BFSO Bulletin 48
December 2005

BFSO completes implementation of review recommendations

In May 2004, the Board of the BFSO commissioned a review of the Scheme's operations. The review found that the BFSO is a "very successful operation – widely and strongly endorsed by its stakeholders and demonstrably meeting each of the ASIC PS.139 benchmarks".

The reviewers suggested that the BFSO may benefit from some improvements involving "minor refinements, shifts in emphasis and adjustments to process and policy". The reviewers made 26 recommendations in total and a response to each recommendation was developed by the Board. Over the past 12 months, the Scheme has implemented the action requested by the Board in response to each recommendation.

The changes made by the Scheme have been incremental in nature – a fine tuning of existing processes and procedures. As the Reviewers observed, the Scheme already functions well, with "an environment of professional management, strong systems, high standards of quality and performance, sustained staff morale and active continuous improvement". Consequently, no dramatic changes to existing processes have been required.

On our website, we have published a table setting out each of the Reviewer's recommendations, the Board's response and the action taken by the Scheme to implement the recommendations.

We would like to take this opportunity to highlight some of the developments which have resulted from the review.

Clarifying our processes

The review made some suggestions about how we can explain our processes more clearly. We have made a number of small refinements to the way we do things to make sure that we are as clear as possible about the processes we follow.

OMBUDSMAN

BULLETIN

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- When people first contact our office we now direct them to the 'How to Resolve Your Dispute' brochure available on our website. If the caller does not have access to the internet, we post them a copy of the brochure in the mail.

- As a matter of course, Case Managers will contact disputants when a file is first allocated to them to discuss the principal issues in dispute and the process they will follow in investigating and resolving the dispute. When a lengthy letter, such as a Finding or Recommendation, is sent to the disputant, the Case Manager will telephone the disputant to discuss the outcome of the dispute and the reasons a particular decision was reached.

- To ensure that we have regular contact with disputants and members, we have implemented an internal reporting system which identifies all cases where there has been no case action for 45 days or more.

- We have amended our standard correspondence to make it clear that, where a disputant believes their dispute is urgent, and should be given priority over other disputes, they can contact the General Manager of the Scheme to discuss their situation. In very limited circumstances, some disputants may be given priority in the allocation of disputes for investigation.

- We have sought more feedback about our processes. We have engaged Mark Sneddon, a partner at law firm Clayton Utz, to undertake an independent audit of case files. Mr Sneddon undertook similar audits in 1996 and 1999. We have also conducted a survey of disputants whose files were closed during 2005 to determine each disputant's level of understanding about the progress of their dispute and the issues involved. The feedback from this survey will help us to further improve our communication with disputants.

Publishing our Findings

The review suggested that our processes may be enhanced by increasing the level of transparency about how we operate and, in particular, the decisions we make. We have, for some time, published a comprehensive set of Guidelines to our Terms of a Reference and a detailed Policies and Procedures Manual setting out our approach to particular types of disputes. As a result of the review, we have also decided to publish a selection of case manager Findings. We have published six in total, dealing with the following disputes:

- A couple with a home loan redraw facility made extra repayments on their home loan account. They subsequently split the loan into a variable rate with redraw facility and a fixed rate loan. The couple claimed that the repayments on the variable rate loan were set too low to repay interest when the redraw facility was used. As a result, the loan balance increased despite repayments. The couple sought compensation for the additional interest they would be required to pay on their loan.

- A disputant took out 2 unsecured personal loans for her boyfriend's benefit. Despite assurance that he would meet the repayments, the boyfriend stopped making payments once his relationship with the disputant came to an end. The disputant's father claimed that the loans should not have been granted and should be cancelled.

- A disputant received a foreign currency cheque in payment for dogs he had advertised for sale over the internet. The cheque was larger than the amount required to pay for the dogs and, at the purchaser's request, the disputant waited 28 days for the cheque to clear and then transferred a large proportion of the funds to an overseas bank account nominated by the purchaser. The cheque was dishonoured after the 28 day hold period had expired overdrawing the disputant's account. The disputant claimed that he was not told that the cheque could be dishonoured after the 28 day hold period had expired and sought reimbursement of the funds the bank had debited from his account.

- A small business referred a dispute to the Scheme involving three separate matters: an error in the registration of a floating charge over the assets of a company; failure to prepare and register a transfer of property and delay in the refinancing of a commercial bill facility.

- A disputant contacted the Scheme about liability for unauthorised withdrawals on his account. The withdrawals had been made from his bank account following the theft of his debit card and pin number from his home. The bank had held him liable for the transactions and he disputed their decision.

- A disputant complained to the Scheme alleging that the bank had taken unfair advantage of his elderly father by providing his father with a line of credit for the purchase of a 4-wheel drive vehicle. The line of credit was provided jointly to the disputant and his live-in carer and was secured against the disputant's home.

All these Findings are available on our website and three are included with this Bulletin. The Findings reveal the detailed level of investigation undertaken by this office before a decision is reached about the merits of a dispute. They also show the fact specific nature of disputes and the level of care taken to weigh the available information to reach a fair outcome. All Findings are made on a case by case basis and reflect the unique factual situation in each case. The sample Findings have been edited for external publication and de-identified.

Hardship policy

- We were asked to consider the role of our office in relation to hardship variation disputes. We did so, and in Bulletin 46 we set out the role our office will play when customers write to us to complain that a credit provider has refused to agree to a proposed repayment plan for a debt that the customer is unable to repay because of general financial difficulties.

Letting people know about what we do

- Increasing awareness of the Scheme is an ongoing process. We have developed a series of strategies, including joint promotions with other ASIC approved ADR schemes in the financial services sector, to increase awareness of the Scheme. The focus of the promotions framework is to publicise the Scheme amongst young people, older people, people from non-English speaking backgrounds and people in rural and regional areas.

- As part of our promotions strategy we have recently undertaken some important initiatives to increase awareness of the Scheme amongst young people. This action is timely, with the ANZ Survey of Adult Financial Literacy in Australia revealing that those least likely to refer to the Scheme were younger respondents, aged 18 – 24. This confirms the results of our own consumer awareness survey conducted in 2003. In November this year, the seven Financial Ombudsman Service schemes had a stand at the Victorian Commercial Teacher's Association annual conference and expo. The stand gave us the opportunity to provide information about the schemes to hundreds of Victorian secondary teachers with the aim that this information is passed on to students as part of their legal and financial studies. As part of the conference, the Scheme also launched its new Youth Bulletin, a joint publication prepared with the Telecommunications Industry Ombudsman – available for download on our website.

- We are committed to ongoing research of our profile within the community. We will undertake our next consumer awareness survey in 2006. That survey will also include research into the principal reasons why some enquirers to our call centre choose not to pursue their dispute either with their financial services provider or the Scheme.

Building relationships

- In 2005 we conducted our first continuous improvement forum with a range of consumer advocates including financial counsellors and solicitors working in the community sector. We received very positive feedback about the forum. In order to engage with a greater number of advocates in the future, we will hold forums around Australia in conjunction with other events, such as financial counselling conferences.

- We also continued our member briefing sessions outlining our approach to particular issues which had arisen through the course of the year. The review recommended that we institute continuous improvement forums with members, as well as consumer groups. A series of meetings was held throughout 2005 with 11 members of the Scheme in which individual disputes were discussed and members were given the opportunity to provide feedback about their dealings with the Scheme.

We welcome the valuable feedback we received from the review.

