

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

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

**CIV-2022-404-2364  
[2024] NZHC 1011**

UNDER Section 100A Commerce Act 1986

IN THE MATTER of a case stated by the Commerce  
Commission relating to the application of the  
Credit Contracts and Consumer Finance Act  
2003 to pawnbroking contracts

BETWEEN COMMERCE COMMISSION  
Applicant

AND NATIONAL PAWNBROKERS  
ASSOCIATION OF NEW ZEALAND  
Respondent

Hearing: 28 August 2023

Appearances: K V Mills, L Dittrich and L J Humphries for Applicant  
S M Lowery and J C Suyker for Respondent

Judgment: 30 April 2024

---

**JUDGMENT OF PETERS J**

---

This judgment was delivered by Justice Peters on 30 April 2024 at 2 pm  
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date: .....

Solicitors: MC, Auckland  
A&B Competition Lawyers, Auckland

Counsel: S M Lowery, Auckland  
J C Suyker, Auckland

Copy for: Commerce Commission, Auckland

## Introduction

[1] Pawnbrokers have long provided a readily available option to a borrower seeking a loan at short notice. Their trade has, like many other forms of moneylending, been regulated for centuries. English statutes concerned with pawnbroking were introduced as early as 1604, when the Parliament of James I enacted the Act Against Brokers in response to rising numbers “abusing the true and honeste ancient name and trade of broker[s]”.<sup>1</sup>

[2] New Zealand’s regulatory response can be traced to the Pawnbrokers Act 1868, subsequently consolidated and re-enacted as the Pawnbrokers Act 1908 (“1908 Act”). The 1908 Act remained in force until repealed and replaced by the Secondhand Dealers and Pawnbrokers Act 2004 (“SDPA”). As did its predecessor, the SDPA requires any person carrying on business as a pawnbroker to be licensed, and it also makes provision for other matters, particularly as to the manner in which pawnbrokers are to conduct business. An important difference between the SDPA and the 1908 Act is that the latter regulated the interest a pawnbroker could charge on a loan. This regulation was abandoned in the SDPA.

[3] The SDPA is the primary statute applicable to pawnbrokers, but it may not be the only one. The Commerce Commission (“Commission”) and pawnbrokers represented by the National Pawnbrokers Association of New Zealand (“Association”) are in dispute as to whether pawnbroking contracts with particular features are “credit contracts” as defined in, and thus subject to, the Credit Contracts and Consumer Finance Act 2003 (“CCCFA”). The Commission says they are, the Association says they are not. A primary purpose of the CCCFA is to protect the interests of a consumer who is a party to a “credit contract” and/or a “consumer” credit contract.

[4] The Commission has presented this issue as a case stated on six questions.<sup>2</sup> The questions fall under three principal topics, being whether pawnbroking contracts are credit contracts; if so, whether they are “consumer” credit contracts; and, if so, what is the effect of s 15A of the CCCFA, which expressly refers to pawnbroking

---

<sup>1</sup> Act Against Brokers 1604 (Eng) 1 Jac I c 21.

<sup>2</sup> Credit Contracts and Consumer Finance Act 2003, s 113(g); and Commerce Act 1986, s 100A.

contracts entered into on particular terms. The Association was heard on the first and third of these topics and abides by the opinion of the Court on the second.

### **The SDPA and pawnbroking**

[5] A pawnbroker is a money lender who advances a sum to a borrower, or pledgor who, in return, pledges goods to the pawnbroker as security for the loan.<sup>3</sup>

[6] The SDPA defines a “pawnbroker” as follows:<sup>4</sup>

**pawnbroker** means a person—

- (a) who, in expectation of profit, gain, or reward, lends money on the security of goods of which the person takes possession, but not ownership; and
- (b) who is not a secondhand dealer or the employee of a secondhand dealer and pawnbroker

[7] The form of security taken for the loan, being the pledge, is a bailment. The pawnbroker takes possession of the goods but not property in them.

[8] The SDPA imposes certain requirements as to the content of a pawnbroking contract. Subject to that, the terms of the pawnbroking contract are a matter for the parties. Given that, the parties have agreed the case stated is confined to a pawnbroking contract with the features set out below, annexed as a schedule to the case stated and to this decision as a schedule:

- (a) In accordance with s 4 of the SDPA:
  - (i) the pawnbroker enters into the arrangement in expectation of profit, gain, or reward; and
  - (ii) the pawnbroker advances money “on the security of goods of which the [pawnbroker] takes possession, but not ownership”; and

---

<sup>3</sup> This matter is principally concerned with the transaction by which the pawnbroker advances money, so I shall refer to the recipient as the “borrower”, rather than the pledgor, or the pledger as referred to in the Secondhand Dealers and Pawnbrokers Act 2004.

