

# **Appendix 1**

## **FSCCL Case Notes**

# The Never Ending Loan

## **Vicky takes out a loan**

In January 2015, Vicky took out a \$175 loan with Breezy Loans. She chose to repay it at \$55 a week for 8 weeks, which would total \$440.

Vicky soon noticed that whenever she missed a payment, she was charged a \$49 'bank dishonour' fee and a \$30 (sometimes higher) 'letter fee'. After she had made six repayments (\$330), the loan balance was at \$590, due to the accumulation of these fees. It seemed she would never be able to repay the loan. Vicky came to FSCL because she thought this wasn't fair.

## **FSCL investigation**

We began by asking Breezy Loans for a report on the complaint. Even with consistent prompting, Breezy Loans did not respond for about six weeks due to a system error and company restructure.

## **Resolution**

Because of the unnecessary delay, Breezy Loans offered to cancel the contract and discharge Vicky from the remaining debt. Vicky accepted this offer.

## **The lesson**

If we had conducted a full investigation, we might have looked into the reasonableness of the fees Breezy Loans charged. The reasonableness of fees charged by lenders is currently an issue the Supreme Court is assessing in *Sportzone Motorcycles Limited and Motor Trade Finances Limited v Commerce Commission* [2015] NZCA 78.

Another issue we may have looked at is whether Breezy Loans complied with the responsible lending principles in the Credit Contracts and Consumer Finance Act 2003 and the Responsible Lending Code, which require lenders to make sure borrowers are well informed about the agreement and its implications before the borrower agrees to enter into it. It is important that lenders are aware of the Principles and the Code so that they lend responsibly.

# \$800 payday loan becomes a \$2,000 debt

## The story

William is 21, employed, earning \$42,000 a year. William did not have quite enough money to cover his expenses so applied to a payday lender, Phone for Cash, for a \$100 loan to be repaid the following week. William completed an application, provided proof of income and the loan was advanced. William repaid the loan on time, without incident. A couple of weeks later William was again short of money. He called Phone for Cash and asked for a \$200 loan to be repaid the following week. Again William repaid the loan on time. A few weeks later William borrowed \$400. This time William could not repay the loan and defaulted. William asked his father for help and fortunately William's father was able to repay the debt.

A few months later, in August, William applied to Phone for Cash for a loan of \$800. William knew he would need to pay Phone for Cash \$1,264 within 45 days. William did not repay the loan and Phone for Cash began its debt recovery process, sending text messages and trying to contact William by telephone. In October Phone for Cash demanded immediate payment of \$1,372. By November the debt had increased to \$1,586 when Phone for Cash again tried to contact William. In January Phone for Cash made its third demand for \$1,766, advising the debt would be referred to a collection agency. William did not respond until February when he asked his father for help.

Phone for Cash asked William to see a budget adviser. The budget adviser said William could afford to pay \$75 a week. Phone for Cash said this was not enough, and wanted William to pay \$600 a week. William phoned FSCL in March, by now his debt was \$2,070.

## Dispute

William agreed he owed Phone for Cash \$2,070 but said it was impossible for him to pay \$600 a week. William said he thought Phone for Cash should not have loaned him \$800 after he had defaulted on the previous loan. William asked for our help to negotiate with Phone for Cash.

## FSCL's review

We asked Phone for Cash whether it would accept anything less than \$600 a week, explaining this was an unrealistic sum. Phone for Cash said it had tried working with William. William had ignored the demands for payment. Phone for Cash was not prepared to accept \$75 a week from William, it was barely enough to keep pace with the interest, and Phone for Cash was concerned William would again default. Phone for Cash explained the administrative time in following up defaulting debtors is uneconomic and it had made the commercial decision to refer the debt for collection. We explained to William that under our terms of reference we cannot interfere with commercial decisions in relation to debt and security. We could not see that Phone for Cash had done anything wrong. Phone for Cash had followed a reasonable application process, William had a relatively good history of repaying debt and had not contacted Phone for Cash early when he knew he could not repay the loan.