Contact details for the BFSO

We would like to remind all our members to ensure that the contact details for our office included on websites and other printed material are up to date. Our contact details are:

Banking and Financial Services Ombudsman
GPO Box 3
Melbourne VIC 3001
Ph: 1300 78 08 08
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BFSO and TIO Joint Youth Bulletin: Sort It

The Banking and Financial Services Ombudsman, Colin Neave, and the Telecommunications Industry Ombudsman, John Pinnock, have launched a joint Bulletin for young people, their parents, teachers and advisers.

The special Bulletin highlights cases their offices have received involving problems experienced by young people with mobile phone, credit card and other debt.

Copies of the Bulletin can be ordered through the Banking and Financial Services Ombudsman and the Telecommunications Industry Ombudsman's offices and are available for download in pdf form on their websites, www.tio.com.au and www.bfso.org.au .

As is always the case, we welcome feedback on our Bulletins.

The office of the Banking and Financial Services Ombudsman wishes you a safe and happy festive season

Colin Neave
Banking and Financial Services Ombudsman

Banking and Financial Services Ombudsman Limited
ABN 48 050 070 034

FINDING 1*

DATE: **18 July 2005**

SUBJECT MATTER: **Dishonoured foreign cheque overdrawing account – disputant claimed not told that cheque could be dishonoured after 28 day hold period expired**

The following is the finding I have reached in the dispute between the disputant and the bank.

Investigation

I have reviewed all of the information provided by the disputant and the bank.

Background Information

The disputant advertised two dogs for sale on the Internet for $400 ($200 each). He received an offer to purchase the dogs for $3,077.29 from a person in the United Kingdom. The purchase price included the supposed cost of transporting the dogs to the purchaser's home in England. The purchaser paid, in advance, a cheque for 7,000 Euro. At the time this cheque was deposited by the disputant, this converted to AUD 11,715.29. The purchaser instructed the disputant to send the funds over and above the agreed purchase price ($8,368) on to an associate of the purchaser in Ghana via Western Union Money Transfer.

Ms T, an authorised signatory with full authority to operate the disputant's account deposited the cheque for 7,000 Euro into the disputant's account held at the bank on 30 November 2004. Ms T signed a declaration acknowledging that if the cheque was returned unpaid for any reason whatsoever within or beyond the 28 day period it would be debited to the disputant's account at the bank's foreign currency selling rate on the day the account was debited.

The converted funds of AUD 11,715.29 were placed on a 28 day hold in the disputant's account. The 28 day period expired on 28 December 2004 and the funds were released. The disputant made a transfer of $8,368 on 30 December 2004. The cheque was subsequently dishonoured on 11 January 2005. The change in the conversion rate by the date the cheque was dishonoured meant that the

* This case manager Finding has been edited for external publication and the parties de-identified.

value of the cheque had increased to $12,319.61. This amount was debited to the disputant's account on that date and backdated to 30 November 2004. It appears that the cheque was fraudulent and the disputant was the victim of a money-laundering scam.

The Dispute

My understanding of the dispute is:

1. The disputant says that his agent Ms T asked the bank teller why she had to sign a form. She was told that it was to give the bank authorisation to clear a foreign cheque in to the bank account and that it was protocol. Ms T was not told that the cheque could dishonour after the 28 day hold period;

2. The disputant says that he was able to withdraw $8,368 on 30 December 2004 which was after the 28 day period had expired. The bank did not mention to him at this time that the cheque might still be dishonoured;

3. Although neither the disputant nor Ms T asked the bank whether the cheque had cleared, the disputant believed that it had, as the hold on the funds was lifted and the funds were made available to him;

4. The disputant says that he was not informed that the cheque had been dishonoured. He found out through his own means on 12 January 2005 that the cheque had been dishonoured and the sum of $12,319.61 had been debited to his account; and

5. On raising the matter with the bank, the disputant says that Ms T was told by the bank that cheques could be dishonoured up to 7 years after they have been deposited. Had the disputant known that when depositing the cheque, he says that he would not have deposited the cheque.

Bank Response

In response, the bank has said:

1. Ms T was an authorised signatory on the account and had full authority to access and operate the account;

2. The amount of $11,715.29 was deposited to the disputant's account on 30 November 2004 and was placed on a 28 day hold which is the normal period applied to foreign cheque deposits of this kind. A dishonour may occur outside this timeframe. The bank fulfilled its obligations to the disputant in notifying him of this by requiring Ms T to sign the declaration;

3. Ms T signed the declaration, by which she acknowledged that if the cheque was returned unpaid for any reason whatsoever within or beyond the 28 day period it would be debited to the disputant's account at the bank's foreign currency selling rate on the day that the account was debited;

4. The amount of $12,319.61 was debited from the disputant's account on 11 January 2005 and backdated to 30 November 2004. This overdrew the account by $11,624.84;

5. The bank was unable to contact the disputant on 11 January 2005 as the bank records contained an outdated telephone number and no record of the disputant's mobile number; and

6. The bank intended to send a letter to the disputant but Ms T contacted the local branch on 12 January 2005 at which time she was asked to request the disputant to make contact with the branch in order to discuss the matter concerning the foreign cheque.

Documents

I have reviewed the following documents:

1. Terms and Conditions of the Account;

2. Copy of the Purchase Foreign Cheque Form signed by Ms T;

3. Copy of the foreign cheque;

4. Memorandum from the relevant Treasury department to the local branch advising them of the returned cheque;

5. Statements for the disputant's account from 1 November 2005 to 29 April 2005;

6. Copy of the provisions of the branch operations manual relating to the processing of foreign cheques;

7. Signed statement from the relevant bank officer, Mr B;

8. Western Union Money Transfer form;

9. Emails between Ms T and the purchaser of the dogs; and

10. Signed Statement from Ms T.

Issues

The issues raised by the case include:

1. Is the disputant bound by the terms of the declaration and the terms and conditions of the account;

2. Did the bank engage in misleading conduct; and

3. Is the disputant entitled to any compensation?

Assessment

Is the disputant bound by the terms of the declaration and the terms and conditions of the account?

The declaration and the terms and conditions of the account both allow the funds to be debited to the disputant's account in circumstances where a foreign cheque is dishonoured after a 28 day period.

The Declaration

Ms T signed a declaration on 30 November 2004 by which she acknowledged that if the cheque was returned unpaid for any reason whatsoever within or beyond the 28 day period, it would be debited to the account at the bank's foreign currency selling rate on the day that the bank debited the account.

Ms T was an authorised signatory on the disputant's account and was thereby authorised to sign the declaration. The disputant agrees that Ms T was authorised to deposit the cheque and to make transactions on his account.

The declaration stated:

> "*I acknowledge that if the cheque is unpaid for any reason whatsoever within or beyond the above 28 day period it will be debited to my/our account at the Bank's foreign currency selling rate on the day you debit my/our account*."

Ms T did not sign the declaration under any disability, incapacity or duress. By signing the form without properly reading the contents, Ms T assumed a risk that the disputant's account would be debited after the 28 day period and that the bank could rely upon its contents. There is no basis upon which the declaration can be set aside.

Terms and Conditions of the Account

Clause 4.3 of the terms and conditions of the disputant's account states that:

> "*If we allow you to draw on a cheque before it has cleared, you will be liable for the amount of the cheque if it is subsequently dishonoured and you authorise us to debit the amount of the cheque plus applicable bank charges to your account. International deposits may be subject to extended clearance times.*"

This clause therefore imposes liability on the account holder where a cheque is dishonoured even if the funds have already been released to him. It also puts the disputant on notice that international deposits may be subject to extended clearance times.

Given the content of the declaration and the terms and conditions, I must then consider whether the bank's failure to tell the disputant's agent that a cheque could be dishonoured after the 28 day hold period amounts to a basis on which the disputant is entitled to any award of compensation to offset the debiting of the account and his liability for the overdrawn account.

Did the bank engage in misleading conduct?

