

REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] The appellant, Harmony Ltd (Harmony), operates a web-based platform that matches consumers wishing to borrow money with investors wishing to lend money, commonly known as peer-to-peer (P2P) lending.¹ It is common ground that the resultant loan transactions, in which Harmony Investor Trustee Ltd (HITL)² is the named creditor as a trustee for the investors, are consumer credit contracts.³

[2] The primary issue on this appeal is whether, as the respondent (the Commission)⁴ contends, the fee Harmony charges to borrowers for arranging the loans (the Platform Fee), is a credit fee, in particular an establishment fee, subject to the statutory control in s 41 of the Credit Contracts and Consumer Finance Act 2003 (the CCCFA). If the Commission is correct and the Platform Fee is such a fee, it must be set at a level that is reasonable, gauged by reference to the costs incurred in establishing and administering the loan.⁵ An important related issue is whether Harmony is itself a creditor.

[3] Harmony maintains that the Platform Fee is an unregulated payment akin to a brokerage fee. It contends that the Harmony structure is not different in substance from a simple model where:

- (a) a third party (H) finds an investor (I) willing to lend money to a borrower (B);
- (b) the loan is a credit contract and (I), but not (H), is a creditor of (B); and

¹ Harmony is a wholly owned subsidiary of Harmony Corp Ltd which holds a licence from the Financial Markets Authority under the Financial Markets Conduct Act 2013 (FMCA) to operate a P2P lending platform.

² A wholly owned subsidiary of Harmony Corp Ltd.

³ The investors and borrowers have no direct contractual relationship.

⁴ It is the role of the Commission to promote compliance with the Credit Contracts and Consumer Finance Act 2003 (the CCCFA): s 111(1).

⁵ Section 42. The reasonableness of Harmony's Platform Fee is being contested in separate proceedings in the High Court.

- (c) a charge by (H) to (B) for matching (B) and (I)⁶ is not a credit fee but one charged under a contract for services between (H) and (B).

[4] Mr Every-Palmer QC for the Commission acknowledged that if P2P lending took the simplest form where, like TradeMe or Tinder, a platform puts (I) and (B) in contact with each other and they then negotiate and implement the loan transaction, then it would be surprising if the intermediary (H) was a creditor. However he submitted that is not the Harmoney model. Harmoney is no mere matchmaker. The reality is that Harmoney carries out all the tasks necessary to provide and administer each loan. The resultant credit contract comprises not merely the Loan Contract document (as Harmoney contends) but also further documents, namely the Loan Disclosure and the Borrower Agreement, which provide for the borrower to pay the Platform Fee to Harmoney for establishing the loan. The Commission contends that both the words and policy of the CCCFA require that the Platform Fee be subject to the statutory constraints on credit fees.

[5] Harmoney responds that the Commission is endeavouring to shoehorn its P2P lending service into the CCCFA by collapsing several documents (the Loan Contract, the Loan Disclosure and the Borrower Agreement) into a single contract, thereby ignoring the documentation which has Harmoney merely providing broking services to the borrower as a principal on its own account and then acting as HITL's agent in relation to implementation of the loan.

[6] On a case stated by the Commission under s 100A of the Commerce Act 1986⁷ Courtney J held:⁸

- (a) the credit contract comprised not only the Loan Contract document but also the Loan Disclosure document;
- (b) HITL, Harmoney and the investors were all creditors for the purposes of the CCCFA; and

⁶ And, for example, documenting the contract and administering payments.

⁷ Which is imported into the CCCFA by s 113(g).

⁸ *Commerce Commission v Harmoney Ltd* [2018] NZHC 1107, [2019] 2 NZLR 81 [High Court judgment].

- (c) the Platform Fee is a credit fee because:
 - (i) it was payable by a debtor under a credit contract; and
 - (ii) it was payable to Harmoney (as a creditor) in connection with a credit contract.⁹

[7] Harmoney appeals against all those findings.¹⁰ The Commission cross-appeals from the Judge’s conclusion that the credit contract did not also include the Borrower Agreement. It also supports on additional grounds the second conclusion, that Harmoney is a creditor, and the third conclusion, that the Platform Fee is a credit fee.

Issues on appeal

[8] Section 100A of the Commerce Act permits the Commission to state a case for the opinion of the High Court on any question of law arising in a matter before the Commission. In this proceeding the Commission initially posed five questions. However two were struck out because they were held to raise questions of fact: whether there was a transaction that was in substance or effect a credit contract; and whether the Harmoney Platform Fee was an establishment fee for the purposes of the CCCFA.¹¹

[9] While the Commission’s original objective may have been to clarify the application of the CCCFA to P2P lending in general, this decision is confined to certain questions of law which were argued on the basis of agreed facts detailed below.

[10] The parties filed an agreed list of issues which it is convenient to recite in full:

Question One: Is the “credit contract” as defined in s 7 of the Credit Contracts and Consumer Finance Act (CCCFA) comprised of a number of the Documents operating together or just the Loan Contract?

⁹ See the definition of “credit fees” at [21] below.

¹⁰ The Commission’s application to strike out the appeal was earlier dismissed: *Harmoney Ltd v Commerce Commission* [2019] NZCA 355.

¹¹ *Commerce Commission v Harmoney Ltd* [2017] NZHC 1167, (2017) 23 PRNZ 644. A further application for a strike out was dismissed: *Commerce Commission v Harmoney Ltd* [2017] NZHC 2421.

