

BFSO Bulletin 42

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BULLETIN

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Independent review of the Banking and Financial Services Ombudsman Scheme

The Board of the Banking and Financial Services Ombudsman Scheme has commissioned an independent review of the operations and procedures of the scheme.

The review is a requirement of clause 4.3(c) of the Constitution of BFSO Limited which states that the directors must commission an independent review of the operations and procedures of the scheme every three years or more frequently if the directors consider this to be appropriate.

This requirement is consistent with ASIC Policy Statement 139 *“Approval of external complaints resolution schemes”*:

PS 139.92: *“A scheme should commission an independent review of its operations and procedures every three years. This timeframe should not preclude a review occurring sooner if appropriate”.*

The independent company appointed to conduct the review is The Navigator Pty Ltd. The review team is led by Phil Khoury, who is assisted by consultants Ms Debra Russell and Ms Fiona Guthrie.

The review commenced on 4 June 2004, when a letter inviting submissions was sent to stakeholders and was also posted on the BFSO website for the general public. The Terms of Reference for the review, and a Background Paper were also posted to the website. (The Terms of Reference are set out below).

Input from both stakeholders and members of the public is encouraged. Submissions are due by 13 July 2004 and should be directed to:

The Navigator Company Pty Ltd
12 Cowderoy Street
St Kilda West VIC 3182

and/or in electronic format to email: phil.khoury@thenavigator.com.au

In addition to considering these submissions, the review process includes examination of internal processes, a confidential sampling of case files, analysis of enquiry and complaint statistics, analysis of existing stakeholder research and interviews with a sampling of stakeholders.

A consumer consultation, facilitated by Debra Russell and Fiona Guthrie, took place at the Stamford Plaza Melbourne on 18 June 2004.

Arrangements are also underway for one on one interviews with a number of bank representatives in both Sydney and Melbourne in early July. In addition to this, an invitation has been sent to all members to attend a workshop at BFSO's offices on Wednesday 21 July. This is the afternoon before the BFSO Members' Conference and so, we are hoping for a good attendance.

Further consultation with stakeholders will be arranged for July and August.

The reviewer is to report findings and recommendations to the BFSO Board as close as practicable to 19 October 2004. The report will be distributed to those who made submissions, and will be made available on the BFSO website:

www.bfso.org.au

Terms of Reference of the Review

The reviewer is asked to report on the operations and procedures of the BFSO with regard to accessibility, independence, fairness, accountability, efficiency and effectiveness, taking into account the following:

Independence of the Scheme:

- *The powers and role of the Ombudsman;*
- *The structure and roles of the Board of the Scheme; and*
- *The procedures for appointing the Ombudsman and Board members.*

Accessibility of the Scheme:

- *The amount and focus of the promotion conducted by the Scheme: and*
- *The degree to which the Scheme's contact points, processes and systems are user-friendly, including to consumers with special needs.*

Fairness of the Scheme's decision-making procedures:

- *The information provided to disputants and members about the procedures for resolving disputes; and*
- *Whether the Scheme's procedures accord with the principles of procedural fairness and allow for determinations and assessments of loss to be based on fairness, law, relevant industry codes and good industry practice.*

Accountability of the Scheme:

- *The adequacy of its systems for collecting and recording disputes information;*
- *The content of the Scheme's Annual Reports, Bulletins and other published material; and*
- *The reporting of systemic issues and serious misconduct to ASIC.*

Efficiency of the Scheme's operations:

- *The workplace culture and its impact on the timely resolution of disputes;*
- *The use of technology in the Scheme's process, including on-line dispute resolution techniques;*
- *The timeframes set by the Scheme for the various stages of the dispute resolution process;*
- *The systems in place for keeping track of disputes, and reporting to parties about progress;*
- *The Scheme's systems for monitoring members' compliance with timeframes for responding to disputes;*
- *The Scheme's procedures for referring disputes to more appropriate fora; and*
- *The degree to which the Scheme meets its performance targets and reports to the Board.*

Effectiveness of the Scheme's operations:

- *The jurisdiction of the Scheme, with particular emphasis on the monetary limit for claims;*
- *The appropriateness of the criteria used in decision making;*
- *The training, support (including advisory resources) and ongoing professional development of staff;*
- *The range of remedies and dispute resolution methods available to parties;*
- *The degree of cooperation of members with the scheme to achieve the purposes of the Scheme; and*
- *The Scheme's impact on members' internal dispute resolution mechanisms.*

Costs associated with mortgagee sales

Introduction

In Bulletin 38 issues surrounding mortgagee sales were discussed at length. In relation to sale expenses, we made reference to the following:

- The wording of mortgages in respect to the passing on of costs to the mortgagor. It was noted that these clauses tend to be widely drafted and would cover agent's fees, valuer's fees, solicitor's fees and costs associated with maintenance. Some of the provisions include a requirement that the costs or fees be reasonable;
- Bulletin Number 34, which said that, if a multiplicity of agents has resulted in apparently excessive costs being charged to the mortgagor, then this office would consider the extent to which those costs may be passed on;
- In some circumstances there may also be scope to consider whether other costs ought to be passed on. In particular:
 - Payment of commissions or for advertising which exceeded that originally quoted by the real estate agent or out of step with standard rates;
 - Payment for repairs and improvements made **after** the property had been sold and where no reference was made to those repairs and improvements in the sale contract; and/or
 - Payment for repairs and improvements which are not apparently necessary and are beyond what a prudent mortgagee would be expected to effect; and

We noted that our approach will be that in all cases the terms of the mortgage would be required to be checked before a decision was made requiring a refund to be made.