There were two occasions when the disputant says that he should have been provided with information by the bank. These were on:

1. 30 November 2004; and

2. 30 December 2004.

Silence can amount to misleading conduct under s12DA of the ASIC Act where in all the circumstances there was a reasonable expectation that if particular matters existed they would be disclosed. Silence can only be misleading or deceptive against a background of other facts known to both parties which makes what is actually said so incomplete that it conveys a misrepresentation.

Conversation of 30 November 2004

In order for me to conclude that the bank engaged in misleading conduct and that the disputant is entitled to compensation as a result of that misleading conduct, I must be satisfied that the bank officer should have expressly told Ms T that the cheque could be dishonoured after the 28 day hold period in response to her enquiry as to why she had to sign the form.

There are no contemporaneous notes of the conversation that took place between Ms T and the bank officer on 30 November 2004.

When a claim is not supported by documentary material, the Ombudsman is restricted in his investigation of disputes. This office is not a court and information provided is not able to be given on oath and tested by cross-examination. In these circumstances, this office gives appropriate weight to information and reaches conclusions based on the weight of information available.

1. Ms T says that she requested an explanation from the bank teller on 30 November 2004 as to why she had to sign the form to deposit the foreign cheque for 7000 Euro. Ms T says that she was told by the bank officer that she had to sign the form:

> *"to give the bank authorisation to clear a foreign cheque in to the bank account and that it was protocol".*

2. Ms T says that she then asked the bank officer whether it would take the full 28 days for the cheque to clear or not and the bank officer said that:

> *"it could but it all depended on the other bank but that it did normally take the 28 days to get a response".*

3. Ms T says that at no time was she informed that the cheque could be dishonoured after 28 days;

4. Ms T's recollection of the conversation with the bank officer on 30 November 2004 is supported by an email dated 16 December 2004 from Ms T to the purchaser. This email states:

> "*Hi [name of purchaser], Your check arrived on 1 December and was banked on the first of December so the bank has informed me it will clear on the 28th December. Don't worry I have been checking it all the time in case it cleared early was hoping before Christmas but it doesn't look like it will clear till its release date.*"

Ms T's understanding from her conversation with the bank officer that the cheque would clear on its release is also consistent with the fact that neither she nor the disputant asked the bank at any time whether the cheque had cleared after the funds had been released;

5. Mr B, the bank officer does not deny Ms T's account in her statement of the conversation that took place on 30 November 2004:

> "*On the 30th November 2004, I received a foreign cheque. The cheque was processed as per normal with depositing any foreign cheque. I do not recall anything unusual about the conversation or the transaction where it took place.*"

> Mr B has said in addition to the above statement that he probably would have said that it normally takes 28 days for a cheque to clear.
>
> In its letter of 19 January 2005 the bank states that it believed that it fulfilled its obligation by informing Ms T that a dishonour may occur outside of the 28 day hold period *within the form declaration* (emphasis added). This suggests an acknowledgement that there was no verbal communication of this fact to Ms T.

Whilst I cannot reach a conclusive view as to exactly what was said by the bank officer during the conversation with Ms T on 30 November 2004, I am satisfied that the bank officer did not tell Ms T that it was possible that the cheque could be dishonoured after the 28 day hold period when she queried why she had to sign the form. This is an important omission because the form was more significant than a matter of protocol or process. It had legal significance.

In my view, Ms T could reasonably have expected that this information was of such importance that it should have been disclosed to her by the bank officer in response to her question. If the bank officer was not in a position to comment on the content and effect of the declaration then this should have been made clear to Ms T.

The bank officer's failure to inform the disputant's agent that the cheque could be dishonoured after the 28 day hold period and that this was the reason for the declaration does, in my view, amount to misleading conduct under section 12AD of the ASIC Act.

Conversation of 30 December 2004

It is not in dispute that the bank officer did not tell the disputant that the funds had not cleared or that the cheque could still be dishonoured on 30 December 2004. Nor is it in dispute that the bank officer was not asked whether this was the case.

The circumstances of the withdrawal were that the bank officer, on checking the account balance, would have been aware that the account had sufficient funds in it for the withdrawal to be made. The bank officer had no obligation to undertake a review of the disputant's account history to ascertain the reason for this. However had he or she done so, then the bank officer could have seen that this was as the result of the deposit of a foreign cheque for the amount of $11, 715.29 on 30 November 2004.

Under the bank's procedures for processing a foreign cheque, a hold is put on the release of the funds for 28 days. The hold is lifted after that time and the customer assumes the risk of the cheque being dishonoured after that time. The bank's procedures require that a customer signs a declaration on depositing a foreign cheque. By the declaration the customer acknowledges that the cheque

may be dishonoured beyond 28 days. It was therefore reasonable for the bank officer to have assumed that the 28 day hold period had passed and that the disputant understood, as a result of signing the declaration, that a cheque could be dishonoured beyond the 28 day period and that he assumed that risk.

In view of the bank's procedures and the content of the declaration, and in circumstances where there was no query, it is my view that the bank officer did not have a duty to tell the disputant that the funds were uncleared.

Further, the bank officer could not have been expected to know whether the disputant was aware that the funds were uncleared if he did not make any enquiries concerning this. As the disputant did not ask the bank officer whether the funds was cleared funds, I consider that the teller's failure to comment that the funds were uncleared was not misleading conduct within section s12DA of the ASIC Act.

In conclusion, it is my view that the bank engaged in misleading conduct by its officer failing to tell the disputant's agent, Ms T, on 30 November 2004 that the cheque could be dishonoured after the 28 hold period and that this was the reason for the declaration. The bank did not engage in any misleading conduct on 30 December 2004.

Loss

The following facts are relevant to the assessment of loss:

1. Funds of $11,715.29 were released to the disputant's account on 28 December 2004;

2. The disputant transferred $8,368 out of his account on 30 December 2004 believing that the funds were cleared;

3. The sum of $12,319.61 was subsequently reversed from the disputant's account on the dishonour of the cheque on 11 January 2005. This overdrew the account; and

4. The disputants subsequently received $200 for the sale of each of the two dogs to another purchaser to another purchaser.

The bank is seeking the repayment of the unauthorised overdraft.

The disputant has acknowledged in his letter to this office of 8 February 2005 that he had the benefit of the funds that were not transferred on 30 December 2004. The disputant therefore had the benefit of funds of $3,347.29. This should be repaid to the bank by the disputant.

The remainder of the overdraft consists of $8,972.32 being the funds that were transferred out of the account on 30 December 2004 with an exchange rate differential. Having regard to the $400 that the disputant ultimately received for the sale of the two dogs, I consider that liability for $8,572.32 is in dispute.

Contribution to Loss

Compensation to which a disputant is entitled may be reduced to the extent which is just and equitable having regard to the disputant's share in the responsibility for loss or damage. Even though I am satisfied that the bank engaged in misleading conduct under section 12AD of the ASIC Act as described above, it is my view that the disputant failed to take reasonable care and has contributed to his own loss for the following reasons:

1. The emails that have been provided to me show that Ms T failed to take reasonable care when she agreed to participate in an arrangement that was, on its face, suspicious and which had in fact raised concerns in her own mind. I note in that regard that:

    a) The emails between Ms T and the purchaser of the dogs show that it was agreed that a cheque for 7000 euros would be sent to Ms T and that she should send 5000 euros on to a third party in Ghana. The cheque was drawn on an Irish credit union account and the purchaser said that he would keep the dogs in his house in Bristol. Ms T proceeded with the transaction with no address or contact details in England; and

    b) The emails provided to me show that Ms T had concerns about this arrangement and did not wish to be involved in the transfer of funds to a third party. However, Ms T would have made significantly more money from selling her dogs to this purchaser than by selling them locally. In my view, Ms T took the decision to proceed with the transaction for financial gain, despite her obvious reservations. Although she did not realise that she was the victim of a scam which would cause personal loss, she ought to have more thoroughly queried the bona fides of the purchaser and considered the risks of the transaction.