The High Court found “the Loan Contract and the Loan Disclosure together form the credit contract”.

- (a) Did the High Court err in finding that the credit contract was comprised of both the Loan Contract and the Loan Disclosure.
- (b) Did the High Court err in finding that the credit contract did not also comprise the Borrower Agreement.

Question Two: On the basis of the Documents and the factual summary, which entity or entities are the “creditor(s)” for the purposes of the CCCFA, as defined in s 5 of the CCCFA?

The High Court found that Harmony, HITL, and the investors, were each creditors under the lending transaction.

- (a) Did the High Court err in finding that Harmony was a creditor.
- (b) Did the High Court err in finding that the investors were creditors.

Question Three: On the basis of the Documents and the factual summary, is the Harmony Platform Fee a “credit fee” as defined in s 5 of the CCCFA?

The High Court found that the Platform Fee was a credit fee under the first limb of the definition of that term (as it was payable by the debtor under a credit contract) and under the second limb (because it was payable to Harmony (as a creditor) in connection with the credit contract). The High Court also held that – in the event that HITL was the only creditor under the transaction – the Platform Fee would not satisfy the third limb of the definition (as it was not payable for the benefit of HITL in connection with the credit contract).

The parties agree that if Harmony is a creditor (in answer to question two), then the Platform Fee will be a credit fee under the second limb of the definition.

- (a) Did the High Court err in finding that the Platform Fee was a credit fee on the basis that it was a “fee ... payable by the debtor under a credit contract”.
- (b) Did the High Court err in finding that the Platform Fee was not a credit fee on the basis that it was not a “fee ... payable by the debtor ... for the benefit of ... the creditor in connection with a credit contract”.

[11] Before addressing those six questions it will be convenient first to consider the factual matrix and the statutory context.

Factual matrix

[12] The case stated included a schedule of relevant facts and annexed samples of five material documents, namely:

- (a) The “Administration Deed” recording the relationship between Harmony and HITL, the parties being Harmony and HITL.¹²
- (b) The “Investor Agreement” setting out the terms on which the investor may access and use the Harmony website, the parties being the investor, Harmony and HITL.
- (c) The “Borrower Agreement” setting out the terms on which the borrower may access and use the Harmony website, the parties being the borrower, Harmony and HITL. It was a term of the Borrower Agreement that the borrower was obliged to pay the Platform Fee.
- (d) The “Loan Disclosure”¹³ providing disclosure of the information about the loan prior to the Loan Contract coming into existence as required by the CCCFA.¹⁴
- (e) The “Loan Contract” which comes into existence automatically after the Loan Disclosure document is sent to the borrower. The parties are the borrower and HITL (with HITL said to be acting through Harmony as its agent).

[13] The following summary of the key elements of a transaction effected through the Harmony website was agreed in the High Court:

- (a) Prior to any Lending Transaction,¹⁵ a prospective borrower was first required to register with Harmony.¹⁶ Harmony would then receive, consider and approve applications for registration in accordance with its eligibility criteria. Harmony performed various tasks including receiving and assessing loan applications and undertaking credit checks.
- (b) If the borrower wanted to take out a loan, he or she was required to complete a loan application.¹⁷ The loan application process was

¹² There were two versions: an Administration Deed dated June 2015 and a Deed of Amendment and Restatement as at 29 October 2015.

¹³ There were two versions: a sample as at 3 September 2014 and a sample as at 11 November 2015.

¹⁴ Section 17.

¹⁵ In the case stated “Lending Transaction” referred to a P2P lending transaction facilitated by Harmony and HITL.

¹⁶ Borrower Agreement, cl 5.

¹⁷ Borrower Agreement, cl 12.

designed to assess a borrower's credit grade, which in turn was used to determine the applicable interest rate and the maximum Loan Amount. The borrower then selected an agreed Loan Amount (between the maximum and a minimum of at least \$1,000) and chose whether to repay the loan over a 36 or 60 month term (provided that the borrower could afford to make repayments over a 36 month term).

- (c) Once a loan entered the online marketplace, investors decided whether or not to fund the Loan through placing an order.¹⁸ Investors made orders in \$25 increments – referred to as “notes” – for each investment until the loan was fully funded.¹⁹
- (d) Investors paid the amount they wanted to invest into an ‘investor account’. Harmony held the investor account in trust for investors whose funds had been deposited into that account.²⁰
- (e) Once there were sufficient orders to fully fund the loan listing (or to offer funding of a lesser amount which the borrower nonetheless agreed to accept), Harmony transferred the investor funds from the investor account to an ‘advance account’, a separate bank account held by the Trustee on trust for investors.²¹
- (f) Harmony would then transfer the loan principal into the borrower's nominated account.²² The borrower did not sign a Loan Contract, as the contract was stated to come into existence immediately after Harmony provided a Loan Disclosure.²³ From that point, the Trustee held the loan on trust for the benefit of investors.²⁴
- (g) Settlement of a loan would occur within one business day after Harmony provided the Loan Disclosure.²⁵ At Settlement, Harmony would deduct from the Loan Amount an amount equal to the Platform Fee (outlined below) and transfer it to Harmony's own account. Harmony would pay the balance of the Loan Amount to the borrower's nominated account.²⁶ The Documents state that these fund transfers were to be made by Harmony “at the direction of the Trustee, as authorised by the Borrower”.²⁷
- (h) The Platform Fee is defined in the Borrower Agreement as “the fee payable by the borrower to Harmony for arranging any Loan which settles, as set out on the Website under the “Interest Rates and Fees

¹⁸ Investor Agreement, cl 12(b).

