

ELDERTON LIMITED
AND
MICHAEL ROGER WOODWARD
AND
THE COMMERCE COMMISSION

SETTLEMENT AGREEMENT

DATED

24th

July

2013

AGREEMENT DATED 24th day of July 2013

PARTIES

ELDERTON LIMITED (Elderton)

and

MICHAEL ROGER WOODWARD

and

THE COMMERCE COMMISSION (the Commission) a statutory body established under section 8 of the Commerce Act 1986

Purpose of Agreement

1. The Commission has conducted an investigation into allegations that Elderton and Michael Woodward (together the **settling parties**) have contravened the Credit Contracts and Consumer Finance Act 2003 (**CCCFA**) and the Fair Trading Act 1986 (**FTA**).
2. The Commission considers that the settling parties have breached the CCCFA and FTA.
3. Elderton admits that its conduct has contravened the CCCFA and FTA.
4. This Settlement Agreement (**Agreement**) records the terms on which the parties have agreed to resolve the Commission's investigation.

Background

Elderton and Woodward

5. Elderton is an Auckland-based lender providing finance in what is colloquially known as the third-tier mortgage market. It has a loan book of less than \$500,000 comprising a small number of loans secured by property.
6. From time to time Elderton is contacted by brokers who have clients who require finance. Often, these clients are finding it difficult to obtain finance for various reasons.
7. Elderton considers the loan proposals from the brokers and, depending on the security and terms, Elderton may offer a loan to the prospective borrower.
8. All of Elderton's customers were introduced by mortgage brokers. Elderton's loan documents were prepared by its lawyer and sent to the borrower's lawyers for signing.

The law

9. A consumer credit contract is defined in section 11 of the CCCFA. In determining whether a credit contract is a consumer credit contract, the purpose of the loan is one of the key criteria. The loan must be primarily for personal, domestic or household purposes.
10. If a credit contract is a consumer credit contract, then the creditor has obligations to provide initial disclosure, continuing disclosure (subject to certain exceptions) and request disclosure.
11. A creditor who has not made initial disclosure is prohibited from enforcing a consumer credit contract. It is a breach of the FTA if a creditor attempts to enforce a consumer credit contract it does not have the right to enforce.
12. The CCCFA also prohibits creditors from charging unreasonable fees.
13. It is not possible for a creditor to contract out of the CCCFA, and it is expressly stated that any creditor who purports to do so breaches the FTA.

Relevant facts

14. In September 2012 the Commission received a complaint about Elderton. The Commission informed Elderton of the complaint, and subsequently commenced an investigation into loans that Elderton had made with four borrowers –
(in relation to two loans).
15. The settling parties have co-operated fully with the Commission's investigation.
16. Elderton's loans with the four borrowers were not documented as consumer credit contracts. Elderton did not provide continuing disclosure statements and did not respond to requests for request disclosure (or responded with incorrect information).
17. Elderton's contracts provided for "processing" (establishment) fees of:
 - 17.1 \$6,715 in relation to a loan to \$170,000;
 - 17.2 \$6,900 in relation to a loan to \$89,000;
 - 17.3 \$3,800 in relation to a loan to \$39,000;
 - 17.4 \$9,050 in relation to the first loan to \$315,900 and \$9,900 in relation to the second loan to \$349,900.
18. Elderton's contract provided for an "overdue" fee which was payable for each week or part week that the principal remained unpaid following the expiry date. It was calculated at 1/X of the processing fee where X is half the number of weeks of the term of the loan. Elderton charged overdue fees to each of the four borrowers.

19. Elderton issued Property Law Notices to _____ and to _____ and proceeded to sell the _____ property at mortgagee sale.
20. Elderton's contracts included specific provisions stating that the CCCFA did not apply to them, thereby purporting to contract out of the CCCFA.

The Commission's view

21. The Commission is of the view that the loans with the four borrowers are consumer credit contracts. Consequently, the Commission considers that Elderton breached:
 - 21.1 section 17 of the CCCFA by failing to provide initial disclosure to _____ as required to _____ and _____ (twice); and
 - 21.2 section 18 of the CCCFA by failing to provide continuing disclosure as required to _____ and _____
 - 21.3 section 24 of the CCCFA by failing to provide request disclosure as required to _____ and _____
 - 21.4 section 41 of the CCCFA by providing for unreasonable establishment fees and unreasonable default fees in contracts with _____ and _____ (twice); and
 - 21.5 section 13(i) of the FTA by misrepresenting that it had the right to sell the _____ property when it did not; and
 - 21.6 section 13(i) of the FTA by purporting to contract out of the CCCFA in relation to the _____ and (two) _____ contracts.
22. The Commission laid informations against the settling parties for alleged breaches of the CCCFA in relation to the _____ loan. The Commission did so prior to the conclusion of its investigation in order to protect its position against a looming statutory time-bar.