We asked William whether he could approach his father again for help. Even if he was not able to raise the full amount needed to repay the debt we said we would help him to negotiate with Phone for Cash if he could improve the repayment offer.

## Outcome

William contacted us about a week later to say he had been able to repay the Phone for Cash debt in full. We discontinued our investigation.

# Where did my money go?

Awhina's 25-year marriage had recently ended and she had moved in with a cousin. While her rent was paid directly from her benefit to her cousin, Awhina needed to cover all her other living costs from her remaining benefit of \$185 a week. To save money, Awhina thought it would be cheaper to buy food in bulk and store it in the freezer.

## **Awhina borrows from a payday lender**

Awhina applied for a loan of \$150 to buy food from a payday lender. Awhina agreed to repay the loan in seven weekly payments of \$48. Awhina successfully repaid the first loan, so borrowed a further \$150 for food. Unfortunately, someone stole \$100 from Awhina's bank account the day the second \$48 loan repayment was due to be deducted. There was not enough money to pay the payday lender and the second repayment was dishonoured.

## **Attempts at contact**

Awhina tried to contact the payday lender by telephone, but whenever she tried the telephone lines were overloaded. Awhina did not have access to her computer so could not email the payday lender to explain what had happened. The payday lender was also trying to contact Awhina about the dishonour by email and text.

## **Loan default triggers \$150 debit from bank account**

Unfortunately, the \$100 withdrawal was enough to upset the fine balance of Awhina's finances and the next payment to the payday lender was also dishonoured. The day before the next \$48 payment was due the payday lender debited \$150 from Awhina's bank account, leaving her with \$35 for all her weekly expenses.

## **Inconvenience caused by debit**

Awhina was shocked and tried again to call the payday lender, but the telephone lines were overloaded. Awhina was able to share a meal with her cousin, borrow \$60 from WINZ, and get a food parcel from the food bank. Just as Awhina was recovering from one very stressful week the payday lender debited a further \$150 from her bank account again leaving her without any money for food.

Awhina contacted us for help. We referred the complaint to the payday lender's internal complaints process

## **The payday lender's view**

The payday lender:

- explained that its contract allows it to debit the customer's account with the amount of the principle borrowed if two successive loan repayments are dishonoured
- said it tried to contact Awhina by text and email but she did not respond
- acknowledged that its telephone lines are occasionally overloaded, but said Awhina could have sent an email or message.

In resolution of the complaint the payday lender offered to write off the residual balance of \$33 and refund a \$12 overcharge.

## **Awhina's view**

Awhina did not accept the settlement offered. She felt the payday lender did not appreciate the consequences for her of the unexpected \$150 debit to her account. Awhina explained that in the context of her recent marriage breakup the debits caused her to feel anxious and vulnerable.

Awhina also said WINZ and the food bank were reluctant to help because the debt related to a payday lender, making it was difficult to get the loan and food parcel. Although she did not go hungry, it was a very stressful few weeks.

Awhina also said that after we referred the complaint to the payday lender, she continued to receive emails and texts from the payday lender demanding she pay the residual \$33 owed.

Awhina complained to FSCL.

## **Review**

This complaint highlighted a couple of issues for us, which we raised with the payday lender.

### **Responsible lending guidelines breached**

We drew the payday lender's attention to section 9C of the Credit Contracts and Consumer Finance Act 2003 (the Act), reminding the payday lender of its responsible lending obligations. While the payday lender's contract with Awhina may have allowed it to debit her account with \$150, the payday lender knew that Awhina's weekly income was \$185 and that after the \$150 debit she would be left with only \$35. In our view the payday lender had breached its obligation under section 9C(3)(d)(i) of the Act to treat Awhina reasonably and ethically.

### **Inadequate internal complaints process**

We were concerned that the payday lender continued to text and email Awhina demanding repayment after the complaint reached its internal complaints process, but did not contact her about the complaint for almost two weeks. We would have expected the payday lender to contact Awhina immediately, and put recovery action on hold while it investigated her complaint.