2. Ms T signed the declaration in the bank. She failed to take reasonable care by failing to read the terms of that declaration. I am satisfied that the bank officer's statement that 'it was protocol' may have contributed to her decision not to read it thoroughly and ensure that she understood it. Nevertheless, had she read the declaration before signing it she would have been aware that the cheque could be unpaid beyond the 28 day hold period and the funds could be debited from the account;

3. Ms T was given a copy of the declaration to take away with her. Even though she has admitted that she was distracted at the bank, it is reasonable to expect that she should have shown it to the disputant, as the account holder, and, that either he or she should have read the declaration at some time during the 28 day period before the funds were released. Again, had either Ms T or the disputant read the declaration then they would have been aware that the cheque could be unpaid beyond the 28 day hold period and the funds could be debited from the account;

4. The emails between Ms T and the purchaser show that Ms T and the purchaser were both waiting for the cheque to clear before Ms T would transfer the funds to the third party and the agreement for the sale of the dogs could proceed. Ms T clearly understood the importance of waiting for the cheque to clear but, despite her concerns as to the legitimacy of the purchaser, neither Ms T nor the disputant asked the bank whether the funds had cleared before they were withdrawn. Had this question been asked then it is likely that the losses would not have occurred. In my view it was reasonable to expect that the disputant would have checked this fact with the bank before withdrawing the funds from his account on 30 December 2004 and transferring part of the funds to a third party with whom he had had no prior contact; and

5. The disputant did not provide the bank with any information concerning the circumstances of the transaction either when the cheque was deposited or when he withdrew the funds on 30 December 2004. If any information had been disclosed to the bank it is unlikely that the bank would have agreed to allow the disputant to operate the account under its terms which allowed use of funds before clearance of cheques, and may have sent the cheque as a bill for collection.

I conclude that the bank engaged in misleading conduct when its officer failed to tell Ms T that the cheque could be dishonoured outside the 28 day hold period and that the bank should compensate the disputant for the loss suffered when the cheque was dishonoured. However, I consider that, on balance, the disputant and his agent, Ms T failed to take reasonable care in the transaction and contributed to their loss. The compensation payable by the bank has been reduced by 50 percent ($4,286.16) to take the disputant's actions into account.

Having regard to the above, it is my view that the bank should compensate the disputant by depositing the amount of $4,286.16 to the disputant's account.

Finding

In my view:

1. The disputant is bound by the declaration;

2. The bank engaged in misleading conduct by failing to inform the disputant's agent that the cheque could be dishonoured after the 28 day hold period on 30 November 2005; and

3. The disputant is entitled to receive compensation of $4,286.16.

Banking and Financial Services Ombudsman Limited
ABN 48 050 070 034

FINDING 2*

DATE: **18 April 2005**

SUBJECT MATTER: **Disputant took out 2 unsecured personal loans for boyfriend's benefit – boyfriend stopped making payments – claim by disputant's father on her behalf that loans should not have been granted and loans should be cancelled**

The following is the finding I have reached in the case of the disputant and the bank.

Investigation

I have reviewed:

- all of the information provided by the disputant and the bank;
- the advice of the Ombudsman's banking adviser regarding the banking practice issues raised by the case;
- the advice of the Ombudsman's legal adviser regarding the legal issues raised by the case; and
- the circumstances of the case with an overall regard to fairness.

Dispute

The dispute concerns the circumstances in which the bank advanced two personal loans totalling about $10,000 to the disputant.

Background Information

Information provided by the disputant and the bank indicates that:

* This case manager Finding has been edited for external publication and the parties de-identified.

1. In March 2002 the disputant commenced work as a secretary in a professional services firm;

2. On 10 November 2002 the disputant applied by telephone for a personal loan of $5,000 to be repaid monthly over a one-year period. The stated purpose of the loan was to purchase a car. The disputant provided details of her current employment and also stated that:

   - her net monthly income was $1,560;
   - she lived at home with her parents and had no accommodation costs; and
   - she estimated her other monthly expenses to be $650.

   I understand that the disputant was advised that she would need to substantiate her income prior to the loan being advanced;

3. On 11 November 2002 the bank approved a loan of $5,000 repayable over one year by monthly payments of $443.00;

4. On 18 November 2002 the disputant applied to restructure the loan by increasing the loan term to five years;

5. On 21 November 2002 the bank re-issued the loan contract to reflect the increased term and reduced monthly payments ($109.90 per month);

6. The disputant attended the bank's [name of] branch on 21 November 2002 to sign the contract. She provided the bank with a letter from her employer, confirming that she was employed by the firm at a weekly net salary of $361.00;

7. The bank funded the loan by crediting $4,880 (net of application fee) to the disputant's current account on 21 November 2002. The funds remained in the account, with the balance gradually reducing by cash advances and EFTPOS purchases. In other words, it does not seem that the loan was used for the stated purpose of buying a car;

8. On 5 January 2003, the disputant applied by telephone for an additional loan of $5,000. The bank drew up paperwork for a personal loan of $9,938 comprising new funds of $5,000 and $4,938 to refinance the existing loan. The loan was to be repaid monthly over a five-year period. The stated purpose of the new funds was to purchase a vehicle. The disputant provided details of her current employment and also stated that:

   - her net monthly income was $1,564;
   - she lived at home with her parents at a monthly cost of $216;
   - she estimated her other monthly expenses to be $300;
   - her assets included a motor vehicle valued at $5,000;

I understand that the disputant was again advised that she would need to substantiate her income prior to the loan being advanced;

9. On 7 January 2003 the bank approved a loan of $9,938 repayable over five years by monthly payments of $218.35;

10. The disputant attended the bank's [name of] branch on 9 January 2003 to sign the contract. I understand that she again provided the bank with a letter from her employer, confirming her employment status and income. I also understand that the disputant informed the bank that she was upgrading her car, and that she was obtaining the car privately from Mr C (who was the disputant's boyfriend at the time). The bank funded the loan on the same day by drawing a bank cheque for $4,851.42 in favour of Mr C (as well as refinancing the existing loan;

11. The last salary credit from the disputant's employers was deposited to the disputant's current account on 9 January 2003. In a response to questions from this office, the disputant acknowledged that she was informed about the start of December 2002 that she was to be retrenched by her employers. Nevertheless, she applied for the second loan at the request of her then boyfriend because she trusted that he would make the repayments;

12. Repayments of the second personal loan were drawn from the current account as follows:

- $218.35 on 9 February 2003;
- $218.35 on 9 March 2003;
- $215.00 on 16 April 2003 (incomplete payment)
- $218.35 on 10 May 2003

The loan has been in arrears since June 2003.

The Disputant's Position

The disputant says:

1. She was in a relationship with a young man (already referred to as "Mr C") from November 2001 to April 2003;

2. Although she was working, her position was probationary rather than permanent;

3. She took out a $5,000 loan for Mr C on 11 November 2002, and he was to make repayments;

4. Her job was to end on 9 January 2003. Mr C, knowing that, convinced her to take out another $5,000 loan for him. He told her he was able to make the repayments;

5. Mr C was paying the loan off until the relationship ended in April 2003;

6. Nobody knew about the loan until June 2003 when her parents found out; and

7. She considers that the bank should not have given her the loan when she requested it, because she did not have a permanent job at the time.