¹⁹ Investor Agreement, cl 12(b).

²⁰ Investor Agreement, cl 12(a).

²¹ Investor Agreement, cl 12(b).

²² Investor Agreement, cl 14(a)(i).

²³ Borrower Agreement, cl 17.

²⁴ Investor Agreement, cls 11 and 15(b).

²⁵ Borrower Agreement, cl 18; and Loan Contract, cl 5.

²⁶ Borrower Agreement, cl 19.

²⁷ Borrower Agreement, cl 19(b). See also Loan Disclosure “Application for Loan” for the Borrower's authorisation to the creditor to transfer the relevant amount to Harmony.

Section.”²⁸ The Borrower Agreement defined the ‘Loan’ as “the total amount lent or to be lent by the Trustee” to the borrower.

- (i) Following settlement, the borrower had an obligation to make all of the loan repayments specified in the Loan Disclosure²⁹ to a ‘Collections Account’ held in the name of the Trustee as trustee for investors.³⁰ Interest accrued on the whole of the Loan Amount, which included the Platform Fee.
- (j) Harmony administered the loan accounts, including by receiving payments and undertaking recovery action. The Documents state Harmony did this as agent for the Trustee. Harmony charged a fixed service fee to investors for these services.³¹ As at December 2015, this fee was set at 1.25 per cent of the principal and interest payments collected on funds advanced by that investor.

Statutory context

The CCCFA

[14] The CCCFA was introduced in 2003 to replace the Hire Purchase Act 1971 and the Credit Contracts Act 1981 and to respond to changes in consumer transactions that had occurred in the meantime. The primary purpose of the CCCFA is to protect the interests of consumers in connection with a range of contracts, namely credit contracts, consumer leases and buy-back transactions.³² Other purposes include the promotion of confident and informed participation in markets for credit by consumers and the protection of the interests of consumers under credit contracts.³³ The CCCFA seeks to achieve those purposes by, for example, providing for the disclosure by providers of credit of adequate information to consumers under consumer credit contracts³⁴ and the observance by those providers of rules about interest charges, credit fees, default fees, and payments in relation to consumer credit contracts.³⁵

²⁸ Borrower Agreement, cl 44. The investor agreement describes the fee as the fee owed “in respect of a loan which settles” (cl 73), but little turns on this.

²⁹ Loan Contract, cl 7.

³⁰ Loan Contract, cl 9(c).

³¹ Investor Agreement, cl 53(a).

³² CCCFA, s 3(1). This purpose became the primary purpose consequent upon the amendment by s 4 of the Credit Contracts and Consumer Finance Amendment Act 2014 effective from 6 June 2015.

³³ Section 3(2).

³⁴ Section 3(3)(b).

³⁵ Section 3(3)(c).

[15] A credit contract is a contract under which credit is or may be provided.³⁶

Credit is defined in s 6:

In this Act, unless the context otherwise requires, **credit** is provided under a contract if a right is granted by a person to another person to—

- (a) defer payment of a debt; or
- (b) incur a debt and defer its payment; or
- (c) purchase property or services and defer payment for that purchase (in whole or in part).

[16] A creditor means a person who provides or may provide credit under a credit contract.³⁷ A debtor is defined as a person to whom credit has been provided or may be provided under a credit contract.³⁸

[17] Part 2 of the CCCFA, which addresses consumer credit contracts, contains the following definition:³⁹

11 Meaning of consumer credit contract

- (1) A credit contract is a **consumer credit contract** if—
 - (a) the debtor is a natural person; and
 - (b) the credit is to be used, or is intended to be used, wholly or predominantly for personal, domestic, or household purposes; and
 - (c) 1 or more of the following applies:
 - (i) interest charges are or may be payable under the contract;
 - (ii) credit fees are or may be payable under the contract;
 - (iii) a security interest is or may be taken under the contract; and
 - (d) when the contract is entered into, 1 or more of the following applies:
 - (i) the creditor, or one of the creditors, carries on a business of providing credit (whether or not the

³⁶ Section 7.

³⁷ Section 5.

³⁸ Section 5.

³⁹ Section 12 states that investment by the debtor is not a personal, domestic or household purpose.

business is the creditor's only business or the creditor's principal business):

- (ii) the creditor, or one of the creditors, makes a practice of providing credit in the course of a business carried on by the creditor:
- (iii) the creditor, or one of the creditors, makes a practice of entering into credit contracts in the creditor's own name as creditor on behalf of, or as trustee or nominee for, any other person:
- (iv) the contract results from an introduction of one party to another party by a paid adviser or broker.

...

[18] Section 17(1) provides that every creditor under a consumer credit contract must ensure that disclosure of as much of the key information set out in sch 1 as is applicable to the contract is made to every debtor under the contract before the contract is entered into.

[19] The key information in sch 1 includes:

- (a) the full name and address of the creditor;
- (b) the amount and a description of each advance;
- (c) the annual interest rate or rates under the contract;
- (d) the method of calculating interest charges payable under the contract; and
- (e) the total amount of interest charges payable under the contract, if ascertainable.

[20] Of particular relevance to the present appeal, the schedule requires disclosure of the following information concerning credit fees and charges:

- (n) a description of the credit fees and charges (other than interest charges) that are, or may become, payable under the contract (unless the fee or charge is disclosed under paragraph (c), including—

- (i) when each fee or charge is payable, if ascertainable; and
- (ii) the amount of each fee or charge if ascertainable, but, if not, the method of calculation of the fee or charge.

