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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-409-000026
[2013] NZHC 2531

UNDER	the Credit Contracts and Consumer Finance Act 2003 and the Fair Trading Act 1986
BETWEEN	COMMERCE COMMISSION Plaintiff
AND	SPORTZONE MOTORCYCLES LIMITED (in liquidation) First Defendant
	MOTOR TRADE FINANCES LIMITED Second Defendant
	MTF SECURITIES LIMITED Third Defendant

Hearing:	12 - 16, 19 - 23 and 27 November 2012
Appearances:	SJ Mills QC, KC Francis and IS Auld for Plaintiff IJ Thain and OV Collette-Moxon for Defendants
Judgment:	27 September 2013

JUDGMENT OF TOOGOOD J

This judgment was delivered by me on Friday, 27 September 2013 at 11am
Pursuant to Rule 11.5 High Court Rules

Registrar/Deputy Registrar

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Introduction

[1] The Credit Contract and Consumer Finance Act 2003 ("the CCCFA") is an important piece of consumer protection legislation, the relevant part of which, for the purposes of this case, regulates credit fees and default fees for consumer credit contracts. In the exercise of its statutory role and functions under the CCCFA as public watchdog, the Commerce Commission has issued this proceeding about fees charged to the purchasers of motorcycles on credit, in addition to interest payments due under the credit contracts into which they entered.

[2] Although the evidence, the legal arguments and the outcome are focused upon the terms of particular credit contracts entered into by the first defendant as a motorcycle retailer, the case has important ramifications for borrowers and lenders in the wider consumer finance market.

[3] The express statutory purposes of the CCCFA do not include placing limits on the cost of consumer finance. Subject to rules regarding the calculating of interest, designed to prevent oppression, the CCCFA contains no limits on interest rates. Further, it permits lenders to charge fees to cover their associated costs with the financing arrangements, including the costs of establishing a credit contract, maintaining an account, and addressing the consequences of default by a borrower. In general terms, the only limitation on fees charged by lenders under a consumer credit contract is that the arrangements must not provide for a credit fee or a default fee that is unreasonable. Reasonableness, in general terms, is determined by the extent to which the fee goes no further than entitling the borrower to recover its costs in connection with or related to the particular matter to which the fee relates.

[4] The real issue in this case is the extent to which a borrower may recover, by the imposition of a fee or fees, general overheads which are not directly or closely related to the particular activity concerned, such as the setting up and processing of an application for credit. It is not disputed that, to the extent that such overheads may not be recoverable by way of a fee, a borrower is not inhibited from setting an interest rate which achieves that purpose, covers the cost of funds, and provides the borrower with a reasonable profit.

[5] The following particular issues require determination:

(a) How do the wording of the relevant statutory provisions and the statutory purposes of the legislative scheme influence the interpretation of the CCCFA?

(b) In light of the purposes of the CCCFA, when determining the reasonableness of a fee, what is the required nexus between a cost and a fee before that cost can be included in an establishment, default or "other" credit fee? More specifically:

(i) What does "in connection with" mean in the context of s 42?

(ii) What does "in relation to" mean in the context of s 44?

(c) Applying the answers to those questions, were any of the defendants' fees unreasonable?

(d) Did the defendants have an obligation to disclose their credit check fees under s 17 of the CCCFA?

(e) Do the terms "establishment fee" and "account maintenance fee" as used by the defendants amount to a breach of s 9 of the Fair Trading Act 1986?

Factual background

[6] The Commerce Commission ("the Commission") is responsible for promoting compliance under the CCCFA.[1]

[7] The first defendant, Sportzone, was in the business of new and used motorcycle sales, services and repairs. It appears to have been a victim of the Christchurch earthquakes and is now in liquidation. This case concerns fees charged

[1] Credit Contract and Consumer Finance Act 2003, s 111(1).

by Sportzone in connection with credit contracts entered into during 2006, 2007 and 2008 with the purchasers of motorcycles who borrowed part of the purchase price.

[8] The second defendant, Motor Trade Finances Limited ("MTF"), provides financial services to associated dealers. Sportzone was one of MTF's associated dealers. The third defendant, MTF Securities Ltd, provided finance to its associated company MTF by purchasing loans from MTF which were then securitised and sold as debt securities.

[9] On 13 July 2004, MTF entered into an agreement with Sportzone which permitted Sportzone to write credit contracts to provide finance to purchasers of vehicles. Under this agreement, Sportzone was allowed to provide intending purchasers of motorcycles with finance by entering into conditional purchase agreements with purchasers for periods of one to five years, with Sportzone taking a security in the motorcycles to secure the payments under the conditional purchase agreements.

The contractual arrangements

[10] Between 26 May 2005 and 16 July 2008 the borrowers entered conditional purchase agreements for the purchase of motorcycles which named Sportzone as the lender. In order to fund the loans, Sportzone simultaneously borrowed from MTF a sum equal to the total advance made under the loans. The MTF loans were funded by MTF through short term bank facilities and by selling them to MTF Securities. As security for repayment of the MTF loans, Sportzone assigned the loans and its security interest in them to MTF. MTF then sold the loans and its security interest in them to MTF Securities. The terms of the credit contracts required the borrowers to make the payments due on the loans to MTF Securities. Payment to MTF Securities of the amounts due under the loans discharged the obligations of Sportzone to pay equivalent amounts under the MTF loans.

[11] The loans provided for the payment of a number of credit fees. They included:

(a) an establishment fee of $200 charged by Sportzone;

(b) an establishment fee of $190 charged by MTF;

(c) as part of the establishment fee charged by MTF and Sportzone, a fee of [withheld from publication] plus GST charged by Baycorp for a credit check and a portion of the cost of a Land Transport Safety Authority charge for a motor vehicle check, the cost of which ranged from [withheld from publication] per borrower;

(d) a monthly account maintenance fee of $5 charged by Sportzone;

(e) a monthly account maintenance fee of $3 charged by MTF to Sportzone and by Sportzone to the borrower;

(f) a full prepayment administration fee of $50 charged by MTF to borrowers who fully prepaid their loans before the date on which the last payment was due; and

(g) a fee of $5 charged by MTF and described in the loans as a "PPSR Financing Statement Registration Fee".

[12] The loans also provided for the payment of a number of default fees:

(a) A prepossession fee of $50 charged by MTF to the borrowers in arrears for 12 days. This fee was increased to $80 for loans advanced after 2 February 2007.

(b) A $70 repossession fee charged by MTF to borrowers in arrears for 34 days. This fee was increased to $80 for loans advanced after 2 February 2007.

[13] In August 2006 the Commission began investigations into Sportzone and the other defendants following receipt of a complaint. The Commission's investigation identified evidence which raised significant concerns regarding the defendants'

general approach to compliance with the CCCFA. This case is the culmination of that investigation.

The statutory framework

[14] This case is concerned with the interpretation of Part 2, subpart 6 of the CCCFA which regulates the reasonableness of credit fees or default fees in consumer credit contracts.

[15] Section 41(1) of the CCCFA provides that a consumer credit contract must not provide for a credit fee or a default fee that is unreasonable. Whether a fee is unreasonable is to be determined by reference to ss 42 to 44.

[16] "Credit fees" and "default fees" are defined in s 5 of the Act:

> **credit fees** means 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 (including any insurance premiums payable if the creditor requires the debtor to obtain insurance cover from a particular insurer); but does not include the following:
>
> (a) interest charges:
>
> (b) a charge for an optional service:
>
> (c) a default fee or a default interest charge:
>
> (d) government charges, duties, taxes, or levies
>
> ...
>
> **default fees** means fees or charges payable on a breach of a credit contract by a debtor or on the enforcement of a credit contract by a creditor; but does not include default interest charges

[17] Section 42 of the CCCFA deals with establishment fees. The term "establishment fees" is defined in s 5:

> **establishment fees** means the fees or charges payable under the credit contract that relate to the costs incurred by the creditor in connection with the application for credit, processing and considering that application, documenting the contract, and advancing the credit; but does not include any fee or charge to the extent that it is a charge for an optional service

[18] Section 42 provides mandatory but not necessarily exclusive criteria for determining whether establishment fees are unreasonable:

> **42 Establishment fees**
>
> In determining whether an establishment fee is unreasonable, the Court must have regard to—
>
> (a) whether the amount of the fee is equal to or less than the creditor's reasonable costs in connection with the application for credit, processing and considering that application, documenting the consumer credit contract, and advancing the credit; or
>
> (b) whether the amount of the fee is equal to or less than the creditor's average reasonable costs of the matters referred to in paragraph (a) for the appropriate class of consumer credit contract.

[19] Section 43 is not directly in issue in this case but it provides some relevant context. The section deals with prepayment fees, being fees which are charged for early repayments under credit contracts. The focus of the section is on a creditor's reasonable costs as well as a reasonable estimate of any loss. Section 43 provides that a fee will be unreasonable "if, and only if" it exceeds a reasonable estimate of loss.

[20] Section 44 provides mandatory but not necessarily exclusive criteria for determining whether "other" credit fees[2] and default fees[3] are unreasonable:

> **44 Other credit fees and default fee**
>
> (1) In determining whether a credit fee or a default fee is unreasonable, the Court must have regard to,—
>
> (a) in relation to the matter giving rise to the fee, whether the fee reasonably compensates the creditor for the following:
>
> (i) any cost incurred by the creditor (including the cost of providing a service to the debtor if the fee relates to the provision of a service):
>
> (ii) a reasonable estimate of any loss incurred by the creditor as a result of the debtor's acts or omissions; and
>
> (b) reasonable standards of commercial practice.

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2 "Other credit fees" means credit fees as defined in s 5, other than establishment fees which are addressed in s 42.

3 See [16] above.

> (2) This section does not apply to—
>
> (a) establishment fees; or
>
> (b) a fee or charge payable on a part prepayment under a consumer credit contract; or
>
> (c) a fee or charge payable on a full prepayment of a consumer credit contract (unless the fee relates to administrative costs).

Pleadings

[21] It is against this legislative background that the Commission brought these proceedings. It claims:

(a) the establishment fees charged by Sportzone and MTF were unreasonable;

(b) the maintenance fees charged by Sportzone and MTF were unreasonable;

(c) the prepossession fees charged by MTF, or alternatively MTF Securities, were unreasonable;

(d) the repossession fees charged by MTF and MTF Securities were unreasonable;

(e) Sportzone and MTF did not properly disclose the credit check fees under s 17 of the CCCFA; and

(f) the use of the terms "establishment fee" and "account maintenance fee" used by Sportzone and MTF amount to misleading and deceptive conduct under s 9 of the Fair Trading Act 1986.

Plaintiff's submissions

[22] The Commission argues that the defendants' fees were unreasonable because the establishment fees included costs which were not incurred in sufficient connection with the particular transaction, and the other credit fees and default fees

were not sufficiently related to the activities for which the fees were charged. For example, the Sportzone establishment fee included costs the Commission says could not lawfully be recovered by such a fee because they were not related to the borrowers' applications for credit, the processing and considering of applications for credit, documenting the consumer credit by the lenders, and advancing the credit to the borrowers. Instead, the fees were intended to recover fixed cost items such as premises rent, telephone and electricity charges, training costs, insurance and rates. Similarly, the MTF account maintenance fee included costs which were unrelated to activities such as administering the MTF loans and maintaining the borrowers' loan accounts. Instead, they were intended to recover costs incurred in respect of system development, area managers and IT production.

[23] The Commission submits that in order to establish that the recovery of a cost can be included in any credit fee as being a cost incurred "in connection with" (s 42) or "in relation to" (s 44) matters giving rise to the fee, a cost must be incurred in relation to a particular loan to an individual borrower. That is, the required connection is to the individual debtor against whom the cost is being charged and that connection must be clearly identified. While a creditor might be able to average its costs for a particular activity, the starting point is the identification of the costs incurred in relation to the specific activity and the specific debtor against which the fee is charged.

[24] As to the recoverability of costs, the Commission argues that other less direct costs can only be recovered as fees if the required connection can be made with the particular category of fee. If no such connection can be made, the cost becomes a general overhead of the business which can be recovered through interest.

[25] The Fair Trading Act claim is based on the defendants allegedly incorrectly representing that the fees charged were recovering only costs that related to those fee categories as defined in the CCCFA.

Defendants' submissions

[26] The defendants argue that their fees were reasonable and were set out with proper regard to the actual costs of relevant activities. In determining the reasonableness of fees, the defendants argue that ss 42 and 44 require the Court to have regard to "fee versus cost" comparisons. For each comparison, the relevant costs are all creditors' actual reasonable costs "in connection with" or "in relation to" the relevant matters giving rise to the fee. Because the matters giving rise to the fee are not the use of the money, such costs will not include the value of the use; that is, the time value of the money. Therefore, the defendants say, when seen in this context, the phrases "in connection with" and "in relation to" do not need to be read more narrowly. The defendants also say that as regards each fee, the Court is not required to consider only the result of the "fee versus costs" comparison. Sections 42 and 44 require the Court to have regard to certain matters, but not exclusively.

