

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

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE**

**CIV-2019-485-000350
[2022] NZHC 823**

UNDER	Parts 1, 2 and 4 of the Credit Contracts and Consumer Finance Act 2003
BETWEEN	COMMERCE COMMISSION Plaintiff
AND	REAL FINANCE LIMITED Defendant

Hearing: 26 April 2022

Appearances: L C A Farmer and A D Luck for the Plaintiff
L D Sookahet for the Defendant

Judgment: 26 April 2022

JUDGMENT OF GRICE J

Introduction

[1] Following an investigation, the Commerce Commission (the Commission) commenced proceedings against the defendant (Real Finance) alleging that various fees charged by Real Finance breached s 41 of the Credit Contracts and Consumer Finance Act 2003 (the CCCFA).

[2] Real Finance has admitted the breaches. Following discussions, the parties have reached a settlement. Real Finance has indicated it consents to declarations referring to the breaches in the terms sought by the Commission.

[3] The parties have also agreed on compensation which is being paid by Real Finance. This includes costs. Real Finance has also contacted and made compensation arrangements directly with the affected borrowers. Therefore, nothing other than the declarations is sought.

Background

[4] Real Finance is a finance company. As part of its business, it provides loans to consumer borrowers in New Zealand. Its business is transacted through its physical branches in Wellington and Christchurch as well as online via its website or by telephone or email contact.

[5] Credit was provided to a borrower under a contract between the borrower and Real Finance with the terms set out in separate agreements, which are credit contracts.

[6] Between 1 April 2013 and 31 March 2020, the contracts provided for specified credit fees and, if applicable, default fees. These included an Establishment Fee, a monthly Administration Fee and a weekly Default Fee where applicable.

[7] The fees payable under the individual contracts varied from standard loan classes from time to time based on the personal and financial circumstances of the borrower.

[8] Real Finance was a creditor in respect of each contract. Each contract was a credit contract. In the case of borrowers who used or intended to use the credit wholly or predominantly for personal, domestic or household purposes, a “consumer credit contract” in terms of the CCCFA.

[9] Section 41 of the CCCFA provides:

41 Unreasonable credit fee or default fee

A consumer credit contract must not provide for a credit fee or a default fee that is unreasonable.

[10] Sections 42, 44 and 44A include further, specific guidance on the approach to be taken in determining whether establishment fees, non-establishment credit fees, and default fees (respectively) breach s 41.

[11] The leading case on the application of these provisions is the Supreme Court's decision in *Sportzone Motorcycles Ltd (in liq) v Commerce Commission*.¹ In that case, the Court held that:

- (a) The wording of the provisions “indicates a transaction-specific approach to the setting of fees.”² That approach requires a creditor “to identify what steps were undertaken in relation to particular aspects of the provision of credit under a consumer credit contract and calculate the costs of taking those steps.”³
- (b) Under a transaction-specific approach “the focus is on the costs incurred by the creditor in relation to the steps to which the fee relates”.⁴ Other business costs (for instance general overheads,⁵ the lender's cost of capital,⁶ or the cost of training staff⁷) are not transaction-specific and accordingly cannot be recovered through fees charged to borrowers.⁸
- (c) A “helpful formulation in determining the reasonableness of a fee is to ask whether the cost is sufficiently close and relevant to the steps in the lending process to which the fee relates that it can reasonably be said it was incurred in relation to those steps.”⁹

[12] As counsel in their joint memorandum noted, s 41 essentially provides that the fees in question here to be charged by a creditor on a consumer credit contract must reflect the creditor's actual (or reasonably anticipated) costs of performing the relevant

¹ *Sportzone Motorcycles Ltd (in liq) v Commerce Commission* [2016] NZSC 53, [2016] 1 NZLR 1024.

² At [111].

³ At [73].

⁴ At [112].

⁵ At [113].

⁶ At [99]–[100].

⁷ At [96].

⁸ At [112]–[113].