[21] Credit fees are defined in s 5:

credit fees means fees or charges payable by the debtor under a credit contract, or payable by the debtor to, or for the benefit of, the creditor in connection with a credit contract, and—

- (a) includes—
 - (i) establishment fees:
 - (ii) prepayment fees as defined in section 43(2) (whether in relation to part prepayments or full prepayments):
 - (iii) insurance premiums payable for credit-related insurance if the creditor requires the debtor to obtain insurance cover from a particular insurer or particular insurers:
 - (iv) fees and charges payable as referred to in section 45 if the other person, body, or agency referred to in that section is an associated person of the creditor
- ...

[22] Establishment fees are also defined in s 5:

establishment fees means the fees or charges payable under the credit contract that relate to the costs incurred by the creditor in connection with the application for credit, processing and considering that application, documenting the contract, and advancing the credit; but does not include any fee or charge to the extent that it is a charge for an optional service

[23] The issue whether the Platform Fee is an establishment fee assumes importance for Harmony because of the requirements in ss 41 and 42:

41 Unreasonable credit fee or default fee

A consumer credit contract must not provide for a credit fee or a default fee that is unreasonable.

42 Establishment fees

In determining whether an establishment fee is unreasonable, the court must have regard to—

- (a) whether the amount of the fee is equal to or less than the creditor's reasonable costs in connection with the application for credit, processing and considering that application,

documenting the consumer credit contract, and advancing the credit; or

- (b) whether the amount of the fee is equal to or less than the creditor's average reasonable costs of the matters referred to in paragraph (a) for the appropriate class of consumer credit contract.

[24] In *Sportzone Motorcycles Ltd (In Liq) v Commerce Commission* the Supreme Court recognised that in applying s 42 in order to determine whether a fee is reasonable in terms of s 41, the focus is on the costs incurred by the creditor in relation to the steps to which the fee relates.⁴⁰ That model requiring the fees to reflect lenders' reasonable costs in turn allows borrowers to compare the headline interest rates offered by different lenders.⁴¹

P2P lending

[25] P2P lending had not evolved when the CCCFA was passed in 2003. In a 2010 Ministry of Economic Development discussion paper, *Review of Securities Law*, such services were said not to be practical in New Zealand because the borrower would be an issuer for the purposes of the Securities Act 1978 and the Financial Reporting Act 1993. Hence the borrower, usually a private individual receiving a relatively small sum of money, would have to register a prospectus, produce an investment statement and file annual audited financial accounts. It was suggested that it would be preferable for the P2P lending service itself to be regulated by mandating disclosure and governance for its service, rather than regulation of the borrowers.⁴²

[26] The Financial Markets Conduct Act 2013 (FMCA) duly made provision for the holders of market services licences to act as providers of prescribed intermediary services, including a P2P lending intermediary if prescribed by regulations.⁴³ Harmony's parent company is the holder of a lending licence granted by the Financial Markets Authority under the FMCA. Regulation 184 of the Financial Markets Conduct Regulations 2014 recognises a P2P lending service as a prescribed

⁴⁰ *Sportzone Motorcycles Ltd (In Liq) v Commerce Commission* [2016] NZSC 53, [2016] 1 NZLR 1024 at [112].

⁴¹ At [61], [63]–[67] and [110].

⁴² *Review of Securities Law: Discussion Paper* (Ministry of Economic Development, June 2010) at 26.

⁴³ Section 390.

intermediary service. For the purposes of the Regulations a person provides a P2P lending service if:⁴⁴

- (a) the person provides a facility by means of which offers of debt securities are made; and
- (b) the principal purpose of the facility is to facilitate the matching of lenders with borrowers who are seeking loans for personal, charitable or small business purposes.

A P2P lending service also includes any broking services provided in the course of providing the service.⁴⁵

[27] The FMCA regulates financial markets for the benefit of investors including by requiring disclosure by the issuers of securities. Thus its focus as regards P2P lending is the interests of those (the investors) who lend money, principally relatively small short-term loans, to consumers.

[28] From the outset the FMCA simplified the process of disclosure by the “issuers” of P2P loan “securities”, that is the consumer borrowers. Instead of a borrower being required to make disclosure as would typically be done by the issue of a prospectus, the FMCA provides for a licenced P2P intermediary to provide a disclosure statement to retail investors,⁴⁶ the content of which is spelled out in the Financial Markets Conduct Regulations 2014.⁴⁷

[29] However the statute book remained silent on the implications of the CCCFA for P2P lending. It was not until 2019 that the Credit Contracts and Consumer Finance Regulations 2004 were amended to provide a partial exemption from disclosure requirements which the CCCFA imposed on P2P lenders to retail consumers (the P2P borrowers).⁴⁸ Regulation 18C relevantly provides:

⁴⁴ Regulation 185(1)(b).

⁴⁵ Regulation 185(2)(a).

⁴⁶ FMCA, s 423.

⁴⁷ Regulation 215.

⁴⁸ Credit Contracts and Consumer Finance Amendment Regulations 2019.

18C Exemptions from disclosure requirements for peer-to-peer lenders

- (1) Subclause (2) applies to a consumer credit contract if—
 - (a) the contract is to be entered into by means of a licensed peer-to-peer lending service; and
 - (b) a representative creditor under the contract complies with the creditor identification requirement in respect of that creditor (or more than 1 representative creditor does).
 - (2) The contract is exempt from any other application of section 17 of the Act in relation to the creditor identification requirement (and, accordingly, no other creditor need comply with the requirement).
- ...