[27] As to the Fair Trading Act claim, the defendants say the only representations were that the "establishment fee" is the fee being charged for establishing the loan, and the "account maintenance fee" is the fee charged for maintaining the borrower's loan account. The defendants deny these are misrepresentations or, if they were, that any losses have been incurred as a result.

[28] As to the disclosure claim, the defendants say they were under no obligation to state the method of calculating the fees or providing a breakdown of them.

Statutory interpretation the essence of the case

[29] The central question is essentially one of statutory interpretation: are the expressions "in connection with" in s 42(a) of the CCCFA, and "in relation to" in s 44(1)(a), to be read narrowly so as to limit costs recoverable by fees to variable costs and some directly-related fixed costs determined by reference to the activities involved in a particular transaction? Or should those provisions be applied broadly so that any direct or indirect costs having some beneficial relationship with the particular activity concerned, whether they are variable costs or fixed costs associated with the business of lending, are recoverable by fees?

[30] The view of the second defendant, a finance company, is that the legislation permits it to recover all of its costs by way of fees and to make its reasonable profits from the margin between the cost of acquiring funds for lending and the interest rate charged to the borrower.

Consideration of the statutory wording

[31] Section 5(1) of the Interpretation Act 1999 provides that the meaning of an enactment must be ascertained from its text and in the light of its purpose. I turn to look at the text.

[32] It is evident from s 41(1) of the CCCFA that the central inquiry to be undertaken in respect of the fees imposed by the defendants which have been challenged by the Commission is whether a fee under consideration is unreasonable.

Establishment fees – s 42(1) CCCFA

[33] In determining whether an establishment fee is unreasonable, s 42(1) directs the Court to assess in respect of the credit contract in question how the fee charged compares to the creditor's actual and reasonable costs in connection with the four identified steps undertaken by the creditor in the transaction.[4] Where it is appropriate to do so, the Court may, instead of looking at the actual costs in connection with a particular transaction, assess the creditor's average reasonable costs in undertaking the four steps described in respect of the appropriate class of credit contract.[5]

[34] As I have indicated, the principal contest between the parties to this case is the degree of connection required between the creditor's costs and the activity for which the fee is charged.

[35] Two features of the inquiry under s 42 should be noted. First, the use of the definite article in referring to "the application for credit" reinforces the inference to be drawn from the use of the term "an" establishment fee at the beginning of the

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[4] Credit Contract and Consumer Finance Act 2003, s 42(a).

[5] Ibid, s 42(b).

section, that the Court's inquiry is directed not to whether the lender's fees in general are reasonable, but whether an establishment fee charged in a particular transaction is unreasonable. This is implied also by the definite article directing the Court to consider "the amount of the fee".

[36] Further, the three chronological steps following the application for credit are referable to the particular transaction; namely, processing and considering "that" application, documenting "the" consumer credit contract, and advancing "the" credit.

[37] The second notable feature of the inquiry is that it is process oriented. What must be assessed is the reasonableness of the costs in connection with the four chronologically-listed steps taken when a credit application is made and granted. That implies that it may not be reasonable to charge an establishment fee which recovers costs which are remote from individual transactions and are connected more closely with the general overheads of the business; that is, costs not directly attributable to the four steps. Even where an average reasonable costs approach is taken under s 42(b), the question remains how the fee charged for the particular transaction compares to the creditor's average reasonable cost for each of the four steps identified in the paragraph.

[38] As the focus of the section is on the particular transaction in question, the costs to be considered must be those related to the credit transaction and not to the sale and purchase transaction in general. To illustrate by reference to Sportzone's business of selling motorcycles, business costs related to the overall business of motorcycle sales, which are incurred irrespective of whether a sale is for cash or on credit, must be disregarded. I do not understand the defendants to argue otherwise, but there is more scope for disagreement in respect of the establishment fees charged by the finance company MTF in relation to costs connected with the overall business of lending.

[39] The inquiry under s 42 must involve making a determination of reasonableness in a particular case, rather than in general, because of the nature of the remedies for any breach of the obligation under s 41 which are necessarily fact or transaction specific: see, for example, applications under s 93 for the exercise of the

Court's general power to make orders under s 94(1)(b) for compensation for loss or damage.

Other credit fees and default fees – s 44 CCCFA

[40] An analysis of the provisions of s 44 indicates that an inquiry into unreasonableness in respect of a credit fee other than an establishment fee, or a default fee, is also transaction specific. This is so, first, because the purpose of the inquiry is likely to be in the context of a claim for a remedy of the type just discussed and second, because of the wording of the section.

[41] As in s 42, the use of the definite article in s 44(1)(a) points to a particular fee charged in a particular transaction. The matter giving rise to the fee is the recovery purpose for which the fee is charged. In the present case, for example, the matters giving rise to the credit fees and default fees in question are the administration and maintenance of the loans and the borrowers' accounts in question; the cost of the borrower falling into arrears in terms of scheduled payments of principal and interest; and costs related to the borrower's default, including fees charged for notifying the borrower of an intention to repossess the subject vehicle (pre-possession fees) and fees charged for the cost of actually repossessing the vehicle.

[42] The reference in s 44(1)(a)(ii) to a reasonable estimate of any loss incurred by the creditor as a result of the debtor's acts or omissions also focuses attention on a particular event or fee activity. In interpreting the phrase "reasonable estimate of the creditor's loss" arising from a part prepayment,[6] Asher J said in *Commerce Commission v Avanti Finance*[7] that he interpreted the phrase as meaning an estimate that, on an objective informed analysis at the time the credit contract is entered into, will do no more than compensate the creditor for the actual losses it could expect to sustain in the event of prepayment. An estimate of loss calculation will be unreasonable if it will result in a creditor recovering significantly more than its actual loss arising from the particular prepayment.

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6 Credit Contracts and Consumer Finance Act 2003, s 43(1).

7 *Commerce Commission v Avanti Finance* (2009) 9 NZBLC 102,662 (HC) at [31].

[43] The Court is required under s 44(1)(b) to have regard to reasonable standards of commercial practice. This requirement does not shift the inquiry away from a consideration of the particular fee charged in a particular case; it indicates that the Court's inquiry as to reasonableness in the particular case will be informed by what is regarded as reasonable in general commercial practice.