### **Telephone system inadequate**

We noted that Awhina's stress was exacerbated by her inability to reach the payday lender by telephone. Although there were other ways to communicate with the payday lender, in our experience for some customers telephone is the most immediate, and sometimes the only means of communication, available. We encouraged the payday lender to improve its telephone system as soon as possible.

## **Outcome**

We asked Awhina how she would like the complaint resolved. Awhina said that in addition to the payday lender's offer, she would like the payday lender to pay her \$300, to recognise the consequences for her of the unexpected debits to her bank account.

We went back to the payday lender and asked whether it would like to increase its settlement offer by \$300. The payday lender agreed and the complaint was resolved on that basis.

### **Key insights for the participant and the complainant**

This complaint highlights the usefulness of the responsible lender guidelines under the Act. Although the contract between the lender and the borrower allowed the lender to debit the borrower's account, the Act allowed us to look at the circumstances of the debit. It is a timely reminder to all lenders to check that debt recovery process is reasonable and ethical. It is also an encouragement for consumers to see consumer protection legislation in a practical context.

# Would you like insurance with that?

## The story

In July 2015 Ruth and Luke saw a car they wanted to buy. They did not have enough money but the car yard told them not to worry, Fast Car Finance would be able to help.

Ruth called Fast Car Finance and completed an application over the telephone. Fast Car Finance were able to arrange a loan with Jupiter Finance and sent the documentation to Luke and Ruth.

Ruth and Luke noticed Fast Car Finance had included insurance from Saturn Insurance. Ruth and Luke thought the insurance must be a compulsory part of the loan so signed and returned the documentation. Ruth and Luke drove away happily in their new car.

A few months later Ruth read over the loan agreement and the insurance documentation again and discovered the insurance was not compulsory. She read further and saw the insurance was for mechanical breakdown and income protection. Luke is a mechanic and they did not need mechanical breakdown insurance. Ruth also said they are both in secure jobs, and thought the income protection insurance was unnecessary.

Ruth said Fast Car Finance did not even mention the insurance in the conversation she had about the loan. If Fast Car Finance had mentioned the insurance Ruth says she would have declined it.

## Dispute

Ruth contacted Fast Car Finance and asked why they did not explain the insurance was optional. Ruth said if they had known more about the insurance they would not have borrowed the extra \$1,390 to pay for it. Ruth asked Fast Car Finance to help her cancel the insurance and refund all the premiums paid.

Fast Car Finance said Ruth and Luke should have queried the insurance earlier and had already received the benefit of cover. Fast Car Finance was not prepared to refund any money. Fast Car Finance also explained that only Ruth and Luke could cancel the insurance.

Ruth and Luke contacted Saturn Insurance, but Saturn Insurance said that if Ruth and Luke cancelled the insurance it would not refund any premiums.

## FSCL's review

Under 9C(5) of the Responsible Lending Code Fast Car Finance is obliged to make sure insurance meets the borrower's requirements. We asked Fast Car Finance about the information its staff give customers about the insurance.

Fast Car Finance agreed information about insurance is important, and should be discussed as part of the loan application process. Unfortunately, Fast Car Finance did not keep notes of its conversations with customers and telephone conversations, at the time Ruth and Luke's loan was arranged, were not recorded. Fast Car Finance also did not provide the scripts it expects staff to follow when arranging finance.

In the absence of any evidence from Fast Car Finance that it had met its Responsible Lending Code objectives, we accepted Ruth's recollection of the conversation.

## Outcome

We then considered the consequences for Ruth and Luke. Although Ruth and Luke wanted Fast Car Finance to refund the full amount they paid for the insurance, we also took into consideration the benefit Ruth and Luke had received. While Ruth and Luke had not needed to claim against the insurance, they had enjoyed the peace of mind insurance brings.

We suggested, and Fast Car Finance agreed, to offer a refund of half the cost of the insurance: \$695. Ruth replied that she thought interest on the \$695 would be reasonable, increasing the settlement figure to \$812.80. Fast Car Brokers agreed, and the complaint was resolved.