<sup>4</sup> Secondhand Dealers and Pawnbrokers Act 2004, ss 4(a) and (b).

- (iii) the contract is entered into by a person who is not “a secondhand dealer or the employee of a secondhand dealer and pawnbroker”.
- (b) In accordance with other provisions of the SDPA the pawnbroking contract must provide for:
- (i) the sum of money advanced to the borrower on the security of the goods;
  - (ii) a redemption date, which is the last day on which the pawnbroker must hold the goods for redemption by the borrower, following which the pawnbroker may sell the goods;<sup>5</sup>
  - (iii) a redemption price, which is the sum the borrower must pay in order to redeem their goods before the redemption date.<sup>6</sup>

[9] As appears from the above, if the borrower does not redeem by the redemption date, the pawnbroker may sell the goods, and apply the proceeds of sale in payment of the redemption price. The SDPA makes provision for the manner in which the goods are to be sold and the pawnbroker’s obligation to account to the borrower for any sum realised in excess of the redemption price. Although counsel for the Commission said in her submissions that ownership in the goods passes to the broker on the failure by the borrower to redeem, that is not correct. The broker acquires a right of sale, and title to the goods passes to the purchaser on sale.<sup>7</sup>

[10] At the hearing, Mr Lowery, counsel for the Association, emphasised two matters that he submits are the essence of a pawnbroking contract and which preclude it being a credit contract in the sense of the CCCFA: the borrower is not obliged to

---

<sup>5</sup> A date three months later than the date on which the pledge was entered into, or a later date as agreed between the pawnbroker and pledger: s 58 of the SDPA.

<sup>6</sup> A total sum consisting of the amount of money advanced on the goods plus a “redemption fee”: s 57 of the SDPA.

<sup>7</sup> *The Odessa* [1916] 1 AC 145 (PC) at 159.

redeem the goods, and the broker has no right of recourse against the borrower if a sale of the goods realises less than the redemption price.

[11] It is correct that the borrower is not obliged to redeem the goods, but I am not persuaded that, as a matter of principle, the pawnbroker has no right of recourse in the event of a shortfall, although it is certainly open to a pawnbroker to forgo a right of recourse. Indeed, in one of the specimen forms of pawnbroking contracts produced at the hearing, the pawnbroker had done just that. In any event, I am not persuaded either of these points affects the issue of whether a pawnbroking contract is a credit contract.

## Questions 1 and 2

### *Question 1*

Does a Pawnbroking Contract with the essential terms of the contract set out in Schedule 1 provide ‘credit’ within the meaning of s 6(a) of the CCCFA such that it meets the definition of ‘credit contract’ in s 7(1) of the CCCFA?

### *Question 2*

Alternatively, does a Pawnbroking Contract with the essential terms of the contract set out in Schedule 1 provide ‘credit’ within the meaning of s 6(b) of the CCCFA such that it meets the definition of ‘credit contract’ in s 7(1) of the CCCFA?

[12] Credit and credit contract are defined in ss 6 and 7(1) of the CCCFA and provide:

#### **6 Meaning of credit**

In this Act, unless the context otherwise requires, **credit** is provided under a contract if a right is granted by a person to another person to—

- (a) defer payment of a debt; or
- (b) incur a debt and defer its payment; or
- (c) purchase property or services and defer payment for that purchase (in whole or in part).

#### **7 Meaning of credit contract**

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

[13] Accordingly, a pawnbroking contract will be a credit contract if it grants a right to “defer payment of a debt” or to “incur a debt and defer its payment” in the sense of ss 6(a) and (b).<sup>8</sup>

[14] The Association’s case is that pawnbroking contracts do not involve or create “debt” and thus are not credit contracts.

*Submissions on Questions 1 and 2*

[15] The Commission submits that credit is provided under a pawnbroking contract in the sense of s 6(a). The borrower is indebted to the pawnbroker for the sum advanced, and the effect of the pawnbroking contract is to grant the borrower a right to defer payment of that debt. Either the borrower pays the debt by the redemption date or the pawnbroker may sell the pledged goods to recover the debt due.

[16] Mr Lowery submits that the borrower does not incur a debt to the pawnbroker and thus a pawnbroking contract does not provide credit in the sense of ss 6(a) or (b).

[17] Mr Lowery submits that for present purposes a debt constitutes an “unavoidable obligation to pay [an] ascertainable amount”. That is the definition adopted in *Geeveekay Pty Ltd v Director of Consumer Affairs Victoria*, being a case decided under the equivalent provisions in the Australian legislation.<sup>9</sup> Mr Lowery submits there is no “unavoidable” obligation to pay under a pawnbroking contract for the reasons referred to in [10] above. Mr Lowery submits there can be no debt if the borrower has the option of paying but is not bound to do so.

---

<sup>8</sup> Sections 6(a) and (b) derive from the definition of credit previously found in Australia’s Uniform Consumer Credit Code, now contained in the National Credit Code (“NCC”):

Meaning of “credit” and “amount of credit”

- 4.(1) For the purposes of this Code, “**credit**” is provided if under a contract—
- (a) payment of a debt owed by one person (the debtor) to another (the credit provider) is deferred; or
  - (b) one person (the debtor) incurs a deferred debt to another (the credit provider).
- (2) For the purposes of this Code, the “**amount of credit**” is the amount of the debt actually deferred.

<sup>9</sup> *Geeveekay Pty Ltd v Director of Consumer Affairs Victoria* [2008] VSC 50, (2008) 19 VR 512.

### *Discussion*

[18] I accept the Commission’s submission that a pawnbroking contract provides credit within the meaning of s 6(a) of the CCCFA. In particular, I accept that the borrower owes the pawnbroker a debt, and the pawnbroking contract grants the borrower the right to defer payment of that debt. That the borrower owes a debt is apparent as a matter of principle, and also well accepted at common law.

### *Debt*

[19] A commonly accepted definition of debt is “a sum of money which is now payable or which will become payable in the future by reason of a present obligation”.<sup>10</sup> Fisher J adopted this definition in *Algert Co Inc v United States Imports Ltd (in liquidation)*.<sup>11</sup> There is no material difference between that definition and the definition in *Geeveekay*. Both require an obligation to pay a sum of money. “Unavoidable” adds nothing, as an obligation is unavoidable by definition.

[20] Regardless, repayment of the sum advanced is unavoidable under a pawnbroking contract. If the borrower does not pay the redemption price of their own volition, the pawnbroker will effect repayment by selling the pledged goods. That the borrower may elect not to redeem the goods does not alter the obligation to repay. It alters the performance of the obligation.

### *Position at common law*

[21] As I have said, it is also well settled at common law that a pawnbroker’s loan gives rise to a debt. In 1701, it was stated:<sup>12</sup>

... if I pawn goods to A. for such a sum, A. may have debt for the money, notwithstanding his having a pawn.

[22] In *Coggs v Bernard*, a landmark judgment on the law of bailment, Holt CJ defined a “pawn” or “pledge” as a class of bailment for valuable consideration whereby “goods or chattels are delivered to another as pawn, to be a security to him

---

<sup>10</sup> *Webb v Stenton* (1883) 11 QBD 518 (CA) at 527.

<sup>11</sup> *Algert Co Inc v United States Imports Ltd (in liquidation)* HC Auckland CP350-SW99, 11 March 2002 at [7].

<sup>12</sup> *Anonymous* (1701) 12 Mod Rep 564, 88 ER 1522.

for money borrowed of him by the bailor”.<sup>13</sup> Holt CJ expressly recognised the creation of a debt:<sup>14</sup>

... [the pawnee] has a special property, for the pawn is a securing to the pawnee that he shall be repaid his debt, and to compel the pawner to pay him.

[23] In *Halliday v Holgate*, Willes J described a pawn transaction as intermediate, between a mortgage and a lien:<sup>15</sup>

... where by contract a deposit of goods is made a security for a debt, and the right to the property vests in the pledgee so far as is necessary to secure the debt. It is true the pledgor has such a property in the article pledged as he can convey to a third person, but *he has no right to the goods without paying off the debt, and until the debt is paid off the pledgee has the whole present interest.*

### *Lack of recourse*

[24] The Association submits the “optional” nature of the arrangement is underscored by the pawnbroker’s lack of recourse if the goods realise less than the redemption price.

[25] It is not clear to me that the pawnbroker is unable to pursue a shortfall, always assuming that shortfall may be laid at the borrower’s door, rather than a reflection on the pawnbroker’s method of sale.

[26] First, there is authority for the proposition that, subject to the terms of the pawnbroking contract and statute, a pawnbroker may sue the pledgor for a deficit after the sale of unredeemed goods.<sup>16</sup>

[27] The following passages from *Halsbury’s Laws of England* also suggest the right exists:<sup>17</sup>

#### 208. Pawnee’s duty of care

The common law requires nothing extraordinary of a pawnee, but only that he use ordinary care in the safekeeping and redelivering of the pledge. Thus, if he loses the goods pawned without default on his part he may still recover the

---

<sup>13</sup> *Coggs v Bernard* (1703) 2 Ld Raym 909, 92 ER 107 at 109 (emphasis added).

<sup>14</sup> At 112.

<sup>15</sup> *Halliday v Holgate* (1868) LR 3 Exch 299 at 302 (emphasis added).

<sup>16</sup> *Jones v Marshall* (1889) 24 QBD 269.

<sup>17</sup> *Halsbury’s Laws of England* (5<sup>th</sup> ed, 2020, online ed) vol 4 Bailment and Pledge at [208] and [212].

debt, and the loss falls on the owner. However, if the pawnee keeps the goods pawned after tender of the debt and they are stolen he is liable, for after tender he keeps them at his own risk. The pawnee may also be liable in damages where he sells pawned goods without the right to do so.

...

212. Pawnee's right of action for debt

A pawnee has a right of action for his debt notwithstanding the possession by him of the pledge subject to the rights of the pawnor. Where the pledge is of a perishable nature and no time for redemption has been fixed, the right of action remains, notwithstanding that the pledge perishes, and the pawnor has no remedy. If by his own default the pawnee is unable to return the security against payment of the debt the pawnor has a good defence to action.

[28] The only authority the Association provided in support of its submission that there is no right of recourse is *Payne v Melbourne Cash & Jewellery Pty Ltd*, a decision of the Victorian Civil and Administrative Tribunal.<sup>18</sup> The case involved a counterclaim by a pawnbroker for a shortfall resulting on the sale of unredeemed goods. The governing Second-Hand Dealers and Pawnbrokers Act 1989 (Vic) was silent on the issue. The Tribunal dismissed the counterclaim, holding that a pawnbroking contract was a “non-recourse loan”.

[29] It is fair to say that in reaching that view the Tribunal was influenced by the pawnbroker's interest rates, which were so exorbitant the Tribunal considered it would be unfair if the pawnbroker were permitted to pursue the borrower.<sup>19</sup> It held that, although the Act provided for the return of any surplus and granted a right to the pledgor to pursue the excess as a debt due, there was no corresponding provision for the pawnbroker to recover a shortfall from the pledgor.<sup>20</sup>

[30] I am not satisfied that *Payne* necessarily reflects the position under the SDPA, which is silent on the issue. The only acknowledgment of the possibility of a deficit is in s 63(4) which provides that a shortfall will not “necessarily demonstrate” that a method of sale is “unreasonable”. That says nothing about whether the pawnbroker has a right to pursue a shortfall.<sup>21</sup> I have reservations about whether silence in the

---

<sup>18</sup> *Payne v Melbourne Cash & Jewellery Pty Ltd* [2021] VCAT 480 (3 May 2022).

<sup>19</sup> At [135(a)].

<sup>20</sup> At [135(c)].

<sup>21</sup> Similarly, no provision addressed the issue in the predecessor Pawnbrokers Act 1908. Compare Consumer Credit Act 1974 (UK), s 121(4) where a shortfall on a pawn sale is treated as a debt.

legislation is sufficient to abrogate what otherwise appears to be a well-established common law right to sue.

[31] Moreover, as Ms Mills, counsel for the Commission, submits, it is important not to conflate the existence of a debt with limitations on the right to recover. The example Ms Mills gave was as follows. Although the provisions of the Limitation Act 2010 provide a defence to a claim to recover a debt after expiry of the period to bring a money claim, the provisions do not expunge the debt, which continues to subsist.<sup>22</sup> A bar on recovery is not evidence that there is no debt created in the first place. Quite the opposite. It is evidence that there otherwise exists a debt to recover.

### *Section 15A CCCFA*

[32] Section 15A of the CCCFA, the subject of Questions 5 and 6, is also relevant to Question 1. It is clear from s 15A that a pawnbroking contract is a credit contract, and a consumer credit contract at that.

[33] Section 15A provides:

#### **15A Part does not apply to pawnbroking contract**

- (1) This Part does not apply to a pawnbroking contract if—
  - (a) the contract was entered into by a pawnbroker in the ordinary course of the pawnbroker's business in accordance with the Secondhand Dealers and Pawnbrokers Act 2004; and
  - (b) in the case that the pledger is in default of his or her obligations under the pawnbroking contract or does not redeem his or her pawned goods on or before the redemption date, the pawnbroker's only right of recourse is under section 63 of the Secondhand Dealers and Pawnbrokers Act 2004.
- (2) In this section, **pawnbroker** has the same meaning as in section 4 of the Secondhand Dealers and Pawnbrokers Act 2004.

[34] As I say below under Questions 5 and 6, the effect of s 15A is to exempt a pawnbroking contract meeting the specified criteria from the disclosure requirements in Part 2 of the CCCFA. Those requirements are otherwise applicable to consumer credit contracts, themselves a subset of credit contracts.

---

<sup>22</sup> See *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 AC 553 (PC) at 558.

[35] Two points follow from s 15A. The first is that a pawnbroking contract entered into in the ordinary course of business and in accordance with the SDPA is not only a credit contract but a consumer credit contract. Mr Lowery submits that s 15A is superfluous, given his submission that a pawnbroking contract is not a credit contract, and that the provision reflects a misapprehension by Parliament as to the legal character of a pawnbroking contract subject to the SDPA. I do not accept this submission because a pawnbroking contract is a “credit contract” under ss 6 and 7.

[36] The second point that follows is that s 15A(1)(b) suggests a borrower (or pledgor) does have an obligation to repay and that the pawnbroker has a right of recourse. Section 15A(1)(b) indicates that a pawnbroker may elect to confine their right of recourse to the pawned goods, not that such is inherent in a pawnbroking contract or the SDPA.

*KBL Investments Ltd v KBL Courtenay Ltd*

[37] The Association also sought to rely on the High Court’s decision in *KBL Investments Ltd v KBL Courtenay Ltd*, in which the plaintiffs submitted that a contract permitting it to repurchase a property it had sold to the defendant by a particular date at a particular price was oppressive in terms of the CCCFA.<sup>23</sup> Cooper J held that the contract was not a credit contract because it did not involve the deferral of debt. The claim failed on that basis.<sup>24</sup> The Association submits the agreement in *KBL* shares the same material terms as a pawnbroking contract. That is incorrect. The plaintiff in *KBL* had an option to purchase. A pawnbroking contract does not confer an option to purchase. It confers a right to redeem the security.

*Prior legislation*

[38] The Association also raised, as a matter of possible relevance, the difference between the definition of “credit contract” in s 7 of the CCCFA and the definition in its predecessor, the Credit Contracts Act 1981. The definition of “credit contract” in the 1981 Act was:

---

<sup>23</sup> *KBL Investments Ltd v KBL Courtenay Ltd* [2015] NZHC 30.

<sup>24</sup> At [181]–[182]. The Court of Appeal dismissed an appeal against the failed cause of action but without deciding the credit contract issue: *KBL Investments Ltd v KBL Courtenay Ltd* [2016] NZCA 227 at [77].

**3. Meaning of “credit contract”**

(1) In this Act, the term “credit contract” means—

- (a) A contract under which a person provides or agrees to provide money or money’s worth in consideration of a promise by another person to pay, or to procure the payment of, in the future and in respect of the provision, a sum or sums of money exceeding in aggregate the amount of the first-mentioned money or money’s worth; or
- (b) A contract under which a person forbears or agrees to forbear from requiring payment of money owing to him in consideration of a promise by another person to pay, or to procure the payment of, in the future and in respect of the forbearance, a sum or sums of money exceeding in aggregate the amount of the first-mentioned money;—

and, without limiting the generality of paragraphs (a) and (b) of this subsection, includes—

...

- (e) A contract under which a person bails or agrees to bail goods (whether or not with an option to purchase) in consideration of a promise by another person to pay, or to procure the payment of, in the future and in respect of the bailment or option, a sum or sums of money exceeding in aggregate the cash price of the goods; and

...

[39] Mr Lowery submits that the omission of a reference to “bailment” in the definition of credit contract in the CCCFA is consistent with the Association’s submission that the Act does not encompass pawnbroking contracts. I do not accept that submission. Sections 6 and 7 are the product of an effort to simplify. Section 3(1) of the 1981 Act made reference to several specific contracts each of which is omitted from the CCCFA definition, including a loan agreement (s 3(c)). However, there can be no dispute that a loan agreement remains a credit contract.

*Conclusion on Questions 1 and 2*

[40] A person who borrows from a pawnbroker owes that pawnbroker a debt. Under a pawnbroking contract with the agreed upon features, the pawnbroker grants the borrower the right to defer payment of that debt. This brings the contract within s 6(a) of the CCCFA and renders it a credit contract within s 7. Given that, the answer to Question 1 is yes.

[41] The answer to Question 2 is no. A pawnbroking contract does not fall within s 6(b) because it does not grant a right to incur a debt and to defer its payment. In a pawnbroking transaction, the debt is incurred on receipt of the funds.

### Questions 3 and 4

#### *Question 3*

If the answer to Question 1 or 2 is “yes”, does a Pawnbroking Contract with the features set out in Schedule 1 involve ‘credit fees’ which “are or may be payable under the contract” such that it meets the definition of a ‘consumer credit contract’ in s 11(1)(c)(ii) of the CCCFA?

#### *Question 4*

If the answer to Question 1 or 2 is “yes”, does a Pawnbroking Contract with the features set out in Schedule 1 involve the taking of a ‘security interest’ which “[is] or may be taken under the contract” such that it meets the definition of a ‘consumer credit contract’ in s 11(1)(c)(iii) of the CCCFA?