Is there a distinction between "in connection with" and "related to"?

[44] Mr Mills QC suggested that the differing language and tighter restrictions on establishment fees evident in the legislative history indicate that the expression "in connection with" in s 42(a) contemplates a closer nexus between the cost and the activity is required than is necessary under s 44(1)(a) where the question is whether the fee reasonably compensates the creditor "in relation to" the matter giving rise to the fee. Although he did not say so, it is implicit in that submission that the Commission may argue that the test of reasonableness under s 42 is more onerous than the test under s 44. If that is what was intended, I am not persuaded it is right. The differing language appears to me to have been used because of the different structure of the sections and the way in which the inquiries into the nexus are to be conducted.

[45] In my view, the expression "in connection with" (s 42(a)), "arising from" (s 43(1) and (2)), and "in relation to" (s 44(1)(a)) merely reflect the nature of the particular inquiry under the respective sections of the CCCFA without altering the standard of reasonableness in s 41.

A general statement of approach based on the statutory wording

[46] The Commission's contention is that because the wording of ss 41, 42 and 44 focuses attention on particular transactions the determination of what is reasonable confines the justification to costs which are directly or closely connected with (in relation to establishment fees) and related to (in connection with other credit fees and default fees) the loan application and the processing of it and the administration of the particular loan.

[47] The defendants argue by reference to what they say is the plain meaning of the expression "in connection with" and "in relation to" that the absence of any qualification to the word "costs" requires the Court to give the expressions their ordinary broad meaning. Thus, anything which is connected with or related to the activity or matter for which the fee is charged will fall within the category of costs to be taken into account in determining the reasonableness of the recovery.

[48] For the defendants, Mr Thain referred to the observation by Hardie Boys J in *Strachan v Marriott*[8] that the expression "in connection with" may signify no more than a relationship between one thing and another and that the expression did not necessarily require that it be a causal relationship. Mr Thain also acknowledged, however, that the Judge went on to cite the following passage in *Hatfield v Health Insurance Commission*:[9]

> Expressions such as "relating to", "in relation to", "in connection with", and "in respect of" are commonly found in legislation but invariably raise problems of statutory interpretation. They are terms which fluctuate in operation from statute to statute ... The terms may have a very wide operation but they do not usually carry the widest possible ambit, for they are subject to the context in which they are used, to the words with which they are associated, and to the object or purpose of the statutory provision in which they appear.

[49] As Mr Thain submitted, that observation may be no more than a re-statement of s 5(1) of the Interpretation Act.

[50] Mr Mills referred to the similar views of Savage J in *Yurjevich v Commissioner of Inland Revenue*[10] where the High Court was required to determine whether costs were incurred "in connection with" the calculation or determination of a taxpayer's income, so as to be deductible for income tax purposes. The taxpayer's claim was for a deduction for travel expenses on trips taken to discuss his tax affairs with his relatives. Savage J acknowledged that the expression required some link or connection between the expenditure and the preparation, institution or presentation of the objection to the Commissioner's assessment. In the Court's view, it would not have been meant by Parliament to include in the meaning of the expression a link or

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8 *Strachan v Marriott* [1995] 3 NZLR 272 (CA) at [279]–[280].

9 *Hatfield v Health Insurance Commission* (1987) 15 FCR 487 at 491.

10 *Yurjevich v Commissioner of Inland Revenue* (1991) 13 NZTC 8,185; (1991) 16 TRNZ 188 (HC).

connection that was not sufficiently closely related to some aspect of the objection itself in the context of the income tax legislation. Savage J said:[11]

> There must, it seems to me, be a link or connection which is sufficiently close and relevant to the preparation institution or presentation of the objection that it can reasonably be said that the expenditure was incurred in connection with it.
>
> It does not seem to me that it is possible to postulate any test more precise than that which I have just given. I think that each case must be considered in the light of its own particular circumstances, and a practical and common sense judgment made in each instance.

[51] The Court concluded that claiming for the expense of travelling to see relatives to discuss a tax assessment merely because the judgment of the relatives was valued by the taxpayer was "too remote" and "not sufficiently relevant" to be considered in the context of the legislation to be "in connection with" the objection to the assessment.

[52] The textual analysis of ss 41, 42 and 44 suggests that a similar approach is required in the present case. What is a reasonable recovery of costs by a fee charged for a particular activity or matter will depend on the extent to which the cost is reasonably referable to the activity or matter in question. I turn to consider the statutory purposes.

The relevant statutory purposes

[53] The purposes of the CCCFA as set out in s 3, so far as is relevant, are as follows:

> **3 Purposes**
>
> The purposes of this Act are—
>
> (a) to protect the interests of consumers in connection with credit contracts, consumer leases, and buy-back transactions of land; and
>
> (b) to provide for the disclosure of adequate information to consumers under consumer credit contracts and consumer leases—
>
> (i) to enable consumers to distinguish between competing credit arrangements or competing lease arrangements; and

[11] At 8,189.

(ii) to enable consumers to become informed of the terms of consumer credit contracts or consumer leases before they become irrevocably committed to them; and

(iii) to enable consumers to monitor the performance of consumer credit contracts or consumer leases; and

(c) to provide rules about interest charges, fees, and payments in relation to consumer credit contracts;

....

[54] The first stated purpose is to protect the interests of consumers in connection with credit contracts; this fundamental purpose must be taken into account in the interpretation of specific sections.[12] Consistently with the purpose of consumer protection, a key objective of the legislation is to provide what Hammond J described in *Bartle v GE Custodians*,[13] as "truth in lending", which is not merely restricted to obvious features such as interest rates but extends to what the transaction in its fundamentals is really all about.

[55] Second, the ends which the provision of adequate information serves are to enable consumers to distinguish between credit contracts, or make what Priestley J in *Commerce Commission v Bluestone Mortgages*[14] referred to as an "apples for apples comparison" between competing offers of credit; to enable creditors to be adequately informed of credit terms before being committed to them;[15] and to enable consumers to monitor the performance of the credit contract.

[56] I accept also the submission of Mr Mills QC on behalf of the Commission that the third express statutory purpose of providing rules about interest charges, fees, and payments in relation to consumer credit contracts[16] has the objective of defining and confining the circumstances in which fees can be charged. It is also intended to regulate the levels of fees, as distinguished from interest, and to avoid charging additional interest disguised as fees.

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12 *Commerce Commission v Avanti Finance*, above n 7 at [28].

13 *Bartle v GE Custodians Ltd* [2010] NZCA 174, [2010] 3 NZLR 601 at [50].

14 *Commerce Commission v Bluestone Mortgages (NZ) Ltd* HC Auckland CIV-2009-409-617, 21 October 2010.

15 *King v Norfolk Nominees Ltd* [2012] NZCA 190 at [40].

16 Credit Contracts and Consumer Finance Act 2003, s 3(c).

Is the purpose of ss 41, 42 and 44 primarily to avoid the charging of fees in the nature of interest?

[57] While not disregarding the provisions of s 3 of the CCCFA, Mr Thain argues for the defendants that the actual purpose of the rules about fees contained in ss 41, 42 and 44 of the CCCFA is to deal with a concern that lenders could otherwise use fees to avoid the limits on interest charges in ss 38 and 39. Those sections prohibit lenders from charging interest in advance and require lenders to calculate interest by applying a rate solely to the amount outstanding at the relevant time. In this regard, Mr Thain referred to observations in the Ministry of Consumer Affairs' initial briefing paper to the Commerce Select Committee in May 2003[17] and a Cabinet Committee Review Paper[18] as indicating that officials considered it necessary to place substantive restrictions on fees because creditors might otherwise be tempted to avoid restrictions on charging interest by imposing fees which are in the nature of interest charges.

[58] The defendants submit that a charge in the nature of interest is one which compensates and rewards the lender for the fact that it does not have the use of its money as distinct from a charge for other services provided or activities carried out by the lender in relation to making or managing the loan or dealing with defaults. They contend, therefore, a narrower purpose for ss 41, 42 and 44; namely, to restrict the ability of creditors to recover in fees amounts which are in fact compensation for providing the borrower with the use of the money lent over the time for which it is lent. On that basis, Mr Thain submits, it is unnecessary to do more than apply the words "in connection with" and "in relation to" in their ordinary broad sense so as to distinguish the costs recovery from interest.

[59] I acknowledge the validity of Mr Thain's argument that one objective of the credit law reform represented by the CCCFA was to promote "pricing flexibility for lenders",[19] and that it was recognised that restrictions on fees inhibit that flexibility.[20]

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17 Ministry of Consumer Affairs Consumer Credit Bill: Initial briefing to the Commerce Select Committee (1 May 2003) at p 10.

18 Cabinet Finance, Infrastructure and Environment Committee *Consumer Credit Law Review: Paper 1: Proposals for Reform* (29 June 2001) FIN(01) 91 at [39].

19 Ibid, at [21].

20 Ministry of Consumer Affairs *Consumer Credit Law Review Part 3: Transparency in Consumer Credit: Interest, Fees and Disclosure* (April 2000) at Part 7.4.7 (p 41) and 9.2.4 (p 55).

As a result, the option of prohibiting the charging of fees was rejected because it would have reduced the scope for innovation and differentiated products in the lending market.[21] As I understand the defendants' case, those propositions support the argument that it is reasonable to include in the fees charged the cost of developing such products.

[60] Mr Thain did not dispute that, in promoting the CCCFA as a replacement for the Hire Purchase Act 1971 and the Credit Contracts Act 1981, the Ministry of Consumer Affairs was concerned to promote transparency in the arrangements for the provision of consumer credit. The Ministry's third consultation document, dated April 2000, dealt specifically with that topic.[22] Mr Thain submitted that because the objective of enabling consumers to distinguish between competing credit arrangements is placed in s 3 as one of the objectives of disclosure of adequate information, it is not necessary to interpret the rules about interest charges, fees, and payments referred to in s 3(c) with the objective of transparency in mind.

[61] I note, however, that in introducing the Consumer Credit Bill in 2003, the Hon Judith Tizard, Minister of Consumer Affairs, summarised the purposes of the Bill as being to protect the interests of consumers in respect of credit contracts, to enable consumers to become informed at the time of entering a contract and throughout its duration, and to "provide transparent rules for charging interest and fees and calculating balances".[23] The Minister also referred to enforcement by the Commission as being an important aspect of the Bill because it would give further protection against unethical behaviour, particularly in respect of unsophisticated borrowers.[24]

[62] Although enforcement is not identified in s 3 as one of the purposes of the CCCFA, the importance of enforcement, as indicated by the Minister's comment in moving the introduction of the Bill, may be inferred by the role of the Commission under the legislation which includes taking prosecutions in relation to breaches[25] and

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21 Ibid, at Part 9.1.1.

22 Ministry of Consumer Affairs *Consumer Credit Law Review Part 3: Transparency in Consumer Credit: Interest, Fees and Disclosure*, above n 20.

23 Consumer Credit Bill (18 February 2003) 606 NZPD 3511.

24 Ibid at 3511–3512.

25 Credit Contracts and Consumer Finance Act 2003, s 111(2)(b).

taking civil proceedings under the Act, including proceedings under Part 5 to re-open oppressive credit contracts.[26] If the statutory obligations of lenders are to have any meaning and a beneficial impact on lending behavior, they must be capable of being readily understood and applied. Transparency and ease of expression will assist enforcement.

Summary of statutory purposes

[63] In summary, therefore, I consider that the statutory purposes for the provisions I am required to interpret in this case are:

(a) consumer protection;

(b) the provision of adequate information;

(c) identifying the circumstances in which fees can be charged, and the levels of them; and

(d) assisting the enforcement of lender obligations.

Reasonableness requires a closely relevant connection between the cost claimed and the particular transaction

[64] The defendants argue that narrowing the scope of the expressions "in connection with" and "relevant to" in the manner sought by the Commission requires the Court to rewrite the statute so that it refers to costs closely or directly connected with or related to the matter or activity in question.

[65] I am not persuaded that it is necessary to read words into the statute in order to give effect to which I consider to be the meaning provided by the text in the light of the relevant statutory purposes. The overriding consideration is that of reasonableness contained in s 41. Reasonableness is to be judged from the view of an informed objective bystander considering whether it is reasonable for the particular borrower to meet the costs which the lender seeks to recover by the fees

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[26] Ibid, ss 111(2)(c) and 120.

charged. That exercise is not assisted by a test which, in effect, permits a creditor to justify any fee on the basis that it is simply recovering an actual business cost incurred by the creditor, other than the cost of the funds advanced, no matter how remote the cost may be from the transaction in which the fee is charged.

[66] Bearing in mind the statutory purposes identified and the focus of the statutory wording upon particular transactions, it is appropriate to adopt the test from *Yurjevich*.[27] To be reasonable, the cost 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 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.

[67] Applied to this case, that approach does not allow the imposition of fees to recover costs which are not closely relevant to the particular transaction but which are merely referable to the general business of selling motorcycles or of lending money. Taking that view does not mean that general business overheads are not recoverable. For Sportzone as the seller of the motorcycles, general overheads which may not be recovered by fees in a credit transaction are recoverable in the purchase price. For the finance company, the general overheads for the business of lending are recoverable in interest.

Applying the principles in practice

[68] 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 straight-forward 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. Context will assist to resolve marginal cases and the concept of reasonableness is sufficiently flexible to allow practical application.

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[27] Above, n 10.

[69] In *Wood v Universal Fur Co Ltd*,[28] Davison CJ was required to consider a dispute which concerned a seller's claim to recovery of his selling costs in respect of a layby sale.[29] After reviewing a number of accounting texts and their treatment of selling and other operating expenditure, the Court noted the contrast between selling costs (both fixed and variable) with general overheads. It determined that selling costs were to be ascertained on the basis of the costs of several specific items connected to the sale and did not include general overheads.

[70] The evidence adduced by the parties in this case included an extensive discussion of accounting principles and the suitability of applying them to the assessment of reasonableness which the Court is required by s 41 to undertake. Evidence was also called from economists intended to support the parties' contentions on accounting issues by reference to the economic consequences. As to the latter, I was assisted by the evidence to understand the discussion about statutory purpose; but if the approach which I consider to be required by the text and purposes of the CCCFA has unintended economic or market consequences, that will be a matter for the relevant government ministries to address.

[71] The Commission's proposition is that the principles of management or cost accounting provide practical guidance to lenders, the Commission in its enforcement role, and a court charged with determining whether a fee is reasonable. In simple terms, it is proposed, principally through the views of Professor Robert Bowman, that the appropriate accounting approach in determining the reasonableness of fees charged under the CCCFA is to assess the fees against the variable costs of the activity giving rise to the fee. For example, Professor Bowman asserts an establishment fee should be assessed against the variable costs incurred in establishling a consumer credit contract, whereas fixed costs are incurred irrespective of the fee-related activities and should not be recoverable.

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28 *Wood v Universal Fur Co Ltd* [1985] 1 NZLR 640 (HC).

29 Under s 9(1)(a) of the Layby Sales Act 1971.

The variable costs approach

[72] To understand the basis of Professor Bowman's proposition, it is necessary to understand the meaning of the accountancy terms direct and indirect costs, and fixed and variable costs. These are two alternative accounting approaches to partitioning costs and virtually any cost related to the productive activity of a company can be categorised as one or other of the descriptions within a pair. In this case the terms can be applied to a range of tasks undertaken by the defendants. Although taken from the accounting approach in relation to manufactured product, the term "cost object" can be used to refer to such activities as the establishment and maintenance of a loan and I accept Professor Bowman's proposition that the concept is helpful in the present context.

[73] The distinctions between fixed or variable costs and between direct or indirect costs are in both cases drawn on their relationship with a cost object. Professor Bowman explained the distinction in these terms:

(a) Direct costs are costs that are easily identified as relating to a cost object within an organisation.

(b) Indirect costs are costs that relate to a productive activity of a company but cannot be readily identified with a particular cost object.

(c) Fixed costs are costs that are independent of the volume of a cost object (the output).

(d) Variable costs are costs that change in proportion to the volume of a cost object.

[74] In the context of fees governed by the CCCFA, Professor Bowman considers that the appropriate accounting approach is to assess the fees charged against the variable costs of the activity giving rise to the fee. For example, an establishment fee should be assessed against the variable costs incurred in establishing a consumer

credit contract. Fixed costs are incurred irrespective of the fee-related activities, and should not be recoverable.

[75] The finance company MTF has allocated virtually all of its company overheads to the fees. In Professor Bowman's opinion this is not a reasonable practice and is not based upon an analysis of variable costs. He argues that MTF has justified its fees by reference to costs that are fixed and are not affected by consumer lending, and overhead costs that are not in connection with the activities giving rise to each fee. He observes that Sportzone also has attempted to justify its fees by reference to a number of costs that are not in connection with the activity in question. He concludes that in relation to all of the fees in issue, the fee income of MTF and Sportzone significantly exceeds their reasonable costs in connection with the relevant activities for which the fees are charged.

[76] Put succinctly, Professor Bowman's opinion is that the language of ss 41-44 of the CCCFA suggests that only variable costs, whether direct or indirect, may be recoverable through fees. From an accounting perspective, the wording of the CCCFA does not support the recovery of fixed costs, whether direct or indirect, through fees.

Alternative accounting approach not valid

[77] One of the criticisms of Professor Bowman's suggested approach made by the defendants' experts is that all costs are variable in the long run, in the sense that determining whether a cost is variable or fixed may depend on the period of time over which the cost is to be assessed. The defendants' expert, Professor David Lont suggests that the assessment of similar costs as either fixed or variable will vary based on a number of factors. He says the absence of accounting standards or guidance from the CCCFA means that arbitrary allocations could occur routinely. If the legislation contained an accounting standard or guidance requiring a percentage apportionment of a cost in a certain way (for example, allocating a managing director's salary to several cost centres in proportion to the percentage of time spent in relation to each relevant activity or matter), then a business would have a

framework to support the cost accounting system for allocating costs as either fixed or variable.

[78] In Professor Lont's view, given the breadth of the expressions costs "in connection with" and costs "in relation to" a cost object (the activities or matters giving rise to the various fees), it is open to a business considering those concepts to recognise that the role of managing director is necessary for the business to exist and trade and that, unless the business exists and trades, it cannot establish loans. In other words, he says, there is a beneficial relationship between the role of managing director and the establishment and maintenance of the loan arrangements entered into by the business.

[79] Taking that approach, Professor Lont considers that it is reasonable to hold that a managing director's costs are related to establishing and maintaining loans just as much as to any of the other activities of the business. That in turn justifies the application of a "full cost absorption" model when allocating costs to fees, including both variable costs and fixed costs that will be incurred regardless of the number of loans written. In Professor Lont's view, there is nothing in the wording of the CCCFA to indicate that, when assessing whether a relationship between costs and one of the specified activities or matters is reasonable, only a "cause and effect" relationship such as that implicit in Professor Bowman's proposition will be sufficient.

[80] Adopting a full cost absorption approach allows both cause and effect relationships and beneficial relationships to justify the imposition of the fee; fixed costs such as rent or costs associated with the provision of computer technology are connected with or related to the activity or matter as there is a benefit provided which allows the service to be performed. On Professor Lont's analysis, this approach might, however, require different proportions of a fixed cost to be allocated to different activities such as loan establishment, account maintenance, and default or arrears recovery.

[81] Evidence was given on behalf of the defendants by Mr John Kensington, a senior and experienced practising chartered accountant. Mr Kensington's approach,

like that of Professor Lont, is based on a view that the broad wording of the CCCFA, taken at face value, permits the cost absorption approach to recovery adopted by the defendants. Undertaking his analysis from that starting point, but doing so with the objectivity and independence required of an expert witness, Mr Kensington acknowledged that in a number of cases, the defendants had allocated costs to some activities incorrectly. He accepted, for example, that the Sportzone establishment fee recovered more than Sportzone's reasonable cost of establishment activities in the 2006 and 2007 years because Sportzone had inappropriately assumed that all of its overheads were related to the establishment process and could be recovered through the establishment fee. Nevertheless, to take another example, Mr Kensington considered it appropriate to allocate most of the costs of MTF's managing director to establishment fees on the basis that the primary role of a managing director would be securing new business. Mr Kensington acknowledged that a small part of the managing director's time would be involved in pre-possession and repossession activities justifying an allocation of a maximum of five per cent of the managing director costs to default fees with the remainder being allocated to establishment, account maintenance and settlement fees.

[82] That approach cannot be justified by what I have determined to be the proper inquiry. Despite Professor Lont's careful and comprehensive analysis and discussion of the accounting principles, and Mr Kensington's support for it, I am unable to accept the fundamental proposition that the CCCFA permits the defendants to recover through fees all costs which can be demonstrated to have some beneficial relationship with the matter or activity in question, no matter how tenuous. Taken to its logical conclusion, the full cost absorption approach redefines the concept of reasonableness in terms of merely identifying a beneficial connection between the cost and the cost object and ensuring that a rational allocation of overheads between cost objects is made. While that approach may be open on the meaning of the expressions "in connection with" and "related to" taken in isolation from text and purpose, the reasonableness standard under the CCCFA is not to be determined from the point of view of a reasonable accountant advising management as to the appropriate allocations of costs for management purposes. To the extent that an accounting method provides a tool for meeting the purposes of the CCCFA, it must assist the application of the close relevance test described at [66] above which I

consider to be required by the statutory wording considered in the context of the statutory purposes.

The application of the variable cost/closely relevant approach

[83] That indicates that the variable cost approach advocated by Professor Bowman, or a variation of it, will be the most effective. The approach is supported by a forensic accountant called by the plaintiff, Mr John Cregten. Mr Cregten's exhaustive analysis of the defendant's financial information and other material provided during the Commission's investigation enabled me to understand more fully the implications of the different views of legislative intent. It is evident also that Mr Cregten's thorough analysis has persuaded the defendants that, if the Commission's approach to the central issue is favoured by the Court, they cannot realistically take issue with his conclusion that the fees charged were unreasonable in terms of the statute. Nor do they dispute most of the amounts by which he assesses the borrowers have been overcharged. Where Mr Cregten has quite properly suggested a range of fees which he would regard as reasonable for any activity or matter, the Commission is content to take the higher figure as that which should be applied.

[84] Mr Cregten's calculations are based on the variable costs analysis advocated by Professor Bowman, but with a less academic approach predicated on his close analysis of what was actually done by the defendants in the relevant years. If provided with the relevant information by the defendants, Mr Cregten might be inclined to allow into the category of costs properly recoverable by fees some fixed costs which would not be allowed by Professor Bowman.

[85] The Commission also called evidence of an approach similar to the close relevance test from an accountant and former chief executive officer and director of Southern Cross Building Society, Mr Robert Smith. While the Southern Cross businesses in which he was involved undertook a variety of residential, commercial and rural property lending, and were therefore of a different nature from consumer financing for motor vehicles, it was nevertheless one of Mr Smith's responsibilities to put in place processes which ensured that Southern Cross' consumer lending fees

were compliant with the CCCFA. In assessing appropriate establishment fees for CCCFA lending, Mr Smith established the following process which, in my view, provides general guidance to the close relevance approach which the Act calls for whatever the nature of the lending activity.

[86] First, the employer should assess the time taken by the responsible employee or employees to consider, process and document each loan. Plainly an averaging approach to the assessment would be appropriate for the purpose of setting fees even though individual cases might involve more or less time than the average. Second, an allocation of the employer's total cost of remuneration (including salary and other benefits) should be undertaken. Third, allocating the total cost of remuneration to the time taken to establish the loan would provide an indicative range for the fee.

[87] In an appropriate case, it might be reasonable to add other variable costs having a causal link to the establishment of the loan, and fixed direct costs other than employee remuneration which may include IT costs properly referable to the establishment activities.

Findings related to the causes of action alleging breach of s 41

[88] The acceptance of the Commission's approach to the application of ss 41, 42 and 44 as advocated by Professor Bowman, Mr Cregten and Mr Smith means that findings that the disputed fees charged by the defendants were unreasonable under s 41 are inevitable. Subject to one reservation, Mr Cregten's assessment of what fees would have been reasonable on a principled approach can form the basis for the orders sought by the Commission under s 94(1)(b) of the CCCFA that the defendants should pay to the borrowers the difference between the fees actually paid and the sums properly payable in accordance with Mr Cregten's analysis. That means that, without more, the amounts which the Court would order to be paid are the lower amounts in the ranges identified by Mr Cregten and replicated in the third amended statement of claim dated 18 February 2011.

[89] The matter is not entirely as straight-forward as that, however, because of concessions made by Mr Cregten and Mr Smith in the course of their evidence which suggests that some at least of the fixed costs or overheads which Mr Cregten

disallowed in his written brief might reasonably be included as elements of a reasonable cost recovery. While some aspects of what were relatively minor shifts in position might be attributable to more informed consideration in the course of the trial, the principle areas of uncertainty may be attributable to the lack of information provided by the defendants.

[90] For these reasons, I propose to accept the invitation of Mr Mills in closing to reserve for discussion by the parties and, if necessary, further consideration by the Court upon receiving further submissions, the making of precise orders as to recovery.