The disputant's father, who is acting as agent for the disputant, says (in summary) that:

1. His daughter, who was only 19 years old at the time and living with her parents, was treated very unfairly by the bank;

2. His daughter trusted her boyfriend when he asked her, on two occasions, to borrow money on his behalf;

3. His daughter had only been working for 10 months and had no savings history. He does not understand how the bank approved the loans because his daughter would not have had enough creditworthiness to repay $9,938;

4. He believes the bank should have rung her parents, for extra security and as a check, to see if his daughter was capable of repaying the debt. He would have told the bank not to lend his daughter the money, especially as the loan was not for her;

5. It seems the [name of] branch only needed a payslip to approve the first loan, and did not ask for proof that she was buying a car from a dealer or someone else;

6. He wonders whether the [name of] branch [re the second loan] did any checking themselves or just trusted that the other branch had done proper checks before approving the first loan; and

7. He cannot help his daughter with her financial situation and considers that the bank should cancel the loan.

Bank Response

In its response to the disputant, the bank said that:

1. From the income and expenditure data supplied by the disputant on both application forms, it was evident that she had sufficient capacity to meet all commitments on a timely basis;

2. Both loan applications were assessed independently from the branches at which they were lodged. The loan applications met the bank's lending criteria at the time and, as such, were subsequently approved;

3. The disputant had signed a declaration on both applications forms that included the statement that "*I have been truthful in all information provided…in this application*" and yet a bank cheque was issued to her boyfriend rather than purchasing a vehicle as stated on the [second] application form; and

4. The bank believes that it acted appropriately in the matter and that the disputant remained liable for the debt.

In a further submission to this office, the bank made a number of comments about the process for approving loans, including that:

1. All loan applications are assessed in exactly the same manner. Provided that an application:

   - meets or exceeds predefined scorecard thresholds;
   - the commitment level of the applicant is within acceptable parameters;
   - there is no adverse credit reference report; and
   - the application passes the bank's fraud detection systems;

   the application would then be approved;

2. The bank's loans are unsecured. The bank does not require details of a vehicle to be purchased, as often a loan is funded before the applicant selects the vehicle. The loan purpose as advised by the applicant is taken to be correct, and a loan would be approved and funded provided that the applicant met the bank's assessment criteria;

3. The application for the disputant's first loan was taken via telephone at the bank's customer service centre in [location] on 10 November 2002. The application was not proceeded with as the initial term was for 12 months. The disputant reapplied for the loan at the bank's [name of]branch on 18 November 2002, with the loan term being amended to five years;

4. The application for the disputant's second loan was taken via telephone at the bank's customer service centre in [location] on 5 January 2003. The application would have been signed by the disputant on 9 January 2003,

when she attended the bank's [name of] branch at the time of funding to sign the relevant paperwork.

Documents

I have reviewed the following documents:

1. *Personal Loan Application* dated 10 November 2002;

2. *Consumer Credit Contract Schedule* dated 11 November 2002;

3. *Personal Loan Application* (restructured loan) dated 18 November 2002;

4. Amended version of *Consumer Credit Contract Schedule* dated 11 November 2002;

5. Letter from the disputant's employers to the bank dated 22 November 2002;

6. *Personal Loan Application* dated 5 January 2003;

7. *Consumer Credit Contract Schedule* dated 7 January 2003;

8. *Customer's Record of Bank Cheque* re cheque dated 9 January 2003 drawn in favour of Mr C; and

9. Statements for the disputant's current Account from 31 May 2002 to 30 June 2003.

On the basis of a phone conversation with the disputant on 24 February 2005, I understand that the bank was provided with a letter from the disputant's employers in January 2003 confirming the disputant's employment status and income. I have not sighted a copy of that letter because the bank is unable to locate the lending file for the second loan.

Issues

The issues raised by the case include:

1. Did the bank have an obligation to seek additional information from the disputant's parents at the time she applied for the loans;

2. Was there maladministration in the making of the decisions to approve either of the first and second loans, or both; and

3. In the event that there was maladministration in the making of the decisions to approve either one or both of the loans, what remedies are appropriate to resolve the dispute?

Assessment

Should the bank have sought information from the disputant's parents?

Despite her comparatively young age the disputant, at 19, was an adult and legally capable of entering into a loan contract with the bank. The disputant did not need the permission of her parents to enter into the loan contract. The bank, for its part, did not need the consent of the disputant's parents before it entered into a loan contract with the disputant. The bank, in fact, had no right to discuss the loan with the disputant's parents, without the express consent of the disputant, because this would have been a breach of privacy laws.

On review, I am satisfied that the bank was neither obligated, nor (without the express permission of the disputant) entitled, to discuss the disputant's loan applications with her parents.

Was there maladministration in the decision to approve the first loan?

It is relevant to the assessment of this dispute to consider the impact of the Code of Banking Practice ("the Code"), which is a voluntary code that sets standards of good banking practice for subscribing banks to follow when dealing with their customers. The bank subscribes to the Code.

With regard to the provision of credit, clause 25.1 of the Code provides that:

> *"Before **we*** [the bank] *offer or give **you*** [the customer] *a credit facility (or increase an existing credit facility), **we** will exercise the care and skill of a diligent and prudent banker in selecting and applying **our** credit assessment methods and in forming **our** opinion about **your** ability to repay it."*

After consulting with the Ombudsman's banking adviser, I am satisfied that the bank did process the first loan application in line with the bank's credit scoring guidelines, and that approval of the loan was consistent with good banking practice.

I note that the disputant relies, in part, on a claim that her position at the professional services firm was never more than probationary. However there is nothing in the loan documentation that indicates that the disputant ever informed the bank that her position was probationary.

I have also sighted the letter dated 22 November 2002 by which the disputant's employers confirmed the disputant's income to the bank. There is nothing in that letter to indicate that the disputant's position was probationary.

Accordingly, I am satisfied that the bank was not on notice that the disputant's employment position was probationary.

The disputant also relies on a claim that she applied for the loan at the request of Mr C, and that he had promised to meet the loan repayments. However, nothing in the loan documentation or in the information provided by the disputant to the bank indicates that the disputant informed the bank of these matters. I am therefore satisfied that the bank was not put on notice that the loan was intended to benefit someone other than the applicant.

The loan was funded by deposit to the disputant's current Account. Accordingly I am satisfied that the disputant did receive benefit of the funds, at least initially. On the basis of a phone conversation with the disputant on 24 February 2005, I understand that the disputant permitted Mr C to withdraw funds from her account as he required, using her debit card. However, this does not alter my view that the disputant received the funds in the first place.

In summary, I am satisfied that there was no element of maladministration in the bank's approval of the first loan, and that the disputant is liable to repay that loan to the bank.

Was there maladministration in the decision to approve the second loan?

Incorrect information provided to bank

My assessment of the bank's handling of the second loan application, taken by telephone on 5 January 2003, needs to take into account that the disputant seems to have provided incorrect information to the bank in three separate areas:

1. It is stated in the application that the purpose of the loan was to purchase a vehicle, but it is apparent that the disputant's actual intention was to make the funds available to Mr C;

2. It is stated in the application that the disputant had an asset of a vehicle valued at $5,000 but no such vehicle existed; and

3. It is stated in the application that the disputant was employed by [name of employer] on a full time basis, whereas she knew she was about to be retrenched and was to finish her employment on 9 January 2003.

Credit scoring model

I accept that, in the first instance, a bank is entitled to rely on information supplied by a loan applicant. However, the bank's credit scoring model relies on certain information being verified before a decision is made to either accept or reject a loan application.

The bank, for its part, says that the second loan was approved according to its credit scoring model.