[42] A credit contract will be a “consumer credit contract” if it meets the definition in s 11(1):

#### **11 Meaning of consumer credit contract**

- (1) A credit contract is a **consumer credit contract** if—
- (a) the debtor is a natural person; and
  - (b) the credit is to be used, or is intended to be used, wholly or predominantly for personal, domestic, or household purposes; and
  - (c) 1 or more of the following applies:
    - (i) interest charges are or may be payable under the contract:
    - (ii) credit fees are or may be payable under the contract:
    - (iii) a security interest is or may be taken under the contract; and
  - (d) when the contract is entered into, 1 or more of the following applies:
    - (i) the creditor, or one of the creditors, carries on a business of providing credit (whether or not the business is the creditor’s only business or the creditor’s principal business):

- (ii) the creditor, or one of the creditors, makes a practice of providing credit in the course of a business carried on by the creditor:
  - (iii) the creditor, or one of the creditors, makes a practice of entering into credit contracts in the creditor's own name as creditor on behalf of, or as trustee or nominee for, any other person:
  - (iv) the contract results from an introduction of one party to another party by a paid adviser or broker.
- (1A) For the purposes of subsection (1)(b), the predominant purpose for which the credit is to be used is—
- (a) the purpose for which more than 50% of the credit is intended to be used; or
  - (b) if the credit is intended to be used to obtain goods or services for use for different purposes, the purpose for which the goods or services are intended to be most used.
- (1B) The reference to intention in subsections (1)(b) and (1A) is a reference to the debtor's intention.
- (1C) An arrangement or a facility is also a consumer credit contract if regulations declare it to be a consumer credit contract.
- (2) This section is subject to sections 14 and 15.

[43] Ms Mills submits that a pawnbroking contract is a consumer credit contract either because the pawnbroker takes a "security interest" over the goods pledged or because the pawnbroker is permitted to charge a "redemption fee", which may constitute a "credit fee".

[44] Any pawnbroking contract subject to this case stated will entail the taking of "a security interest" in the sense of s 11(1)(c)(iii). Therefore, the answer to Question 4 is yes.

[45] As to Question 3, the Commission submits that a pawnbroking contract involves credit fees in the sense of s 11(1)(c)(ii) because a pawnbroker's redemption fee is analogous to credit fees, as defined in the CCCFA:<sup>25</sup>

**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, and—

---

<sup>25</sup> Credit Contracts and Consumer Finance Act 2003, s 5.

- (a) includes—
  - (i) establishment fees:
  - (ii) prepayment fees as defined in section 43(2) (whether in relation to part prepayments or full prepayments):
  - (iii) insurance premiums payable for credit-related insurance if the creditor requires the debtor to obtain insurance cover from a particular insurer or particular insurers:
  - (iv) fees and charges payable as referred to in section 45 if the other person, body, or agency referred to in that section is an associated person of the creditor; but
- (b) does not include—
  - (i) interest charges:
  - (ii) charges for an optional service:
  - (iii) default fees:
  - (iv) government charges, duties, taxes, or levies:
  - (v) fees and charges payable as referred to in section 45 if the other person, body, or agency referred to in that section is not an associated person of the creditor:
  - (vi) cancellation charges as referred to in section 36F of the Fair Trading Act 1986

[46] Given my conclusion on Question 4, it is unnecessary to answer Question 3. Ultimately, however, the answer will come down to whether a redemption fee is an interest charge. A redemption fee is the only fee or charge a pawnbroker may charge, at least as part of the redemption price of pawned goods.<sup>26</sup>

[47] The opening words of the definition of “credit fees” will be satisfied because a redemption fee is payable under a credit contract. However, (b)(i) excludes interest charges which are defined in s 5 of the CCCFA as:

**interest charge** means a charge that accrues over time and is determined by applying a rate to an amount owing under a credit contract (and includes a default interest charge)

---

<sup>26</sup> Secondhand Dealers and Pawnbrokers Act 2004, s 57(2).

[48] In short, whether a credit fee is payable under a pawnbroking contract will depend on the method by which the redemption fee is calculated. It is not possible to say more than that in the abstract.

## **Questions 5 and 6**

### *Question 5*

If the answer to Question 1 or 2 *and* either 3 or 4 is “yes”, and Pawnbroking Contracts are found to meet the definition of ‘consumer credit contract’ in s 11 of the CCCFA, does s 15A of the CCCFA otherwise exclude the application of the CCCFA to Pawnbroking Contracts with the essential terms of the contract set out in Schedule 1 because s 11 is located in Part 2 of the CCCFA?

### *Question 6*

If the answer to Question 5 is “no”, what interpretation of the phrase “in the case that” in s 15A(1)(b) of the CCCFA is correct?