Recompense to affected borrowers

23. As a result of the investigation Elderton:
 - 23.1 has renegotiated the one loan still outstanding _____ and re-documented it as a consumer credit contract;
 - 23.2 in assessing the opening balance for the new _____ loan, has recalculated the closing balance of the loans it replaced after excluding unreasonable establishment fees and all default fees and default interest;

23.3 has reimbursed \$20,148;

23.4 has agreed to provide further compensation to:

23.4.1 of \$12,000; and

23.4.2 of \$6,000; and

23.4.3 of \$4,000.

Undertakings by Elderton and Woodward

24. Elderton agrees to pay the further compensation described at paragraph 23.4 within 5 working days of the signing of this Agreement.
25. Elderton undertakes that it will not make any loans that are, or may be, consumer credit contracts. To ensure it does not do so, Elderton agrees not to make any loans to natural persons.
26. Mr Woodward undertakes that he will not make any loans that are, or may be, consumer credit contracts, or allow any company in which he is a director to make any loans that are, or may be, consumer credit loans. To ensure he does not do so, Mr Woodward agrees not to make any loans to natural persons.

No further action by Commission

27. The Commission will withdraw the informations laid against the settling parties and close its investigation upon being satisfied that Elderton has made the payments described at paragraph 23.4.

Unaffected rights

28. This Agreement cannot, and does not, bind any of Elderton's borrowers. Elderton's borrowers are not prevented from taking their own action against the settling parties under the FTA or CCCFA.
29. If there is any material breach by the settling parties in fulfilling this Agreement (such breach to be determined solely by the Commission), the Commission may in its complete discretion bring proceedings against either or both settling parties for breach of the terms of this Agreement or in relation to the alleged breaches identified at paragraph 21.
30. If Elderton or Mr Woodward (personally or by acting through a company) enters into loan contracts that are or may be consumer credit contracts, in contravention of their undertaking, the Commission may, at its discretion, apply to the Court for an order under section 108 of the CCCFA prohibiting Elderton or Mr Woodward or any company through which Mr Woodward is acting from acting as a creditor.

31. Nothing in this Agreement will limit or affect the ability of the Commission to issue proceedings against the settling parties in respect of matters not related to this Agreement, or in respect of conduct engaged in by the settling parties after the date of this Agreement.

Giving effect to the Agreement

32. All parties agree to take such steps as are necessary or desirable to give full effect to the terms of this Agreement.
33. If necessary to give effect to the Agreement, the terms of this Agreement may be amended by the agreement of the parties.

Miscellaneous

34. The fact that this Agreement has been entered into is not confidential. The parties agree that the only content of this Agreement that is confidential are the names of the borrowers. This Agreement may be published on the Commission's website and may be released to the public, subject to the redaction of the borrowers' names.
35. The parties may make public statements in relation to the settlement. Any public statement must be consistent with the matters set out in this Agreement.
36. The settling parties agree that they will not make any public comment in relation to this settlement until after the Commission has issued a media release notifying the public of this settlement.
37. Any notice or communication that is given or served under or in connection with this Agreement must be given in writing in the following manner:

- 37.1 If addressed to the Commission, by hand delivery or email to the following address:

Commerce Commission
Level 19
135 Albert Street
AUCKLAND 1143
Email – john.lyall@comcom.govt.nz


- 37.2 If addressed to Elderton or Mr Woodward, by hand delivery or email to the following address:

Elderton Limited
c/- Neilsons
270 Neilson Street
Onehunga
AUCKLAND 1643
Email – trent@neilsonslawyers.co.nz

EXECUTED by and under the name of the **COMMERCE COMMISSION** by:


Dr Mark Berry, Chair

EXECUTED on behalf of **ELDERTON LIMITED** by:


Director

EXECUTED by **MICHAEL ROGER WOODWARD**:

