



Review

16 September 2017

- **Financial Hardship**
 - **Lender**
- **Security Property**

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16 September 2017

Consumer:

ABCD Pty Ltd
c/- Mr X

Financial services provider:

Lender

REVIEW

1. This Review provides the parties with our assessment of the consumer's hardship complaint.

Summary

2. We find that:
 - (a) The consumer's claim the financial services provider (**FSP**) was not the legal owner of the debt when the default notices were issued has not been made out.¹
 - (b) The FSP was merely exercising its own commercial decision when it decided not to release the full funds from an earlier sale of one of the security properties in 2015.²
 - (c) The consumer's claim that he is in front with his payments has not been made out.³
 - (d) The FSP is not required to provide hardship assistance, such as a moratorium on payments.⁴
2. Consequently, it is unclear how we can assist further with the complaint.

Background to complaint

3. We refer to the consumer's previous complaint, which was closed on 20 February 2017.⁵ During the course of the previous complaint, it

¹ CIO Rule 36.1(d) – 10th Edition.

² CIO Rule 10.1(f) – 10th Edition.

³ CIO Rule 36.1(d) – 10th Edition.

⁴ CIO Rule 36.1(d) – 10th Edition.

⁵ Copy of closure letter attached.

became apparent the consumer was in financial hardship. We invited the consumer to make a hardship complaint, which he did not request at the time. Consequently, his complaint was closed.

4. The consumer later lodged a hardship complaint, after he was served with default notices from the FSP.

Consumer's claim/s

5. The consumer says that:
 - (a) The FSP was not the legal owner of the mortgage loan when they issued the default notices.
 - (b) The consumer is in front with his payments, as the FSP received around \$400,000 from the sale of one of the security properties.
6. To resolve their complaint, the consumer wanted access to the funds he paid in advance.
7. After we opened the complaint the consumer's home and business suffered damage because of cyclone Debbie. Consequently, the consumer also required time for repairs and resume trading.

FSP's response

8. The FSP says that:
 - (a) The consumer has not made any payments for over 6 months (well before the cyclone), and prior to this was only making interest payments for about 12 months. The status of the loan account is as follows:
 - i. Total arrears outstanding as at 9 May 2017 was \$157,118.31.
 - ii. Last payment received was \$4,449.40 on 17 November 2016.
 - iii. Current minimum monthly payment is \$17,149.87.
 - (b) In January 2017, the FSP arranged with the consumer to do a valuation of the business to assess whether further funds could be made available. The consumer would not cooperate with the valuer and no valuation was completed.
 - (c) They would like details of the damage to the business, including whether the insurer has approved a claim and when it is likely the consumer will be trading again.
 - (d) To resolve the complaint, they would be prepared to enter into a Deed of Forbearance, subject to various terms and conditions.⁶
9. In our telephone conversation with the FSP on 3 July 2017, the FSP stated the issue regarding the funds received from a partial discharge, were dealt with in a previous CIO complaint. They also stated they remain concerned the consumer

⁶ Refer email dated 15 May 2017 with enclosures attached.

has yet to authorise the commencement of the remedial work on their security. They are prepared to consider a moratorium of payments subject to specific terms, which it will consider and advise in due course.

10. In the FSP's email dated 11 August 2017, they enclosed correspondence confirming the business licence was suspended and that it would be cancelled on 29 August 2017, if the fees were not paid.⁷

Considerations CIO is required to have regard to

11. In dealing with this complaint, CIO has observed procedural fairness and has had regard to:
 - (a) relevant legal requirements and rights provided by law to consumers,
 - (b) applicable codes of practice,
 - (c) good industry practice in the financial services industry, and
 - (d) fairness in all the circumstances.⁸
12. Both the consumer and the FSP have been given the opportunity to provide information to support their respective positions.
13. We are satisfied that, with the exception of any information considered to be confidential and/or commercially sensitive, all information relevant to this complaint received from the FSP and the consumer has been exchanged between the parties.

The consumer's claims about the default notices

14. During a telephone conversation with the consumer on 22 June 2017, the consumer claimed that the FSP was not the legal owner of the debt at the time the FSP issued default notices.
15. In the previous complaint, CIO explained that the debt was validly assigned to the FSP, effective from 5 December 2016.⁹ The FSP subsequently sent the default notices in March 2017.
16. Given the above, the consumer's claims that the FSP was not the legal owner of the debt at the time they issued the default notices has not been made out.