Representative creditor is defined as follows at reg 18C(7):

representative creditor, in relation to a consumer credit contract entered into by means of a licensed peer-to-peer lending service, means a creditor under the contract—

- (a) who provides the service; or
- (b) who—
 - (i) is introduced (directly or indirectly) by a provider of the service to each other creditor under the contract; and
 - (ii) holds property or exercises rights under the contract for the benefit, or on behalf, of each other creditor.

[30] It is clear that both the FMCA and the CCCFA have a role to play in regulating P2P lending arrangements. The Commission further submits that the two regimes operate without conflict. The issue in this case is said to arise not because of any tension between the two statutes but as a consequence of the steps which the Commission alleges Harmony has taken to seek to exempt its fees from scrutiny under the CCCFA.

Question 1(a): Did the High Court err in finding that the credit contract comprised both the Loan Contract and the Loan Disclosure?

The parties' cases

[31] The formulation of the equivalent question in the High Court was whether the credit contract comprised a number of the material documents operating together or

solely the Loan Contract. In concluding that the Loan Disclosure was part of the credit contract Courtney J reasoned:⁴⁹

Although Harmony argues that the Loan Disclosure is not part of the credit contract because it merely fulfils the statutory requirement for initial disclosure of key information in relation [to] a particular loan, it also acknowledges that the Loan Disclosure is, in practical terms, the vehicle through which the specific terms of an individual loan is recorded. Since those terms cannot be found in the Loan Contract document, the Loan Disclosure must form part of the contract.

[32] In this Court Harmony reprises the contention that the Loan Disclosure does no more than fulfil the specific statutory disclosure function under s 17 of the CCCFA. It argues that the Loan Disclosure is not a credit contract because it does not create any right or obligation to incur a debt and defer payment. The point is made that the Loan Disclosure is not the document under which HITL would sue for payment in the event of a default by the borrower.

[33] The Commission submits that the terms of a contract may be contained in more than one document. That may occur where one of the documents expressly refers to terms in the other, or where, on an objective analysis of the agreement, a reasonable person in the position of the parties would have understood the terms to operate together.⁵⁰

Analysis

[34] The Loan Contract, described by the Judge as merely a standard form contract,⁵¹ is devoid of detail concerning the specifics of the loan: including the amount; the term; and the rate of interest. As the Judge explained, in order to ascertain that information, recourse must be had to the Loan Disclosure, the document which provides CCCFA disclosure to retail borrowers. Harmony acknowledges the reality of that state of affairs but nevertheless submits:

... the credit contract is solely comprised of the Loan Contract (certain terms of which are recorded in the Loan Disclosure).

⁴⁹ High Court judgment, above n 8, at [32].

⁵⁰ Edwin Peel *Treitel on The Law of Contract* (14th ed, Sweet & Maxwell, London, 2015) at [6-003] and [6-005].

⁵¹ High Court judgment, above n 8, at [27].

[35] The Loan Contract states that it “comes into existence and enters into force” immediately after the Loan Disclosure has been provided to the borrower but it does not convey any information as to how this comes about. That process is detailed in the Borrower Agreement which contains a definition of Loan Contract:

Loan Contract in relation to a Loan means the contract under which that Loan is made, as described in clause 17

Clause 17 of the Borrower Agreement explains the mechanism:

17 Immediately after Harmony has provided the Loan Disclosure to you, a Loan Contract will come into existence under which the Trustee (who will be the lender of the Loan) will agree to advance the Loan Amount to you. The Loan Contract will be on the form set out on the Website under the “Legal Agreements” section when the Loan Listing for the Loan is placed. ...

[36] This is not a scenario where a contractual term is unwittingly omitted from the intended contractual document and, being ascertainable in extra-contract material, can be fairly treated as an implied term. Rather it is plain that it was never the intention that the Loan Contract would document the key terms of the loan. Those key terms would only be found in the Loan Disclosure and each of them would be the subject of an express cross-reference in the Loan Contract.

4 Loan: The Trustee agrees to advance the Loan Amount specified in the Loan Disclosure to you for the term so specified, on and subject to the terms of this Loan Contract.

...

6 Interest: Interest will accrue on the outstanding amount of the Loan at the interest rate specified in that Loan Disclosure, on the basis of a 365-day year. ...

7 Repayment: You must pay all loan repayments specified in the Loan Disclosure comprising all payments of principal and interest to Harmony (as agent for the Trustee) on the repayment dates specified in the Loan Disclosure.

[37] We consider that the deliberate approach to documentary structure of avoiding reference in the Loan Contract to any of the specific details of the loan, no doubt as a way of facilitating the e-transactions on which P2P lending is based, is accentuated by the description of those details as being “specified” in the Loan Disclosure. That terminology can be contrasted with other references to the content of the Loan Disclosure in definitions contained in the Loan Contract:

Loan means the total amount lent or to be lent by the Trustee to you under this Loan Contract, **as set out** in the Loan Disclosure (whether credited to your bank account or otherwise applied for your benefit); and where applicable includes the amount of all compounded and capitalised interest

...

Settlement in relation to the Loan means

- (a) Harmony arranging for the collection of funds from all Participating Investors, and (as directed by the Trustee) applying the Loan Amount **as provided in** the Loan Disclosure; and
- (b) the time at which the above transfer occurs

(Emphasis added).