## Lesson

The Responsible Lending Code places new obligations on lenders. Lenders are now obliged to ensure insurance sold as part of the loan meets the borrower's requirements and objectives. It is important that lenders be able to demonstrate they have met their Code obligations.

Although Fast Car Finance was the broker, arranging lending with Jupiter Finance, we expect Fast Car Finance to meet the same standards expected of a lender. In this transaction Jupiter Finance had no direct contact with Ruth and Luke; Fast Car Finance was acting as Jupiter Finance's agent.

# George's guarantee glitch

In July 2016, George, a pensioner, agreed to guarantee his son Paul's \$2,000 loan. Paul defaulted almost immediately on his weekly \$180 repayments. When the lender could not locate Paul, the lender advised George of its intention to repossess his car, which was security for the loan. George could also not locate Paul, and then complained to FSCL.

George claimed the lender did not enquire into whether he could afford to guarantee Paul's loan, explain the key aspects of the guarantee, or the potential consequences of guaranteeing the loan. George said if the lender had taken these steps, he would never have provided the guarantee. He said he would be prepared to pay the frozen principal (\$2,000), if he could pay by instalments.

The lender's file notes indicated it had gone through the implications of providing a guarantee with George and had advised him he could seek legal advice. The lender also had three-months' worth of bank statements it had relied on in deciding George could afford to guarantee the loan. With his only income being national superannuation and existing payments including mortgage and insurance, George would only have had \$101 per month to cover all his other basic living costs if he had been called upon to pay the guarantee at \$180 per week.

We suggested the lender consider releasing George from the guarantee on this basis.

## The lender's view

The lender did not agree to release George from the guarantee. The lender claimed it had explained to George that \$180 would be a high amount to repay given his income, and George gave the guarantee despite this. In other words, the lender considered the onus was on George to not give the guarantee if he could not afford it.

The lender also said the credit contract provided safeguards because it allowed for George and the lender to enter into a reduced payment arrangement, if that became necessary.

The lender said it would allow George to make payments at less than \$180 per week if this meant he would pay the debt. By this time, with fees and interest added (and continuing to be added), the debt had increased to \$3,500.

## FSCL's view

We found the lender should never have taken George's guarantee.

It was clear George could not afford to provide the guarantee when he would only have \$101 left per month for basic necessities. In our view, the lender had breached a key responsible lender's obligation under section 9C(4)(a) of the Credit Contracts and Consumer Finance Act 2003 (CCCFA). That section states lenders must ensure they undertake reasonable enquiries before a guarantee is given, to be satisfied that the guarantor will be able to comply with the guarantee without suffering substantial hardship.

The Responsible Lending Code provides helpful guidance on what 'substantial hardship' means. The Code says a guarantor can afford to provide the guarantee without suffering substantial hardship if the guarantor can make payments without undue difficulty, and meet necessities, while also meeting other financial obligations without having to realise security or assets. George's circumstances did not meet that definition.

We reminded the lender that the lender responsibility principles placed a fundamental obligation on the lender to ensure George could afford to provide the guarantee without suffering substantial hardship. This stands regardless of whether the guarantor is prepared to provide the guarantee.

We thought George should be put back in the position he would have been in if the lender had not breached the CCCFA and that the lender should release George from the guarantee. This was particularly because George never received any benefit from the \$2,000 loan to his son, Paul. The lender could continue to pursue Paul for payment of the debt.

We also noted the lender had indicated it considered it acceptable for George to provide the guarantee, despite him not being able to afford to, because there were unforeseen hardship mechanisms available to him under the credit contract and the CCCFA. However, George's inability to pay the guarantee was not based on any unforeseen hardship (for example loss of a partner or income, or sickness). Rather, George's hardship was foreseen, because he could not afford to provide the guarantee to begin with.

## Resolution

Under sections 93 and 94 of the CCCFA, if a lender breaches any of the provisions of section 9C of the CCCFA, one of the remedies is that the lender has to reimburse the person who suffered a loss as a result of the lender's actions.