We are unable to reconsider concerns raised in a previous complaint with us

17. During a telephone conversation with the consumer on 22 June 2017, he claimed that the loan is in advance as the FSP had received more than \$400,000 from the sale of one of the security properties and kept those funds, when they were not entitled to do so.

Relevant considerations

18. Our Rules and Guidelines set out what complaints we can deal with and our process for dealing with aspects of a complaint.

⁷ Copy of email and enclosure attached.

⁸ CIO Rule 12.1 – 10th Edition.

⁹ Copy of Review dated 2 February 2017 attached.

19. Before we complete our assessment of select aspects of a complaint, we must first satisfy ourselves that we have the jurisdiction to deal with that aspect. If we do not have the jurisdiction to deal with that aspect, we cannot consider that aspect further.

Our findings

20. On 19 December 2016, the FSP (through Leading Bank) responded to the consumer's queries about access to the remaining funds after the sale of 3 ABC Road. It said its decision to release \$35,000 at settlement was a commercial decision, having regard to the remaining security held by the bank.

21. Given the above, we have looked at the General Terms and Conditions that apply to the loan.¹⁰ These terms and conditions say:

Application of Payments

10.2 We may apply payments we receive under the *facility* towards amounts which are owed to us under the *facility* in any way that we think fit, regardless of any direction given to us by a *transaction party* to apply payments in a particular manner.

22. 'We' meant Leading Bank (now the FSP by way of assignment); 'facility' means the loan account; and 'transaction party' refers to the consumer.

23. Given the above, it appears it was at the FSP's discretion how it applied any funds received at the settlement of the sale of 3 ABC Road. This also means that if they were to apply the full funds to the loan account (i.e. the facility) and not release any funds to the consumer that would be their right under the terms and conditions.

24. By signing the original loan agreement, the consumer has also agreed to the lender revaluing security properties at its discretion,¹¹ and the terms and conditions also say:

Additional security

17.1 If we reasonably believe that:

- the value of any *security property* has declined; or
 - the *amount* secured by a *security* has increased for any reason,
- you agree to provide us with any additional *security* that we ask for within the timeframe we require.

25. Given the above, it appears the FSP was merely ensuring it had sufficient security remaining, before it released any funds to the consumer, and saving the need to request the consumer provide additional security later.

26. The consumer appears to have accepted these terms and conditions by signing the original loan offer and subsequent variations.

Conclusion

27. On the available information, it appears the FSP was doing no more than what it was entitled to do under the loan terms and conditions, and exercising its own

¹⁰ We looked at both the October 2011 and June 2009 versions, as it was unclear (on the available information) whether the consumer was notified of the October 2011 version. However, the consumer would have been aware of the June 2009 version given the variation signed in January 2011. Despite this, the Terms and Conditions relied on in this Review are identical in both versions.

¹¹ See Clause 20 of the Letter of Offer signed by the consumer on 20 July 2006.

commercial decision. Accordingly, it is unclear how we can assist further with this aspect of the complaint.

The consumer's claims that he is in front in his payments

28. The consumer says he is in front in his payments given the fact that more than \$400,000 has been applied to his loan. The FSP claims that he is in arrears by more than \$188,302.91 as he has failed to make payments in line with the loan and most recent variation.

Our findings

29. Despite any adjustment made to the account after the sale of 3 ABC Road, the consumer has obligations under the loan agreement and variation signed on 26 June 2015 to make certain monthly payments:
- (a) That variation says the consumer's payments would be changed to interest only for 2 months (ending on 1 August 2015), then they would revert to principle and interest until the loan expires.
 - (b) The loan agreement requires the consumer to make monthly payments to the account; initially interest only for 3 years and then principle and interest payments for the remaining 17 years.¹² This requirement does not change with any extra payments made (such as in the case of a partial discharge).
30. The statement of account indicates that since the variation was signed in June 2015, when the consumer has made payments, they have not been principal and interest, as required under the loan and variation. In fact, the consumer has failed to make any payments since November 2016.

Conclusion

31. Given the above, the consumer's claim that he is in front with his payments has not been made out.

The FSP is not required to provide hardship assistance

32. The consumer says the business, which is the main security for this loan, was damaged because of cyclone Debbie at the end of March 2017. The consumer is negotiating with the insurer regarding repairs, and is seeking a moratorium on payments until he can resume trading.

