

**BETWEEN**

**ABV**

APPLICANT

**AND**

**ZYH Ltd**

RESPONDENT

Date of Order:

22 April 2013

Referee:

Referee Ballard

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**ORDER OF THE DISPUTES TRIBUNAL**

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**The Tribunal hereby orders that ZYH Ltd is to pay ABV the sum of \$748.00 on or before 5 pm on 30 April 2013.**

## **Facts**

[1] ABV entered into a credit agreement with ZYH Ltd in September 2008, borrowing \$146,961.00 to refinance her house. She claims that ZYH Ltd failed to disclose all of the fees she would have to pay over the life of the loan, and is in breach of s 17 of the Credit Contracts and Consumer Finance Act (CCCFA).

[2] She seeks a refund of \$11,209.38, comprising the following fees that she claims were not disclosed to her:

Service fees	\$500.00
Expired insurance fees	\$1,000.00
Enforcement fees	\$1,922.88
Default administration fees	\$2,590.00
Property Law Act (PLA) fees	\$2,000.00
Real estate agent fees	\$3,196.50

## **Issues**

[3] The issues for the Tribunal to decide are:

- (i) Did ZYH Ltd fail to disclose its fees in breach of s 17 of the CCCFA?
- (ii) Were the new fees and charges oppressive?
- (iii) Were the new fees validly charged?
- (iv) Is ABV entitled to a refund of all or part of the fees charged?

## **Decision**

*Did ZYH Ltd fail to disclose its fees in breach of s 17 of the CCCFA?*

[4] I am not persuaded that ZYH Ltd was in breach of s 17 of the CCCFA. I have had regard to ABV's arguments that the original loan documents failed to disclose that it would charge a monthly service fee and an expired insurance fee, that charges would be imposed for enforcement expenses, real estate commissions and PLA notice fees, and that the default administration fee would be raised from \$25.00 to \$95.00.

[5] However, I note that ZYH Ltd's contract (Clause 29.4 of the Memorandum) includes provision for changes to be made to the credit fees and charges, and that it sent all of its New Zealand clients notice of the proposed changes when it sent its six monthly statement out in December 2008. The changes were to come into effect on 4 March 2009. Although ABV claims that she did not receive this notice, I am satisfied that it was sent to her. With the exception of the \$10.00 monthly service fee (which was a new fee that was imposed on all loans after the contract was entered into), the other fees and charges were only payable if the payments were in arrears.

[6] I also note that, even if I were to find that ZYH Ltd was in breach of s 17, there is a limitation on the time in which an application may be made to a court for an order under s 93. Section 95(2) provides that an application must be made within three years from the time when the matter giving rise to the application occurred. That time is either when the contract was agreed to in September 2008, or when the first alleged breach occurred in March-April 2009. Either way, my view is that the application is out of time.

*Were the new fees and charges oppressive?*

[7] I am not persuaded that the new fees and charges were oppressive. I have had regard to ABV's argument that they were and that under s 120 of the CCCFA, she was entitled to a remedy. She maintained that if ZYH Ltd was allowed to increase the fees in the way that it did, it opened the floodgates for creditors to mislead consumers and to charge them whatever they liked, having induced them into the contract with low or non-existent disclosed fees at the time the contract was entered into.

[8] However, in order for me to make a finding that the fees were oppressive, I would have to be persuaded that they were more than just unfair or unreasonable. As the courts have recognised, it is necessary to balance the interests of both parties to a credit contract when considering whether to re-open a credit contract on the grounds that the fees or charges were oppressive. I have not seen any evidence to persuade me that the fees were exceptional or inconsistent with normal market practice, or that ZYH Ltd took advantage of ABV in any way. I consider it more than likely that the change to the fee structure is reflective of the deepening global financial crisis at the time and the need to have some buffer to protect against a likely higher incidence of defaults.

*Were the new fees validly charged?*

[9] ABV's claim is for a refund of \$11,209.38. However, this is not supported by the account summary as there are some errors in her calculations and some reversals/refunds that have not been taken into account. The correct sum should be \$7,354.75, comprising:

Service fees	\$440.00
Expired insurance fees	\$500.00
Enforcement fees	\$461.25
Default administration fees	\$2590.00
Property Law Act (PLA) fees	\$2000.00
Real estate agent fees	\$1363.50

[10] Apart from the expired insurance fees (discussed below), my finding is that all of these fees were validly charged. ZYH Ltd explained that the service fee (\$10.00 per month) was imposed because it could no longer absorb the cost of servicing and maintaining the loan due to changes in global economic conditions. The other fees all arose because the loan had frequently fallen into arrears. Each time there was a default, additional fees were incurred, including the PLA fees of \$500.00 and the real estate agent's fees when the property was being prepared for a mortgagee sale.

*Is ABV entitled to a refund of all or any of these fees?*

[11] My finding is that ABV is entitled to a refund of the expired insurance fee. ABV produced a copy of documents that showed she maintained her insurance throughout the term of the loan. Although she had not notified ZYH Ltd (as she was required to do under the agreement), ZYH Ltd was prepared to accept that the property was properly insured throughout the term. The \$500.00 expired insurance fee is therefore waived and ABV is entitled to a refund.

[12] As a final point, I am ordering ZYH Ltd to pay ABV the cost of her first appearance at the Tribunal. Because ZYH Ltd's representative was a barrister and solicitor, he was not a person who was authorised to appear on its behalf and the hearing had to be rescheduled. ABV forfeited a day's wages on that occasion so that she could appear. She said her hourly rate is \$31.00 per hour and I consider it only fair that she be reimbursed for the lost wages (\$31.00 x eight hours).

[13] For the reasons given, ZYH Ltd is ordered to pay ABV the sum of \$748.00 on or before 5 pm on 30 April 2013.