The bank has provided a copy of the credit score for the disputant's second loan. I note that:

1. The credit scoring model confirms that a motor vehicle asset exists; and

2. The credit scoring model confirms that all income was verified.

Verification of motor vehicle

With regard to verification of a motor vehicle, the bank has explained that:

- the bank's loans are unsecured and, therefore, it does not require details of a vehicle to be purchased;
- the loan purpose as advised by the applicant is taken as correct;
- often an applicant may have a price in mind and the loan will be funded prior to a vehicle being selected; and
- provided that the applicant meets the bank's assessment criteria, a loan would be approved and funded.

The bank's comments primarily relate to circumstances where a car is to be purchased. I accept that, where a loan is unsecured, the bank's practice is not to require verification that a car has been purchased after a loan has been funded. I also accept that there is no inconsistency in this regard between the bank's practice and good industry practice.

There is a separate issue of whether the bank should have taken other steps, in addition to the statements made by the disputant, to verify the existence of the notional car that the disputant listed as an asset. However, given:

- the low value of the notional car;
- the fact that the notional car was not being taken as security;
- the fact that, according to the explanation given by the disputant, the notional car was to be upgraded to another car; and
- the fact that the loan depended for its viability on the disputant's income rather than on any assets that she possessed.

I am satisfied that the bank was not acting inconsistently with good industry practice when it relied on the disputant's word to verify the existence of the notional car.

Verification of income

With regard to verification of the disputant's income, I have not sighted an income verification document in relation to the second loan, because the bank has not been able to locate the original lending file for the second loan. However, on the basis of information provided to me by the disputant, I accept that the bank followed its usual practice of requiring income to be verified and that the bank was provided with a letter from the disputant's employers confirming the disputant's employment status and income in wording similar to that of the 22 November 2002 letter. Accordingly, I am satisfied that the "Combined Financials" section of the credit scoring for the second loan was prepared in accordance with good industry practice.

In terms of the bank's assessment of the disputant's ability to service a combined loan of $10,000, I am satisfied that the bank was entitled to proceed on the basis of the information provided by the disputant, that is that she had an income of $1,560 per month, and that her obligation to make loan repayments of $218 per month could be met from her uncommitted income after meeting monthly commitments for board and other personal expenses.

Was the bank on notice that the disputant received no benefit from the loan?

It is apparent, in hindsight, that the disputant received no benefit from the second loan, because the bank funded the loan by a bank cheque drawn in favour of Mr C, and the disputant handed that cheque to Mr C.

From information provided to me by the disputant, I understand that the bank drew the cheque in favour of Mr C because, on the day the second loan was funded, the disputant informed staff at [name of] branch that she was upgrading her car and that Mr C was providing the new car.

For the same reason that I accept that it was not inconsistent with good industry practice that the bank did not require the disputant to verify that a car was purchased after the loan was funded, I accept that it was not inconsistent with good industry practice that the bank relied on the disputant's word that Mr C was the vendor of the upgraded car.

I am satisfied that at no time did the disputant give the bank reason to believe that the purpose of the loan was for anything other than the purpose stated on the application form, or that she was obtaining the money at the request of Mr C. Accordingly, I am satisfied that at no time was the bank on notice that the disputant would not receive any benefit from the second loan.

Was the bank on notice that the disputant was acting under the influence of Mr C?

It is apparent, in hindsight, that the disputant was at all times acting under the influence of Mr C.

It is also apparent, in hindsight, that the disputant was either oblivious to the longer term risk that she would be left holding a large debt if Mr C reneged on his promises to her, or that she ignored that longer term risk in the belief that the relationship with Mr C would continue. She was, clearly, financially exploited by Mr C for his own benefit.

If the bank had been aware that the disputant was acting under the influence of Mr C, it could not be said that the bank was exercising "…the skill and care of a diligent and prudent banker..." when it assessed the loan. However, on the basis of information provided to me by the disputant, I am satisfied that:

- Mr C was not present at either of the two occasions on which the disputant presented herself at a branch in order to have a personal loan funded;
- on neither occasion did the disputant mention that she had applied for the loans at the request of Mr C; and
- at the time the second loan was funded, the disputant only mentioned Mr C in the context that he was the person through whom she was upgrading her car.

Accordingly, I am satisfied that at no time was the bank on notice that the disputant was acting under the influence of Mr C.

Summary

In all the circumstances of this case, I am satisfied that there was no element of maladministration in the bank's approval of the second loan, and that the disputant is liable to repay that loan to the bank.

<u>In the event that there was maladministration in lending, what remedies are appropriate to resolve the dispute?</u>

For the reasons set out above, I am satisfied that there was no element of maladministration in the bank's decisions to fund either the first or the second loan.

Accordingly, I am satisfied that there is no obligation on the bank to vary the terms and conditions that apply to the existing loan.

I suggest that the disputant seek independent legal advice about any rights she may have to seek recovery of the funds from Mr C. This is not, however, something this office can assist with.

Finding

In my view:

1. The disputant is liable to repay the loan of $9,938 (including repayment of the first loan) that was funded on 9 January 2003; and

2. There is no obligation on the bank to vary the terms and conditions that apply to the loan.

Addendum: After the Finding was sent to both parties, the disputant's father made an offer to settle his daughter's debt by making a lump sum payment of $5,000. This was accepted by the bank in full and final settlement of the debt.

FINDING 3*

DATE: **30 May 2005**

SUBJECT MATTER: **Error in registration of floating charge over assets of company – claim that bank failed to prepare and register unrelated transfer of property – delay in refinancing settlement**

The following is the finding I have reached regarding the dispute raised by the disputant, on behalf of C Pty Ltd ("the company") with the bank.

Investigation

I have reviewed:

- All of the information provided by the disputant and the bank;
- The advice of the Ombudsman's banking adviser regarding the banking practice issues raised by the case; and
- The circumstances of the case with an overall regard to fairness.

Background Information

The dispute concerns three separate matters:

1. The bank's incorrect registration of a floating charge over the company's assets and the impact that had on the company's sale of a trailer in November 2002 and a truck in January 2003;

2. Whether, in June 2003, the bank offered to prepare and register the necessary documents to enable a transfer of property between members of the disputant's family but later advised that, while it would prepare new mortgages and guarantees, it would not prepare the transfer document; and

* This case manager Finding has been edited for external publication and the parties de-identified

3. A delay in settlement when the company refinanced its facilities with Bank B in January 2004. The bank had rolled the company's commercial bill facility into its overdraft account in anticipation of settlement proceeding on 7 January 2004 and when settlement did not occur on that day, the bank charged default interest on the overdraft account until settlement of the refinance took place on 28 January 2004.

The Disputant's Position

The incorrectly registered floating charge

The disputant says:

1. The company had a number of facilities with the bank. The security provided to the bank included fixed charges over specific plant and machinery owned by the company;

2. In November 2002 the company sold a trailer. It subsequently became aware that the bank had incorrectly registered a fixed and floating charge over the company's assets. As a result, settlement of the sale of the trailer was delayed by at least two days;

3. On the basis of a letter provided to the company by the bank on 29 November 2002 advising that it would correct its error within one to two weeks, the company sold a truck on 22 January 2003. It discovered, however, that the bank had not corrected its error and the records of Australian Securities and Investments Commission ("ASIC") still recorded a floating charge over the assets of the company. This became apparent from searches conducted by the financier for the purchaser. The matter was resolved when the bank brought the relevant paperwork out to the company to sign on 29 January 2003. Once again settlement of the sale was delayed by at least two days;

4. The effects of the errors were still being felt in February 2003 as indicated by correspondence dated 13 February 2003 received by the company from an external company, which had relied on ASIC's incorrect records; and

5. In addition to the inconvenience caused by the delay in settlement of the sales, the company suffered a loss of reputation because it had inadvertently made false declarations about having unencumbered ownership of the trailer and truck.