[38] In our view this is a classic example of the first of the scenarios referred to in the Commission's submission where, as a consequence of express references in a contractual document (A) to the contents of another document (B), the terms of the contract comprise those of both documents A and B.

[39] We also consider that the second scenario has application in this situation. In that regard it is significant that both versions of the Loan Disclosure acknowledge the relationship with the Loan Contract. The earlier version of 3 September 2014 commenced with a statement labelled "Important" which included:

This document relates to your Loan Contract and contains some of the key information for initial disclosure purposes. ... You should keep a copy of this document in a safe place.

The equivalent statement in the revised version of 11 November 2015 stated:

This document relates to your Loan Contract. It sets out the key information about your Loan Contract. ... You should keep this disclosure statement and a copy of your Loan Contract in a safe place.

[40] Harmony's proposition that the Loan Contract exclusively comprises the credit contract but does not contain all its terms is self-contradictory. The inherent difficulty with the argument can be demonstrated by Harmony's scenario of HITL's pursuit of a defaulting borrower. The claim could not be advanced in reliance on the Loan Contract alone. It would be necessary to also invoke the Loan Disclosure as evidence of terms essential to the formulation of the claim, as the quoted extracts from that document suggest.

[41] The fact that the Loan Disclosure performs the statutorily required written disclosure function is not the point. In the particular circumstances it also serves a second function as a component of the credit contract. It follows that there was no error in the Judge's conclusion, with which we agree.

Question 1(b): Did the High Court err in finding that the credit contract did not also comprise the Borrower Agreement?

The parties' cases

[42] The Borrower Agreement is the source of the borrower's obligation to pay the Platform Fee. It specifies that the borrower must borrow the amount of the fee as part of the loan and pay the fee out of the Loan Amount. In the High Court the Commission maintained that the Borrower Agreement, the Loan Contract, and the Loan Disclosure were all essential to the provision of credit and should be regarded as a single contract.

[43] The Judge's reasons for rejecting the proposition that the Borrower Agreement was part of the credit contract were as follows:⁵²

[34] However, the Borrower Agreement also covers general matters that are beyond the necessary scope of specific credit contracts such as eligibility to register, limitation of liability and resolution of disputes. It exists independently of the Loan Contract in the sense that a Borrower could register with the service but never take out a loan. So although the Borrower Agreement creates an obligation to pay the Platform Fee, in the event of a loan being given it does not provide credit in the sense of deferring payment of that debt. That is a consequence only of the Loan Contract/Loan Disclosure. There is no basis on which to construe the Borrower Agreement as part of the Loan Contract.

[44] In its cross-appeal the Commission relies on the second limb of its legal proposition,⁵³ namely that the intention of the parties, determined in accordance with the objective test of agreement, supported reading the terms of the Borrower Agreement together with those of the other two documents.⁵⁴ It contends the Judge erred in finding that because the Borrower Agreement contained terms relevant to

⁵² High Court judgment, above n 8.

⁵³ At [33] above.

⁵⁴ The objective assessment of parties' intentions has been affirmed as the correct approach to contractual interpretation by the Supreme Court: see *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60].

“general matters” it could not also contain terms necessary for credit to be provided to a borrower.

[45] Harmony responds that the Loan Contract and Borrower Agreement are separate contracts, with different principals and with distinct functions. The Loan Contract is the contract under which the loan is provided while the Borrower Agreement is the contract under which Harmony’s P2P lending service is provided. It submits that the Commission strains to argue that the credit contract comprises all three documents because the source of the obligation to pay the Platform Fee is in the Borrower Agreement. It endorses the Judge’s reasoning at [34] commencing from the second sentence.

Analysis

[46] The Loan Contract does not contain any express reference to the Borrower Agreement. Neither does the revised version of the Loan Disclosure. However the original Loan Disclosure did. The “Important” statement at the commencement of the document⁵⁵ concluded:

Defined terms in this document have their meaning in the Borrower Agreement.

[47] That statement reflected the fact that the definitions of a number of significant terms are to be found not in the Loan Contract but in the Borrower Agreement, for example:

Interest Rate means the annual interest rate (expressed as a percentage rate per annum) which is set by Harmony in respect of a Loan Listing

...

Loan Repayments means, as the context requires:

- (a) the monthly payments of principal and interest which will be payable by the Borrower in respect of the Loan Amount specified in a Loan Listing; or
- (b) the monthly payments of principal and interest which are payable by the Borrower on a Loan which has Settled

⁵⁵ At [39] above.

[48] Of particular significance is the definition in the Borrower Agreement of “Loan Amount”:

Loan Amount means, as the context requires:

- (a) the amount that a Borrower wishes to borrow (inclusive of the amount of the Platform Fee payable on the Loan), as set out in the relevant Loan Listing; or
- (b) the total amount of the Loan at Settlement (inclusive of the amount of the Platform Fee deductible by Harmony at Settlement), as set out in the Loan Disclosure

That definition refers to the Platform Fee and records both the fact that it comprises part of the amount borrowed and that it is deductible by Harmony at settlement. The Platform Fee is defined in the Borrower Agreement as follows:

Platform Fee means the fee payable by the Borrower to Harmony for arranging any Loan which Settles, as set out on the Website under the “Interest Rates & Fees” section

[49] The Loan Contract does not contain any express reference to the Platform Fee. However the definition of “Settlement” in the Loan Contract earlier noted⁵⁶ (which is different from the definition in the Borrower Agreement) refers to Harmony “applying the Loan Amount as provided in the Loan Disclosure”. The Loan Disclosure sets out how the loan (referred to in that document as the Initial Unpaid Balance) is comprised in the following manner:⁵⁷

CREDIT DETAILS	Initial Unpaid Balance (“Loan”):	[x+y]
	The Initial Unpaid Balance is made up of:	
	1. Amount to be credited to your bank account:	[x]
	2. Amount to be paid to Harmony Ltd to cover Platform Fee:	[y]
	Total advance:	[x+y]

[50] That mode of allocation of the Loan Amount reflects the settlement procedure recorded in the Borrower Agreement:

⁵⁶ At [37] above.