Relevant considerations

33. It appears the National Credit Code (**NCC**) does not regulate the consumer's loan; however, we have assessed the complaint and applied the same reasons as if it were.
34. Under section 72 of the NCC, a borrower can apply to their lender for a change in their payment obligations if the borrower is finding it difficult to make payments.
35. The lender is not required to agree to a borrower's request. However, where the lender does not agree to the proposed change, we may, if appropriate, order the

¹² See Clauses 4 and 8 of the Letter of Offer signed by the consumer on 20 July 2006.

lender to make the change. We will only do this if the borrower can show us that they are likely to be able to meet their obligations under the loan if it is changed in a particular way.

36. We consider three to six months to be a reasonable period for a borrower to demonstrate that they could meet their obligations. This includes their obligations to make their minimum payments and clear any arrears.

Our finding

37. We understand the following about the loan account:¹³

	Loan no: 123456
Minimum monthly payments	\$15,592.30
Arrears	\$188,302.91
Date and Amount of last payment	17 November 2016 for \$4,449.40
Account balance	\$1,577,873.93

38. In our emails to the consumer dated 6 February 2017, 29 March 2017, 1 June 2017 and 27 June 2017,¹⁴ we requested information, including details of income and expenses. To date we have not received this information. Without this information, we are unable to make a reasonable assessment as to the consumer's ability to service the loan now or in the future.
39. According to the loan statements,¹⁵ it appears the consumer has failed to make a full principal and interest payment since 1 June 2015, which was for \$19,017.99. This was prior to Cyclone Debbie in March 2017.
40. On 25 June 2015, the parties agreed to reduce payments from principal and interest, to interest only for a period of two months, finishing on 1 August 2015.¹⁶ However, since the expiry of the variation, it appears the consumer has only been making payments equivalent to the monthly interest, with the last payment received in November 2016, as noted above.¹⁷ Therefore, we have assumed the consumer has been in financial hardship since around mid-2015.
41. Since the cyclone, the consumer has engaged a lawyer to manage his insurance claim. It appears the consumer is disputing certain aspects of the policy, which is still the subject of current negotiations.¹⁸ There is no information to show when the repair work is likely to be completed and therefore, when the consumer can resume trading.
42. We also note the FSP's concerns about the non-payment of the required licences to allow the consumer to trade, once repairs are complete. Unless the consumer can

¹³ Copy of email dated 20 July 2017 and statements attached.

¹⁴ Copy of emails attached.

¹⁵ Refer to statements attached.

¹⁶ Copy of Letter of Variation attached.

¹⁷ Refer to FSP's email dated 15 May 2017 with enclosure (except for documents considered sensitive).

¹⁸ Refer to the FSP's email dated 5 and 6 June 2017 with enclosures attached.

show he has paid those licences and they remain valid, it is unclear whether the consumer can actually recommence trading upon completion of the repairs.

43. In the FSP's emails dated 20 July 2017,¹⁹ the FSP agreed to provide the consumer with a three month moratorium, finishing on 31 October 2017, subject to the following conditions:
- (a) the consumer must provide his approval / consent to the insurance works at the security property, and
 - (b) the consumer must co-operate with the insurer and their contractors.

If the consumer chooses to accept the proposal, he should do so by the due date.

44. However, on the available information, it appears the consumer has been in financial difficulties for some time, even prior to the damages sustained because of the cyclone. Furthermore, there is no information to indicate that the consumer's financial position is likely to improve to a point where the consumer can resume his minimum payments and make extra payments to clear the arrears, once the repairs are complete. This is because there are concerns about whether the consumer has a valid license and can resume trading in a reasonable time (i.e. within three to six months).

Conclusion

45. For the reasons outlined above, the FSP is not required to give the consumer hardship assistance.

Responding to our Review

46. For the reasons set out above, it is unclear how we can assist further with the complaint.
47. If the consumer disagrees with our Review and has further information to indicate that the complaint should remain open, we ask that this be provided to us by no later than **Monday, 2 October 2017**.
48. If the consumer provides us with new information, we will assess whether this changes the findings set out in this Review. If so, we will notify the parties and continue to deal with the complaint.
49. The consumer can also ask for a Determination. A Determination is made by the Ombudsman and is a final decision about the complaint.
50. If we do not receive a response from the consumer, the Review will become our final decision and the complaint will be closed. We will notify the parties of this.

The consumer must respond by **Monday, 2 October 2017**. If more time is needed, a request for an extension should be made as soon as possible and, at the very latest, before **Monday, 2 October 2017**.

Dispute Resolution Consultant

¹⁹ Refer to copy emails attached.