The June 2003 representation

The disputant says that on or about 4 June 2003 the bank's officer, Mr O offered to prepare and register the necessary documents to enable the transfer of

property between family members. When the bank subsequently advised that it could not prepare the transfer, there was little time to have the document prepared by a solicitor and stamped for a settlement date of 30 June 2003. Due to a delay in stamping, settlement of the transfer did not take place until the end of the first week in July 2003, causing the transferor to delay settlement of another property. This resulted in inconvenience and embarrassment being suffered.

Delay in settlement of the refinance

The disputant says that:

1. On 10 December 2003 the company informed the bank of its intention to refinance its facilities with Bank B. Settlement of the refinance was to take place on 31 December 2003 to coincide with the expiry of the company's current commercial bill with the bank. Because of delays by the bank, settlement of the refinance did not occur until 28 January 2004. During this delay the commercial bill, which had been rolled into the company's overdraft account, rather than being reinstated, incurred penalty interest for the period of the delay. This was despite the bank's officer, Mr N, informing the company on 22 January 2004 that the default charges would not be pursued;

2. The cause of the delay was the late preparation of documents required to transfer the stamp duty paid by the company on the securities it had provided to the bank. The bank was well aware that a transfer of stamp duty would be requested. This was at all times inferred in discussions with the bank and Bank B. The bank should have acted in the interests of its customer and proceeded on the basis that a transfer of stamp duty would take place, as is common in this type of commercial transaction. Further, it was up to the bank to ensure all necessary discharge papers were signed in good time and that unrelated guarantees were discharged; and

3. The delay in settlement of the refinance has resulted in an additional cost to the company of $5,204.92. This figure has been reached by deducting from the $11,656.96 in interest and charges imposed by the bank during the delay the sum of $6,452.04 which would have been paid to Bank B during that period in any event.

Customer service issues

The disputant says that there was a lack of professionalism by the bank in its management of the company's accounts. He states that the assistance of accountants and solicitors was sought because of the bank's cavalier attitude and refusal to discuss and negotiate a settlement of the matters in dispute.

The compensation claimed

The company seeks to recover from the bank:

- Compensation for the inconvenience and loss of reputation it suffered because of the bank's error in registering a floating charge over the assets of the company;

- $5,204.92 in relation to the additional interest and charges incurred by the company because of the delay in settlement of the refinance; and

- The accountancy and legal fees of over $7,000 incurred by the company in pursuing its disputes with the bank.

Bank Response

The bank has provided the following responses to the matters raised by the disputant.

The incorrectly registered floating charge

On becoming aware of its error in registering a fixed and floating charge rather than fixed charges only, the bank provided the company with a letter dated 29 November 2002 addressed "*To whom it may concern*" for the express purpose of confirming to the purchaser of the truck and trailer that those assets were not charged. The bank's letter was such that any reasonable purchaser would have relied on it and proceeded to settlement immediately. The bank notes it was not advised at the time of any delay in settlement of the sales, despite its discussions with the disputant relating to a loan application. In any event the bank considers the company did not suffer any loss in relation to the sale of the truck and trailer.

The June 2003 representation

When the disputant informed the bank of his intention to transfer real property mortgaged to the bank between family members, although not obligated to do so, the bank agreed to the request and provided additional lending at that time. Any transfers were subject to the bank's mortgage and it agreed the transfer would not be treated as a default under the relevant facilities. However, the bank did not agree to prepare and register the transfer documents. The proposed transfer of property was instigated by the disputant for his benefit and responsibility for preparation of the documents lay with him.

Delay in settlement of the refinance

1. On 29 December 2003 the bank received a letter from solicitors for Bank B, advising of the company's planned refinance with Bank B and

requesting that the bank prepare a discharge of mortgage in relation to a property in [suburb] in readiness for settlement. No date for settlement was specified. On the same day the bank provided the company with a settlement instruction form for completion and return to the bank;

2. The bank attended the proposed settlement on 7 January 2004 and discovered that the company wished to transfer the existing securities to Bank B with a view to mitigating its stamp duty liability. The failure of settlement to occur on that day resulted from Bank B failing to inform the bank of the desired assignment and to prepare the necessary deed earlier;

3. A deed of assignment was subsequently prepared by Bank B's solicitors and forwarded to the bank for execution. Settlement of the refinance took place on 28 January 2004;

4. The company's commercial bill facility had been rolled into its overdraft account on 6 January 2004 in anticipation of settlement occurring on 7 January 2004. Once the bill facility was rolled into the overdraft the bill facility came to an end. When settlement did not occur this resulted in the overdraft account being in excess of its limit and thus attracting interest at default rates;

5. If the bill had remained in place until settlement of the refinance:

   - The overdraft would not have gone over its limit and would have accrued interest in the amount of $2,625.15 from 6 to 28 January 2004; and

   - The bill would have incurred interest for the period from 6 January 2004 to 28 January 2004 in the amount of $2,527 and incurred a facility fee in the sum of $771 (making a total amount of $3,298).

   Accordingly the difference between the default interest of $9,555.99 charged on the overdraft account and the interest that would have been incurred had settlement taken place on 7 January 2004 is $3,632.84 ($9,555.99 - $2,625.15 - $3,298 = $3,632.84); and

6. While the bank considers the company has not suffered any loss because of errors by it, in an effort to resolve this dispute and without any admission of liability, the bank has agreed to pay the company any amount of $3,632.84, being its estimate of the additional interest paid because the refinance with Bank B was not effected on 7 January 2004.

Documents

I have reviewed the documents set out in the attached schedule.

Issues

The disputant has claimed that there was a lack of professionalism by the bank in its dealings with him. However, customer service issues not causing loss are not matters which can be investigated by this office.

The Ombudsman's role is to consider and, if appropriate, investigate disputes that are within the terms of reference and relate to acts or omissions by a financial services provider. Such a consideration may include questions of appropriate compensation for loss arising from errors made.

The issues raised by the case for my investigation are:

1. Is the company entitled to compensation because the bank incorrectly registered a floating charge over its assets;

2. Did the bank misrepresent to the disputant that it would prepare all of the necessary documentation to enable the transfer of property between members of the disputant's family;

3. Did the bank cause or contribute to the delay in the refinance of the company's facilities with Bank B? If it did, what loss has the company suffered because of the bank's errors;

4. When settlement of the refinance was postponed, should the bank have reinstated the company's commercial bill facility; and

5. Is the company entitled to the reimbursement of the legal and accountancy costs incurred in pursuing the dispute with the bank?

Assessment

<u>The incorrect registration of a floating charge over the company's assets</u>

It is not in dispute that the bank incorrectly registered a fixed and floating charge over the company's assets rather than fixed charges over specific assets.

When the error became apparent in November 2002, the bank provided the company with two letters, one addressed to the company and the other "*To whom it may concern*" declaring that it did not hold a floating charge and that the records of ASIC would be corrected. It appears that the bank did not then take

the promised corrective action promptly, with the result that ASIC's records were still incorrect when the company sold a truck in January 2003.

The disputant has claimed that the delay in settlement of the sales of the truck and trailer were at least two days in each instance. While no financial loss appears to have resulted from the bank's error, the company seeks compensation for inconvenience in having the error corrected and damage to the company's reputation because it appeared the company was trying to sell goods over which there was a charge.

When a company lodges a dispute with the Ombudsman it is the company that is the legal entity making the claim for financial loss. The claim must be made by legal representatives of the company, that is the director(s) of the company. However, the director(s) of the company cannot make a claim for their own personal loss unless they have a separate contract with the bank and are making a claim for breach of that contract. Therefore the Ombudsman cannot consider a claim by a director of a company for inconvenience or stress arising from the bank's conduct with respect to the company's account.