⁵⁷ The second sample as at 11 November 2015.

- 19 At Settlement, Harmony will:
- (a) collect the funds that make up the Loan Amount from the Participating Investors, and deposit the Loan Amount in the Advance Account; and
 - (b) acting at the direction of the Trustee, as authorised by you:
 - (i) deduct an amount equivalent to the Platform Fee from the Loan Amount, and transfer it to Harmony’s own account (in satisfaction of your obligation to pay that Platform Fee to Harmony); and
 - (ii) transfer the balance of the Loan Amount to your Nominated Account.

By referring to the provision in the Loan Disclosure relating to the application of the Loan Amount, the Loan Contract indirectly refers both to the Platform Fee and to the requirement that it be paid to Harmony from the Loan Amount.

[51] The “Loan Amount” definition also refers to the Loan Listing which is defined in the Borrower Agreement in this way:⁵⁸

Loan Listing means a listing on the Website which is placed by a Borrower and accepted by Harmony, and which sets out the details of a Loan which the Borrower wishes to have funded

The reference to the listing being “placed” on the website reflects the statement in both versions of the Loan Disclosure to the effect that the Loan Contract will be in the form set out on Harmony’s website when the Loan Listing for the Loan was “placed”.

[52] The Loan Contract also makes an indirect reference to the borrower registration and loan application procedures which are set out in detail in the Borrower Agreement. The default provision in cl 11 of the Loan Contract includes:⁵⁹

- 11 Default
- ...
- (b) ... if you:
- ...

⁵⁸ The Loan Contract contains a more succinct definition of “Loan Listing” as meaning a loan listing on the Website relating to the Loan. However that term is not used in the Loan Contract.

⁵⁹ This echoes the warranty in cl 25 of the Borrower Agreement.

- (iii) provided Harmoney with incorrect or fraudulent information in registering as a Borrower or applying for the Loan,

Harmoney (as agent for the Trustee) may by notice to you declare all money outstanding under the Loan Contract (including all interests and fees) immediately due and payable. In that case, you must immediately pay that outstanding money.

[53] There is also reference in cl 15(c) of the Loan Contract to the Loan Application which is defined to mean the application which the borrower made for the Loan⁶⁰ on the Harmoney website, being the website operated to provide the Service. “Service” is defined to mean the P2P service which Harmoney provides through the website.

[54] The Commission submits that it is the intention of the parties to the Borrower Agreement that it should apply to Loan Contracts. It draws attention to cl 8 of the Borrower Agreement which permits Harmoney to terminate or suspend the registration of a borrower in certain circumstances. In that event the Borrower Agreement provides:

10 If your registration is terminated or suspended, this agreement will continue to apply in respect of any Loans and Loan Contracts to which you are a party when the termination or suspension takes effect.

The Commission explains that this enables Harmoney to continue to rely on the provisions of the Borrower Agreement regarding payment obligations (cl 22), collection services (cls 23 and 24) and warranties given by the borrower to Harmoney (cl 25).

[55] Harmoney’s objective in crafting a Loan Contract which avoided express reference to the Platform Fee is readily apparent. However in our view the utilisation of discrete documents is ineffective in the particular circumstances where the definitions of relevant credit terms are contained in the Borrower Agreement and the specific details of individual loans are to be found only in the Loan Disclosure to which the Loan Contract expressly cross-refers. The degree of inter-relationship among the three documents is of such a nature that, on an objective analysis, they would be read by a reasonable observer as operating together. The interpretation of what is in effect a mosaic of documents governing the loan arrangement does not involve a “brushing

⁶⁰ At [37] above.

aside” of the documents in the sense described in *Buckley & Young Ltd v Commissioner of Inland Revenue*.⁶¹

[56] The Judge’s conclusion that the Borrower Agreement did not form part of the credit contract was influenced by her view that the Borrower Agreement covers “general matters” and has independent existence.⁶² We do not consider the fact that a document includes both terms relevant to the loan transaction and other terms precludes it from being a part of the credit contract. In any case we do not view the borrower registration criteria and the loan application process as being beyond the scope of the particular credit contract facility.

[57] Nor do we consider it significant that a borrower may register with Harmony’s Service but never take out a loan. The Borrower Agreement is a necessary prerequisite to the formation of an HITL loan transaction. The Platform Fee only becomes payable when a Loan Contract is formed and it is deducted from the Loan Amount advanced. It matters not that Borrower Agreements can come into existence but Loan Contracts never eventuate. Only if a credit contract materialises will the Borrower Agreement form part of it.

[58] For these reasons we reach a different conclusion from the Judge. In our view any credit contract which is formed comprising the Loan Contract and the Loan Disclosure will also comprise the related Borrower Agreement.

Question 2(a): Did the High Court err in finding that Harmony was a creditor?

