel dated 6 October 2021, the parties state that the application for declaratory orders is not opposed and they ask that the orders be made without a hearing. Having reviewed the file, and in particular the affidavit of Mr Atwell, I am satisfied I can make the orders sought without a hearing. In this respect, I note r 15.15 which permits the Court to give any judgment or order on an application where a party has admitted facts as it thinks just.

[10] I make the following declarations:

- (a) A declaration that by its conduct, Moola breached s 9C(1) via ss 9C(2)(a)(ii) and 9C(3)(a)(i) of the Credit Contracts and Consumer Finance Act 2003 (CCCFA) by failing to make reasonable inquiries so as to be satisfied that it was likely that the loan would meet the Schedule One Borrower's requirements and objectives.
- (b) A declaration that by its conduct Moola breached s 9C(1) via ss 9C(2)(a)(ii) and 9C(3)(a)(ii) of the CCCFA in relation to the Schedule One Borrowers by failing to make reasonable inquiries so as to be satisfied that it was likely that the Borrower would make the payments under the agreement without suffering substantial hardship.
- (c) A declaration that by its conduct, Moola breached s 9C(1) via s 9C(2)(a)(i) of the CCCFA in relation to the Schedule One Borrowers by failing to exercise the required care, diligence and skill in advertising.
- (d) A declaration that by its conduct Moola breached s 9C(1) via s 9C(3)(d)(i) of the CCCFA by failing to treat the Schedule One Borrowers reasonably and in an ethical manner when breaches of the agreement had occurred.

[11] The parties agree there is no issue as to costs.

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Brewer J