In addition, this office is not able to consider claims regarding loss of reputation. To do so would require taking evidence on oath from third parties and testing that evidence by cross examination. Those procedures are outside the power of the Ombudsman.

While I acknowledge that the bank made an error in registering the fixed and floating charge over the company's assets and then did not take prompt action to have the records of ASIC corrected, this office does not award damages to punish a bank. Rather, our aim is to ensure that customers have not suffered loss because of bank errors.

In these circumstances, I consider that this office is unable to find that compensation should be paid by the bank in relation to its incorrect registration of a floating charge over the company's assets.

Did the bank make a misrepresentation to the disputant in June 2003?

I have reviewed the bank's files and note that they indicate the relevant transfer was from a company operated by the disputant's brother and his wife to a company operated by the disputant and his wife.

I was unable to locate on the bank's files any documentation which indicated that in mid 2003 the bank represented to the disputant that it would prepare all of the necessary documentation required to complete the transfer of the property and it would be a most unusual occurrence if such a representation were made. I understand that Mr O, the officer who is claimed to have made the representation, is no longer employed by the bank and it has not been possible to

obtain a statement from him regarding his recollection of the discussions that took place.

While the disputant states the property transfer was delayed and that in turn caused a delay in a separate property transaction, I understand the party involved in that other transaction was the disputant's brother rather than the disputant. It appears to me, therefore, that no loss was suffered by the disputant even if a misrepresentation was made by the bank to him.

The delay in settlement of the refinance

To assist me in my investigation of this issue I reviewed information provided by the disputant, the files of the bank and information provided by Bank B, the company's new finance provider.

The information discloses that:

1. On 10 December 2003 the company sent a facsimile to the bank advising of its intention to refinance its facilities with Bank B. The company advised that Bank B would contact the bank in due course and requested that the bank have security ready for discharge by the end of December 2003;

2. The next contact was on 29 December 2003 when the bank received advice from Bank B's solicitors that Bank B was going to refinance the company's facilities and requesting that the bank ensure the matter progress to settlement as soon as possible; and

3. On the same day the bank sent a settlement instruction form by facsimile to the company for completion and return to enable the refinance to proceed.

While it appears to me that it would have been good practice for the bank to have sent the settlement instruction sheet to the company for completion upon its receipt of the company's notification of its intended refinance 10 December 2003, it did act promptly in doing so upon receiving further advice of the refinance from Bank B's solicitors.

The initial settlement date proposed was 7 January 2004, which was six working days after the first contact from Bank B. That length of booking time for settlements is normal and I am not satisfied the bank caused any delay at this stage of the refinance.
However, it appears that prior to the appointed time for settlement on 7 January 2004, it became apparent that the company sought an assignment to Bank B of the stamp duty it had paid on its securities with the bank and this necessitated the postponement of settlement.

There is nothing in the information available which suggests that the bank had any prior notice of this proposal. In fact Bank B's solicitors state that they did not know of the request until that time.

Settlement of the refinance was deferred while the assignment documentation was prepared by Bank B's solicitors and executed by all of the relevant parties. It appears, however, that this procedure may have taken longer than necessary because it became apparent that the primary security held by the bank was a guarantee from the disputant's brother. It appears that this guarantee should have been released with the transfer of property that took place in mid 2003. The guarantees continued existence in 2004 meant that additional documentation needed to be prepared and signed by the disputant's brother and this inevitably meant a greater delay in settlement of the refinance took place than would have occurred if the guarantee had been released earlier.

Given this sequence of events, it appears to me that the delay in settlement of the refinance of the company's facilities with Bank B resulted from a combination of the delay in the need for a transfer of stamp duty on securities becoming apparent and the additional time that took because the need for the disputant's brother to be a signatory to the documents. In my view these two causes contributed equally to the delay.

The company's commercial bill facility

In regard to the bank's treatment of the company's commercial bill facility, I have considered the following questions:

1. Was the bank entitled to roll the facility into the company's overdraft in anticipation of settlement; and

2. When the bank became aware that settlement could not proceed on 7 January 2004, should it have taken action to reinstate the commercial bill facility?

I discussed the appropriateness of the bank's actions regarding the bill facility with the banking adviser to the Ombudsman.

It is the banking adviser's view that:

- The bank was entitled to roll the commercial bill facility into the company's overdraft account in anticipation of settlement; and

- When settlement did not proceed, reinstatement of the bill facility was not reasonable given the impending settlement.

I accept the advice of the banking adviser and consider the bank was entitled to treat the bill facility in the manner it did.

Accountancy and legal costs incurred by the disputant and the company

It is only in unusual circumstances that the Ombudsman will require a financial services provider to reimburse the reasonable fees charged by a legal or other financial adviser. This is because the scheme is free to access for disputants and each party is expected to bear any costs it incurs.

To assess whether professional costs might be recoverable, we will take into account the complexity of the dispute and, in particular, whether:

- The dispute raises legal issues that reasonably require expert legal advice to the disputant;

- The dispute involves complex financial data and the expert advice of an accountant or other financial expert was reasonably required; and

- The fees were incurred in good faith in the belief that expert assistance was required because of the complexity of the issues in dispute.

In this case the costs incurred by the disputant relate to negotiations undertaken directly with the bank rather than in the submission of the dispute to this office.

It appears to me that the issues in dispute could have been raised with this office without the involvement of independent advisers. In these circumstances, I consider that the legal and accountancy costs incurred by the company should not be reimbursed by the bank.

What is the appropriate resolution of this dispute?

As indicated above, I consider the bank's liability in this case is limited to the extent it contributed to the delay that occurred in settlement of the refinance of the company's facilities from the bank to Bank B.

In my view the bank's contribution can be apportioned at around 50%. In these circumstances, it appears to me that the bank's offer to pay the company an amount of $3,632.84 provides a reasonable resolution of this dispute. That amount is based on the bank's calculation of the additional interest the company paid during the entire period of the delay and is more than half of the company's calculation of its loss ($5,204.92) arising from the delayed settlement.

Finding

In my view:

1. I am unable to find that compensation should be paid by the bank for the delay in the settlement of the company's sale of a trailer and truck

because of the bank's incorrect registration of a floating charge over the assets of the company;

2. There is no information available which establishes that the bank misrepresented to the disputant its willingness to prepare transfer documents in mid 2003 and, in any event, neither the disputant or the company appear to have suffered any loss even if the representation was made;

3. The bank was entitled to treat the company's commercial bill in the manner it did;

4. The bank's offer to pay the disputant an amount of $3,632.84 provides reasonable compensation for the extent to which the bank contributed to the delay in settlement of the refinance of the company's facilities with it in January 2004; and

5. The company is not entitled to the reimbursement of its legal and accountant's costs in pursuing its claim against the bank.

Schedule of Documents

1. A facsimile from the bank to the company dated 29 November 2002 enclosing:
   a. A letter addressed "To whom it may concern"; and
   b. A letter to the company;

2. A letter from [name of company] to the company dated 13 February 2003;

3. A Facility Offer from Bank B to the company dated 26 November 2003;

4. A facsimile from the company to the bank dated 10 December 2003;

5. A facsimile from the solicitors for Bank B, to the bank dated 29 December 2003;

6. A facsimile from the bank to the company dated 29 December 2003;

7. A letter and attachments from [name of company] to X solicitors dated 16 April 2004;

8. A deed dated 28 January 2004;

9. Letters from the solicitors for Bank B dated 25 February 2004 and 13 December 2004;

10. Correspondence between the bank and the disputant's solicitors, various dates; and

11. A letter from Bank B to this office dated 16 May 2005.