⁹ At [113].

activity. Other costs incurred will not be referable to particular credit transactions and will therefore have to be recovered in the interest rate.¹⁰

[13] The Commission alleged that each Fee referred to in this case was an unreasonable credit fee under the CCCFA.

Settlement

[14] Real Finance admitted all the claims as pleaded in the second amended statement of claim, including the breaches of s 41 of the CCCFA. As a result of the settlement to which I have referred above the only matter that the court is required to consider is whether the declaration sought should be made.

Discussion

[15] Declaratory relief is available in this Court for breaches of the CCCFA.¹¹ While a declaration will not be granted where the matter is moot or the relief will be of no practical utility, declaratory relief following a settlement in this regulatory context may be of real practical utility where there is public interest in a Court declaring conduct to be in breach rather than that breach being acknowledged and admitted in a private settlement agreement between the parties.¹² It will also act to deter others from engaging in similar conduct.

[16] Those considerations apply in this case. Indeed, the parties agreed that the Commission would seek a declaratory order and that Real Finance would consent. For these reasons, and on the basis of Real Finance's admissions, I consider it is in the interests of justice to grant the declaratory order sought. The declarations made in this judgment will be publicised by the Commission and will be available for future guidance together with other relevant decisions on its website.

¹⁰ At [111].

¹¹ *Commerce Commission v Ferratum New Zealand Ltd* [2020] NZHC 1607, (2020) 15 TCLR 621 at [16]–[18].

¹² *Commerce Commission v ANZ Bank New Zealand Ltd* [2015] NZHC 1168, (2015) 14 TCLR 71 at [18]; and *Commerce Commission v Ferratum New Zealand Ltd*, above n 11, at [19]–[21].

[17] I conclude that there is a strong public interest in making the declaratory order for reasons identified in other cases relating to the legislation under consideration here and under the Fair Trading Act 1986, under which the Commission also supervises consumer transactions. They are:

- (a) There is a public interest in the Court declaring Real Finance's conduct to be a breach of the CCCFA because the facts giving rise to the declaration will provide a tangible illustration of a fee-setting methodology which runs contrary to the transaction-specific approach contemplated by *Sportzone Motorcycles Ltd (in liq) v Commerce Commission*.¹³ That, in turn, will provide useful guidance to the market on the practical application of those provisions, particularly in light of recent amendments to the CCCFA, which among other matters: require credit providers to be certified as fit and proper persons;¹⁴ allow the Commission to seek pecuniary penalties for breaches of s 41;¹⁵ and place obligations on a creditor's directors and senior managers to exercise due diligence to ensure that the creditor complies with its duties under the CCCFA.¹⁶
- (b) A declaration will constitute a public record of Real Finance's breach, serving to censure its conduct and deter others from breaching the CCCFA.
- (c) A declaration will serve as confirmation to the public and the commercial community that the Commission will act to enforce the CCCFA where appropriate.
- (d) The declarations are not opposed by Real Finance and are sought as part of a negotiated settlement between the parties. As such, the observations in the cases around the role of the Court in encouraging such settlements are engaged here.

¹³ *Sportzone Motorcycles Ltd (in liq) v Commerce Commission*, above n 1.

¹⁴ Credit Contracts and Consumer Finance Act 2003, s 131G.

¹⁵ Section 107A.

¹⁶ Section 59B.

Result

[18] I make the following orders:

- (a) a declaration that Real Finance Ltd breached s 41 of the Credit Contracts and Consumer Finance Act 2003 by charging unreasonable establishment fees on consumer credit contracts entered into by it between 1 April 2013 and 31 March 2020;
- (b) a declaration that Real Finance Ltd breached s 41 of the Credit Contracts and Consumer Finance Act 2003 by charging unreasonable administration fees on consumer credit contracts entered into by it between 1 April 2013 and 31 March 2020; and
- (c) a declaration that Real Finance Ltd breached s 41 of the Credit Contracts and Consumer Finance Act 2003 by charging unreasonable default fees on consumer credit contracts entered into by it between 1 April 2013 and 31 March 2020.

[19] By agreement no order is made as to costs.

Grice J

Solicitors:
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