We said that if the lender were to continue attempts to enforce the guarantee and seek payment from George, he would be suffering a loss as a result of the lender's breach of section 9C(4)(a) of the CCCFA. The lender would then be required to refund all amounts it had recovered from George. On this basis, we considered the best course of action was for the lender to immediately release George from the guarantee.

The lender accepted our view and agreed to release George from the guarantee immediately, resolving the complaint.

### **Our insight**

The lender thanked us for our letter explaining our findings. It said the complaint had presented an excellent opportunity to completely review its processes surrounding guarantors. This case is a great example of the value of complaints for businesses – complaints often highlight where process improvements can be made.

# Pay no one but us

In December 2013, Yvonne borrowed \$13,995 to purchase a new car.

In July 2016, Yvonne was suffering from anxiety and depression and her doctor recommended that she took time off work to focus on her health. Yvonne's partner worked, but Yvonne had been the higher income earner.

Yvonne contacted the finance company and asked if her repayments could be reduced until she was back at work. The finance company told her that she could apply for financial hardship. Yvonne sent the finance company:

- a letter outlining her reasons for experiencing financial hardship
- a budget from Presbyterian Support
- her bank statement for the period 11 May 2016 – 11 August 2016
- her partner's bank statement for the period 12 May – 12 August 2016.

Yvonne's budget sheet showed that she was receiving a benefit of \$208 per week and that her partner earned \$547 per week. Their total household income was \$755. The budget sheet also showed that Yvonne and her partner's weekly expenses were \$876.78, they were renting, and had over \$64,000 in debt.

The finance company declined Yvonne's hardship application, saying that she could only apply for hardship if there was "no income". As Yvonne's partner was still earning, the finance company considered that she could still afford to meet her weekly repayments of \$156.50.

Yvonne complained to FSCL.

## Our view

After investigating Yvonne's complaint, we found the finance company should not have:

- issued Yvonne two repossession warning notices when a decision had not been reached on her hardship application
- declined Yvonne's hardship application for the reason it did (that it could only accept a hardship application where there was no income)
- asked Yvonne to provide a budget sheet which showed only her income and expenses, excluding any household income or expenses
- told Yvonne that her budget sheet and bank account statements showed that she could still afford to meet her weekly car repayments
- declined Yvonne's hardship application without telling her she could request a review of the decision by either FSCL or the Disputes Tribunal.

We also found some third party fees had been incorrectly charged to Yvonne's loan account and should be reimbursed.

## Sale of the car

Yvonne had stopped working in July 2016 but, by the time we were considering Yvonne's complaint, it was November 2016. Yvonne said she would not be well enough to go back to work for at least a few more months.

While we agreed that the finance company's assessment of Yvonne's hardship application could have been much better, the financial hardship provisions are only intended to provide borrowers with temporary relief for temporary changes in their financial circumstances.

The change in Yvonne's financial position was not temporary. It did not appear likely that Yvonne would be able to return to work in the near future. We suggested to Yvonne that the next best step may be for the car to be sold as, once security is sold, any residual debt crystallises. This means that no interest, default charges, or administration costs can be added to the residual balance.

Yvonne decided that the car should be sold and she delivered the car to an auction yard. By voluntarily surrendering the car, Yvonne avoided any repossession costs being added to her loan account and the car could be put up for auction straight away.

## **Outcome**

At the time Yvonne's car was sold, her loan balance was \$9,998.66. The car was sold for \$3,210.75 meaning that the residual balance owing on Yvonne's loan account was \$6,787.00.

We suggested that the finance company reduce the residual balance by \$750 for the stress and inconvenience it caused Yvonne as a result of its poor assessment of her hardship application. We also said that the finance company should refund third party fees incorrectly charged to Yvonne's account totalling \$1,105.85.

The finance company agreed to reduce Yvonne's residual loan balance by \$1,855.85, leaving a balance of \$4,931.15. Yvonne agreed to repay this amount in weekly instalments of \$20, with the view to increase her repayments once she had returned to work.