[49] Sections 11 and 15A are both in Part 2 of the CCCFA to which Question 5 refers. The significance of Part 2 is that it sets out the disclosure requirements applicable to a consumer credit contract. The provisions in Part 2 are not the only provisions in the CCCFA which apply to consumer credit contracts but they are significant and compliance is essential.

[50] It is common ground between the parties that the effect of s 15A, set out in [33] above, is to exempt a pawnbroking contract within its ambit from the disclosure requirements in Part 2. However, (and on the basis its submissions on Questions 1 and 2 were not accepted) the Association submits that s 15A has an effect beyond that. The Association submits that the effect of s 15A is to exclude any pawnbroking contract within its ambit from the definition of consumer credit contract in s 11 and thus from all requirements of the CCCFA which apply to consumer credit contracts.

[51] The Commission submits that is not correct and that the effect of s 15A is confined to the Part 2 requirements.

[52] I accept the Commission’s submission for the reasons set out below.

[53] First, the definition of consumer credit contract in s 11 applies throughout the CCCFA by virtue of s 5. Section 5 is the interpretation section and provides:

**consumer credit contract** has the meaning set out in section 11

[54] Accordingly, any provision, say in Part 1A of the CCCFA, which refers to a consumer credit contract requires recourse to s 11, by virtue of s 5.

[55] Secondly, by s 11(2), s 11 is subject (only) to ss 14 and 15. Section 11(2) provides:

**11 Meaning of consumer credit contract**

(2) This section is subject to sections 14 and 15.

[56] Section 14 of the CCCFA is concerned with the circumstances in which a debtor may declare that the credit provided under the relevant contract will be used wholly or predominantly for business and/or investment purposes, so as to take it outside the scope of the provisions applicable to a consumer credit contract. The opening words of s 14 are as follows:

**14 Effect of declaration**

(1) A credit contract is not a consumer credit contract ...

[57] Section 15 provides that certain identified contracts are not consumer credit contracts. The opening words of s 15 are as follows:

**15 Certain contracts not consumer credit contracts**

(1) The following contracts are not consumer credit contracts: ...

[58] The opening words of s 15A are different. They are as follows:

**15A Part does not apply to pawnbroking contract**

(1) This Part does not apply to a pawnbroking contract if—

[59] There is a clear distinction to be drawn between the opening words of ss 14 and 15 on the one hand and s 15A on the other. Sections 14 and 15 expressly provide that certain contracts are not consumer credit contracts. On its face, s 15A is confined to excluding the application of Part 2 to contracts within its ambit.

[60] I note also that s 15A was included in the CCCFA by the Credit Contracts and Consumer Finance Amendment Act 2014. That Act also made a modest amendment to s 15. If it was intended to exclude certain pawnbroking contracts from all provisions applicable to consumer credit contracts, that could have been achieved by amendment to s 15, rather than by adding a separate provision, that is s 15A.

[61] Mr Lowery submits that to construe s 15A as confined to Part 2 is to ignore that s 11 is in Part 2. In short, if Part 2 does not apply to a pawnbroking contract within s 15A, then s 11 does not apply. I do not accept that submission because, as I have said, the s 11 definition applies throughout the CCCFA by virtue of s 5. That said, I take Mr Lowery's point that the matter could have been expressed more clearly.

[62] Mr Lowery also submits, correctly, that the purpose of the exclusion in s 15A was to ensure that the disclosure requirements in the SDPA were not duplicated by the CCCFA. Mr Lowery submits that an unfortunate effect of confining s 15A to Part 2 of the CCCFA is that other provisions in the CCCFA will operate to duplicate other aspects of the SDPA. By way of example, the SDPA requires a pawnbroker to be licensed and to meet "fit and proper person" requirements. The CCCFA imposes similar, and potentially more onerous, requirements on a creditor providing consumer credit.

[63] I accept that may be so, but I do not consider it a basis on which to give the opening words of s 15A other than their plain meaning. It follows that the answer to Question 5 is no.

[64] Turning to Question 6, the Commission submits that there are two possible constructions of the phrase "in the case that" appearing in s 15A(1)(b):

- (a) the section applies to pawnbroking contracts where the *contract itself* provides that the pawnbroker's only remedy, if the pledgor defaults on their obligations under the contract or does not redeem their pledged goods on or before the redemption date, is under s 63 of the SDPA; or
- (b) the section applies to pawnbroking contracts only in the case that the qualifying acts in s 15A(1)(b) have actually occurred, i.e. once a

pledgor is in default or does not redeem their goods before the redemption date and the pawnbroker's only right of recourse is under s 63 of the SDPA.