Further observations on the approach to s 41 – draft guidelines

[91] I am mindful, however, that these issues have not previously been considered by the Court and that the Commission and the financial services industry have an interest in the findings. It is appropriate, therefore, to comment on the draft guidelines dated May 2010 which the Commission circulated for public information. It is not for the Court to rewrite the guidelines but some brief observations may be helpful.

[92] I am satisfied from the exchanges between counsel and Mr Cregten, Mr Smith, Mr Kensington and Professor Lont that some modification of the more rigid approach to fixed costs recovery taken by Professor Bowman may be appropriate in respect of establishment fees, provided a sufficiently close and relevant connection with the four establishment activities identified in s 42 can be proved. In assessing the reasonableness of establishment fees, the recovery of any portion of fixed cost items such depreciation, premises costs, IT costs, head office functions, and return on capital/cost of capital, would require a strict application of the close relevance test. This is particularly important given the impact which the addition of an establishment fee has on the total cost of the transaction to the borrower, including on the liability to pay interest.

[93] A similar view may be taken of fixed costs identified in connection with other credit fees and default fees. In respect of those items, the added consideration of reasonable standards of commercial practice in s 44(1)(b) applies.

[94] While it is inevitably the case in enforcement proceedings that the Commission will carry the burden of proving unreasonableness on the balance of probabilities, the evidential onus of disproving unreasonableness which might be established prima facie is likely to fall on the lender which is in possession of all of the relevant information.

[95] To deal briefly with a point which Mr Kensington sought to make about the level of default fees, I would not consider the test of close relevance to be satisfied in respect of any part of a default fee which was imposed for the purpose of deterring defaults. Quite apart from it being questionable whether the imposition of such a component met the test of compliance with reasonable standards of commercial practice, it would fail to meet the test of a cost incurred or loss incurred under s 44(1)(a).

[96] Looking at the guidelines, I note that under the heading, "Meaning of 'reasonably compensates'" in relation to credit fees, the draft guidelines contain the following statement:

> A key question that arises will be the meaning of the word "any" in the phrase "any cost incurred", and whether that is to be construed as embracing any cost actually incurred, no matter how remote from the loan. The Commission's current view is that the fee must be causally connected to the cost incurred, and satisfy common law standards of remoteness – it must be a cost proximate to the provision of the credit. The Commission would be unlikely to regard a cost as reasonable if it were not a cost within the reasonable contemplation of the parties to the loan.

[97] While it will be a matter for the Commission to consider what if any changes to that paragraph are required in the light of this judgment, and the formulation of the appropriate test, I observe that asserting a requirement for a fee to be "causally connected" to the cost sought to be recovered may be misleading, particularly in relation to the recovery of reasonable portions of fixed costs. A causal connection is likely to establish a sufficiently close relevance to justify inclusion in the calculation of the fee, but the notion of causation is not a necessary element.

Fifth cause of action – breach of s 17 CCCFA

[98] I turn to consider briefly the fifth cause of action against the first and second defendants alleging a breach of s 17 of the CCCFA. This claim did not attract much attention in the course of the hearing but it is a matter on which some guidance, at least, is sought by way of a declaration.

[99] The Commission has proved that the credit contracts included, as part of the establishment fee charged by Sportzone and MTF, a fee of [withheld from publication] plus GST charged by Baycorp for a credit check and a portion of the cost of a Land Transport Safety Authority charge for a vehicle check conducted through the Motochek service operated by Land Transport New Zealand, the cost of which ranged between [withheld from publication] per borrower.

[100] Section 17 of the CCCFA requires every creditor under a consumer credit contract to ensure that disclosure of as much of the key information set out in schedule one as is applicable to the contract is made to every debtor before the contract is made or within five working days. The information required by schedule one to be disclosed includes a description of the credit fees and charges payable under the contract. These credit check fees were not separately disclosed to the borrowers either before the contract was made or within five working days of the day on which the contract was made.

[101] Section 45 provides for the passing on to a debtor of third party fees paid by a creditor such as the payments to Baycorp and Land Transport New Zealand. The amount which the debtor is required to be paid must not exceed the actual amount payable by the creditor.[30] It is submitted for the Commission that it is implicit in the creditor's obligations regarding passing on that the nature and fact of the charge being passed on must be disclosed under s 17.

[102] I accept the submission on behalf of the defendants, however, that in the circumstances of this case the Baycorp and Motochek fee were included as part of the establishment fees which were disclosed, and that no further identification of the

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[30] Section 45(1).

nature of the fee is required. I agree with Mr Thain's argument that the Baycorp and Motochek charges are recoverable as closely relevant components of the costs of the defendant in establishing a loan. As such, disclosure of the amount of the establishment fee is sufficient. To hold otherwise would mean that every third party cost which the lender sought to recover would have to be identified. I do not think the object of transparency requires such an obligation to be imposed.

Sixth cause of action – s 9, Fair Trading Act 1986

[103] The sixth cause of action against Sportzone and MTF alleges a breach of s 9 of the Fair Trading Act in that it is claimed that the defendants engaged in misleading and deceptive conduct. The conduct alleged is that by using the descriptions "establishment fee" and "account maintenance fee" in documents provided to the borrower the lender represented that the fees concerned amounted to the recovery of costs incurred in establishing and maintaining the borrower's account. It is argued that, in view of the finding that the fees charged were not reasonable and included the purported recovery of costs not lawfully recoverable as credit fees, the representations were misleading and deceptive or likely to mislead or deceive the borrowers.

[104] Mr Thain responded to this claim comprehensively but I am satisfied that the claim is misconceived and can be dismissed without detailed analysis, for two reasons. First, I am not persuaded that the description "establishment fee" or "account maintenance fee" amounts to a representation other than that a fee of a certain amount for the establishment or maintenance of the loan was included in the borrower's cost of the transaction. A finding long after the event that some part of the fees disclosed was not properly charged in terms of the CCCFA does not establish that the borrower is likely to have been misled or deceived at the time of entering into the contract.

[105] Second, there is no evidence that any borrower suffered or was likely to suffer loss or damage by the representation that the lender was seeking to recover costs in establishing and maintaining the loan account.

Result

[106] In accordance with the indication at [90], I reserve for discussion by the parties and, if necessary, further consideration by the Court upon receiving further submissions, the making of precise orders as to recovery under s 94(1)(b).

[107] I dismiss the Commission's application for a declaration that there was a breach of s 17 of the Act.

[108] I dismiss the Commission's claim under the Fair Trading Act.

[109] Costs are reserved.

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Toogood J