

**BETWEEN**

**CY LIMITED**  
APPLICANT

**AND**

**XB**  
RESPONDENT

**AND**

**XBX**  
SECOND RESPONDENT

Date of Order:

21 March 2016

Referee:

Referee Jaduram

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**ORDER OF THE DISPUTES TRIBUNAL**

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**The Tribunal hereby orders that the claim is dismissed.**

### **Facts**

[1] XB and XBX entered into an agreement for the sale and purchase of a property in A. XB and XBX stopped making payments under that agreement. The agreement included a disclosure statement under the Credit Contract and Consumer Finance Act 2003. CY Limited is claiming \$3,031.72 for amounts outstanding. XBX and XB were to pay \$232.66 each week for 3 years. That amount is made up of instalments of the purchase price, interest and an amount for the estimated annual rates and insurance.

[2] CY Limited was represented at the hearing by BB, an employee of CY Limited. CC, the director of CY Limited also provided BB with an authority to act.

[3] XBX and XB did not attend the hearing.

### **Law**

[4] The relevant law is the law of contract and the Credit Contracts and Consumer Finance Act 2003 ("CCCFA"). The CCCFA applies to consumer credit contracts.

### **Issues**

[5] The issues to be determined are:

- a. Whether the agreement is a consumer credit contract.
- b. If so, has CY Limited made the required disclosures under the CCCFA?

*Is the agreement a consumer credit contract?*

[6] CY Limited, as owner of properties in Central North Island, entered into a sale and purchase of a property it owned with XBX and XB. CY Limited provided a loan to enable XBX and XB to buy the property from it (i.e. a loan for the purchase price). The legal transfer of the property to the purchaser (which is called the "settlement date" in the agreement) was deferred until the loan was repaid. In this case the "settlement date" was to be 3 years after XBX and XB took possession of the property. If they defaulted, the agreement says CY Limited can cancel the agreement and retake possession of the property.

[7] The loan was for \$119,070.00 (which was the purchase price less an “incentive discount”). The total interest charges over the 3 years were calculated as \$30,296.52. The weekly payments also included an amount for estimated annual rates and insurance.

[8] I find that the agreement is a consumer credit contract under the CCCFA because:

a. The meaning of “credit” under the CCCFA includes a debtor:

i. borrowing money from a creditor and paying it back later;

ii. buying property from a creditor and paying back the purchase price to the creditor later.

“Credit” has been provided by CY Limited to XBX and XB as they have borrowed money from CY Limited and the loan was to be repaid over 3 years. I am also of the view that the arrangement falls under a. ii. I say this because even though the agreement says that the settlement date is 3 years after the possession date it is only the legal transfer that takes place on the settlement date. Possession was already given from day one and XBX and XB are paying back the loan with interest, rates and insurance from day one; and

b. The debtor must be a “natural person”. XBX and XB are “natural persons”; and

c. The credit was to be used wholly for “personal, domestic, or household purposes”. I am satisfied that XBX and XB were using the credit for “personal, domestic, or household purposes”. I spoke to CC by phone during the hearing. He said there was no need to make the required disclosures because XBX and XB were purchasing the property for investment purposes. There is no evidence to suggest that this was the case and at a minimum there would have had to have been a written declaration (as required under the CCCFA from XBX and XB that the credit was to be used for business or investment purposes. CC did not have such a written declaration from XBX and XB; and

d. Interest was payable under the agreement; and

e. Two of the criteria for a creditor to be captured under the CCCFA are that:

- i. The creditor “makes a practice of providing credit in the course of a business of a business carried on by the creditor”; or
- ii. The creditor “carries on a business of providing credit (whether or not the business is the creditor’s only business or the creditor’s principal business.”

CY Limited explained that their customers cannot get loans from banks and therefore CY Limited provides the loans to assist in the purchases. CY Limited’s agreement reflects this. At clause 15.3 it says that if CY Limited is able to arrange first mortgage finance which is no less disadvantageous than the terms under CY Limited’s agreement, then CY Limited may require the settlement date to be bought forward. I am satisfied therefore that CY Limited is a creditor who falls within one or both of the requirements set out in this subparagraph.

*Has CY Limited made the required disclosures under the CCCFA?*

[9] Since 6 June 2015, the CCCFA includes the requirement that additional key information must be disclosed to consumers before the consumer credit agreement is signed. Under the CCCFA, if key information is not disclosed then the creditor cannot enforce the contract or enforce other aspects in relation to the contract.

[10] XBX and XB’s agreement is dated 20 August 2015.

[11] The additional key information requires disclosure to be made in relation to the following:

- a. The debtor’s right to apply for relief on grounds of unforeseen hardship; and
- b. The creditor’s registration number as a financial service provider under the Financial Services Providers (Registration and Dispute Resolution) Act 2008 (“FSPR”) and the details of the approved disputes resolution scheme that the creditor is a member of.

[12] CY Limited does not comply with the requirements under the CCCFA as XBX and XB’s agreement does not disclose information mentioned above. Therefore CY Limited cannot (before disclosure is made):

- a. Enforce XBX and XB’s agreement; and

- b. Enforce any right in relation to the cost of borrowing which are, in this case, the interest charges and any default fees.

## **Conclusion**

[13] In summary, CY Limited has not complied with the disclosure provisions under the CCCFA. Therefore it cannot enforce its consumer credit agreement. Accordingly the claim is dismissed.

## **Other information**

[14] A creditor who is required to be registered under the FSPR and is not registered cannot, for example, enforce any rights in relation to the costs of borrowing until the creditor becomes registered, gives the debtor both its registration details, its dispute resolution scheme details and what the debtor must pay in relation to the cost of borrowing. The cost of borrowing must not include amounts accrued before notice was given. A creditor who is providing a “financial service” must be registered. A “financial service” includes providing credit under a credit contract. A creditor must also belong to an approved disputes resolution scheme if it provides a financial service to a retail client.

[15] It appears that CY Limited might not be registered as a financial service provider and might not be a member of any approved dispute resolution scheme.