In addition, it was noted that it is clear law that a mortgagee in possession owes a duty to account to the mortgagor. Despite this we often receive complaints that a mortgagee has not notified the mortgagor that a property has been sold or has not provided a statement of account.

Recent cases considered by this office have indicated that issues concerning the costs passed on to mortgagors on mortgagee sales still arise.

Entitlement to pass on costs properly incurred

As noted above, it is usual for the terms of the memorandum of common provisions applicable to the mortgage to contain a broadly worded clause which allows costs associated with the bank's enforcement of the mortgage to be recovered from the mortgagor. While some clauses make express reference to the recovery of "reasonable" costs, not all do.

Even in the absence of an express proviso as to reasonableness, it is open for a disputant to argue or for this office to conclude that certain costs ought not to be passed on.

While courts are, generally, willing to uphold clearly expressed costs recovery clauses in mortgages, there is an implied qualification that the costs will be properly incurred. In the case of *Elders Trustees & Executor Co Ltd v Eagle Star Nominees Ltd*¹ McLelland J said, after referring to a mortgage provision entitling a mortgagee to recover all costs, charges, expenses and payments incurred by the mortgagee:

"In my opinion there is a necessarily implied qualification that the provision applies only to costs, charges, expenses or payment properly incurred. . . . For this purpose I consider that 'properly' means reasonably and in good faith"

The Court then referred to a decision of Street J in *Re Shanahan*² that a clause entitling a mortgagee to costs would not cover costs that were incurred by the mortgagee unjustifiably or vexatiously so as to impose an unwarranted burden on the mortgagor.

While BFSO has not seen a case where it could have been argued or established that the bank acted in bad faith or vexatiously in relation to the incurring of costs, some cases have raised concerns about whether some costs were incurred reasonably or justifiably.

It should be noted that it is not intended for this office to undertake a costing process of the type which applies in the courts and which is done by a specialised cost consultant. Nor is it intended for this office to query the rates of payment agreed between banks and their agents. What we do intend to consider, though, is the nature of the costs which are incurred and payable by the mortgagor in the circumstances of the particular case and to ask whether they were reasonably and justifiably incurred.

¹ (1986) 4BPR 9205

² (1941) 58 WN (NSW) 132 at 9208-9

Copies of invoices and other material

As explained in Bulletin 38, it is the view of this office that the bank is required to provide to the mortgagor copies of all invoices or other documents that form the basis for charges made to the account, including legal bills. The information to be included ought to be of sufficient detail that the mortgagor can make sense of all charges to the account and understand the work done.

If the information is provided when the costs are debited to the account, then it is more likely that discrepancies or other concerns will be picked up. In one case, it was only after the invoices were provided to this office that it was realised by the bank that an amount for costs had been debited twice. While the bank immediately refunded the amount, an interest adjustment was required to be made because the error was not discovered for a number of months.

In other cases, disputants have requested copies of invoices or other information before the dispute was lodged with this office and that material is first provided by us during the course of the investigation or as attachments to a Finding. In our view the provision of information at such a late stage is contrary to the bank's duty and potentially unfair as it has the effect of limiting the disputant's ability to determine what claim to make and perhaps whether to accept an offer to resolve the dispute.

Duplication of costs

Bulletin 34 referred to a number of agents being used by the bank which resulted in potentially excessive costs being passed on to the mortgagor. Some expansion can be made on those comments in the light of recent cases considered by this office.

In one case, an examination of the invoices issued by the bank's solicitors and relevant correspondence on the bank's file showed that from time to time the solicitor received reports sought by the bank from real estate agents and valuers and sent them on to the bank without any legal advice or comment. In this respect the solicitor's role appeared to be primarily administrative in relation to those reports but the bank, and in due course the mortgagor, was charged for the solicitor's time at solicitor's rates.

In another case correspondence and other material relevant to the account in issue was routinely faxed to and between the bank collections officer, the bank's solicitor and the bank's property realisation consultant. While generally it appeared that this was appropriate because advice or action was required of one of the bank's agents, there is the potential for unnecessary costs to be incurred especially where the material is routinely circulated for review where the particular agent is not directly involved or no action by them is required.

Where one or more consultants or agents are engaged by a bank, this office will take account of the actual work done which is directly related to the realisation process over and above administrative tasks such as forwarding information to the bank, particularly when charges are incurred for the administrative tasks.

Conclusion

While it is usually clear from the terms of the mortgage that the bank may appoint agents of its own choice and that it is for the bank to determine the tasks those agents are asked to complete, where the costs appear not to have been properly incurred (as discussed in *Elders Trustees & Executor Co Ltd v Eagle Star Nominees Ltd*) the amount of the costs may be raised with the bank for response and/or we may find that it is appropriate for a refund to be given with an appropriate interest adjustment.

United Nations Forum on Online Dispute Resolution

The BFSO is involved in a United Nations forum on online dispute resolution. The UNESCAP Third Annual Forum on Online Dispute Resolution ("ODR") will be held at the University of Melbourne, Law School on Monday 5 and Tuesday 6 July 2004 and is hosted by the International Conflict Resolution Centre at the University of Melbourne in collaboration with the United Nations Economic and Social Commission for Asia and the Pacific.

Included in the program is a Forum on ODR in Financial Services, convened by BFSO General Counsel, Elisabeth Wentworth. The forum will discuss the possibilities for ODR in the financial services industry, will include some demonstrations of existing models and will include a discussion on the use of ODR in the context of the internal and external dispute resolution obligations of financial services licensees. A report on the forum will appear in a future Bulletin.

More information is available on the Forum's website
www.odrforum2004.themediationroom.com



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