[65] The Commission submits the former construction is correct. I accept that submission. The consequence of the latter construction is that the applicability of s 15A might be triggered at different times during the term of the contract, and dependent on the conduct of the pledgor. That would defeat the purpose of s 15A, which is to exclude a pawnbroking contract within its ambit from the application of Part 2 from the outset of the contract.

[66] It follows that the answer to Question 6 is that the correct interpretation of the phrase is "if the contract itself provides that, in the case that ...".

## **Result**

[67] The opinion of the Court on the questions stated is as follows:

- (a) Question 1: Does a Pawnbroking Contract with the essential terms of the contract set out in Schedule 1 provide 'credit' within the meaning of s 6(a) of the CCCFA such that it meets the definition of 'credit contract' in s 7(1) of the CCCFA?

Answer: Yes.

- (b) Question 2: Does a Pawnbroking Contract with the essential terms of the contract set out in Schedule 1 provide 'credit' within the meaning of s 6(b) of the CCCFA such that it meets the definition of 'credit contract' in s 7(1) of the CCCFA?

Answer: No.

- (c) Question 3: If the answer to Question 1 or 2 is "yes", does a Pawnbroking Contract with the features set out in Schedule 1 involve 'credit fees' which "are or may be payable under the contract" such that

it meets the definition of a ‘consumer credit contract’ in s 11(1)(c)(ii) of the CCCFA?

Answer: It is not possible to answer this question on the evidence before me.

- (d) Question 4: If the answer to Question 1 or 2 is “yes”, does a Pawnbroking Contract with the features set out in Schedule 1 involve the taking of a ‘security interest’ which “[is] or may be taken under the contract” such that it meets the definition of a ‘consumer credit contract’ in s 11(1)(c)(iii) of the CCCFA?

Answer: Yes.

- (e) Question 5: If the answer to Question 1 or 2 *and* either 3 or 4 is “yes”, and Pawnbroking Contracts are found to meet the definition of ‘consumer credit contract’ in s 11 of the CCCFA, does s 15A of the CCCFA otherwise exclude the application of the CCCFA to Pawnbroking Contracts with the essential terms of the contract set out in Schedule 1 because s 11 is located in 2 of the CCCFA?

Answer: No.

- (f) Question 6: If the answer to Question 5 is “no”, what interpretation of the phrase “in the case that” in s 15A(1)(b) of the CCCFA is correct?

Answer: “if the contract itself provides that, in the case that ...”.

### *Costs*

[68] No submissions were made to me on the matter of costs, and it may be that no issue arises on that score. If any issue as to costs does arise, the parties should file memoranda.

## Schedule 1: the key features of Pawnbroking Contracts in respect of which the Commission seeks the Court's guidance

- 1 The Commission seeks the Court's guidance in respect of the questions stated in Part 9 above, where the Pawnbroking Contract has the following features:
  - (a) In accordance with s 4 of the SDPA:
    - (i) The pawnbroker enters into the arrangement in expectation of profit, gain, or reward; and
    - (ii) Money is advanced "on the security of goods of which the person takes possession, but not ownership"; and
    - (iii) The contract is entered into by persons who are not "a secondhand dealer or the employee of a secondhand dealer and pawnbroker"; and
- 2 The provisions of the SDPA regulate how the core features of a Pawnbroking Contract, set out in s 4 (and above), are to operate in practice, including that Pawnbroking Contracts must provide for:
  - (i) A redemption date, which is the last day on which the pawnbroker must hold the goods for redemption by the pledger (and after which, the pawnbroker can sell the goods);<sup>27</sup> and
  - (ii) A redemption price, which is the amount of money a pledger must pay in order to redeem their goods before the redemption date;<sup>28</sup> and
  - (iii) The amount of money advanced to the pledger on the goods.<sup>29</sup>
- 3 Two sample Pawnbroking Contracts with the core features of a Pawnbroking Contract outlined above at paragraph [1], and which are consistent with requirements of the SDPA at paragraph [2] are **appended** to assist the Court, as follows:
  - (i) **Appendix 1:** Dollar Dealers contract;
  - (ii) **Appendix 2:** Cash Converters contract.

---

<sup>26</sup> In accordance with ss 51 and 59 of the SDPA. Section 59 of the SDPA sets out the requirements of a 'pledge ticket', which includes the information at s 51(2)(b) to (h). Section 51 requires pawnbrokers to keep a record of the information therein.

<sup>27</sup> As defined in s 58 of the SDPA.

<sup>28</sup> As defined in s 57(1) of the SDPA. This comprises the amount of money advanced on the goods "plus" the redemption fee payable by the pledger on redemption of the goods (s 57(1)(a) and (b)).

<sup>29</sup> This must be noted on the 'pledge ticket' pursuant to s 59(2)(c) and s 51(2)(f) of the SDPA.