The High Court judgment

[59] The significance of the question whether Harmony is a creditor lies in the definition of credit fees which incorporates three limbs, namely fees or charges.⁶³

- (a) payable by the debtor under a credit contract;

⁶¹ *Buckley & Young Ltd v Commissioner of Inland Revenue* [1978] 2 NZLR 485 (CA) at 490. The Court here stated different documents should only be brushed aside if and to the extent they were shams.

⁶² High Court judgment, above n 8, at [34].

⁶³ CCCFA, s 5.

- (b) payable by the debtor to the creditor in connection with the credit contract; or
- (c) payable by the debtor for the benefit of the creditor in connection with the credit contract.

In this Court there is agreement that if Harmony is a creditor then the Platform Fee will be a credit fee under the second limb of the definition.⁶⁴

[60] There is no dispute that HITL, the only creditor named in the Loan Contract, is a creditor. It has what the Commission described (erroneously, as Mr Every-Palmer accepted) the “legal title to the funds advanced”. It is the entity to whom the borrower owes an obligation to repay the Loan Amount.

[61] In the High Court the Commission contended that Harmony is a creditor because it controls HITL and therefore has effective control over the provision of credit. Harmony has the power to exercise the right to dismiss HITL and to appoint a new trustee/creditor in its place. Consequently, regardless of the description of the parties in the loan documents, the Commission submitted that Harmony was either the sole or with HITL a joint principal in the provision of credit. Harmony maintained that HITL was properly appointed by the investors to act as a bare trustee and that Harmony only ever acted as HITL’s agent.

[62] In finding that Harmony was a creditor, the Judge went further than the Commission’s effective control argument, reasoning that HITL was in fact the agent of Harmony whose business it was undertaking:

[73] The consensual undertakings necessary for the creation of an agency relationship are clearly set out in the Administration Deed. In my view, the fact that the Administration Deed allows Harmony to terminate HITL’s appointment and does not allow HITL to terminate Harmony’s appointment is consistent only with HITL being Harmony’s agent, not the other way around. HITL’s appointment of Harmony as its agent under the Investor Agreement does not represent the whole picture because, before HITL engaged Harmony, Harmony had already engaged HITL to act as its agent. Their respective roles under the Loan Contract can only be understood against that background.

⁶⁴ The first and third limbs are the subject of questions 3(a) and (b).

[74] Looked at in this way, it can be seen that Harmony's services extend beyond mere matchmaking. It provides a nominal creditor (HITL) to hold the loans as a bare trustee for investors. It does so by delegating that task to HITL, with whom investors contract, unaware of Harmony's role. Harmony also undertakes the full administration of the loans and does so by authorising HITL to contract with investors on the basis that HITL will engage Harmony to undertake the work. The investors believe they are contracting with HITL; in fact, Harmony is an undisclosed principal to the contract.

The parties' cases

[63] Harmony points to the definition of "parties" in cl 1 of the Loan Contract where HITL is described in this way:

- (c) Harmony Investor Trustee Limited (Trustee), as lender (acting through its agent Harmony Limited (Harmony)).

The clause continues:

The Trustee enters into this Loan Contract as bare trustee for the benefit of the Participating Investors, and not in any other capacity. The Trustee holds all rights and powers vested in it under or in connection with this Loan Contract as trustee for the Participating Investors in accordance with their respective interests, on and subject to the terms of the Trustee's appointment.

[64] To similar effect is cl 11 of the Investor Agreement which states:

- 11 Every Loan you fund through the Service will be made by the Trustee (acting through Harmony as its agent). The Trustee will then hold that Loan on a bare trust for the benefit of yourself and every other Participating Investor in accordance with clause 15.

[65] As advanced in its written submissions the Commission's argument was four-pronged. First the Commission reiterated its effective control argument, submitting that HITL is no more than an inert link in the chain between the investors and Harmony and between Harmony and the borrowers. Such effective control was said to be reflected in Harmony's power to replace HITL or terminate its appointment "at any time" and at Harmony's "absolute discretion".⁶⁵ Secondly, the Commission endorsed and adopted the High Court's reasoning that Harmony was HITL's undisclosed principal, although observing that such a finding was not necessary for the conclusion that Harmony was a creditor.

⁶⁵ Administration Deed, cl 11.1(a); and Amended and Restated Administration Deed, cl 12.1.

[66] In its memorandum of intention to support the decision on other grounds the Commission advanced two further arguments:

- (a) The documents reserved powers exclusively to Harmony, the exercise of which forms part of the provision of credit. These include the power to introduce new types of fees, to accept instructions from borrowers, to determine the amount payable by way of an early discharge of the loan, to decide the order in which amounts paid are applied, and to agree to assignments of the loan. As such, Harmony comes within the definition of “creditor” in s 5 of the CCCFA.
- (b) Section 11(1)(d) of the CCCFA confirms that an entity entering credit contracts in its own name on behalf of another may itself be a creditor for the purposes of the CCCFA. Hence Harmony is a creditor whenever it provides credit in its capacity as the Trustee’s agent.

[67] However in the course of the hearing there was a significant refinement in the Commission’s case whereby a statutory interpretation argument, initially a precursor to the effective control proposition, assumed the primary focus. By a process of melding together the definitions of credit, credit contract and creditor, Mr Every-Palmer submitted that the key consideration is the way in which the right to incur a debt is granted. He maintained that no limitation should be read into the definition of creditor so as to restrict the right of grant to the party to whom the debt is eventually owed. Rather, the natural analysis of the particular circumstances of the Harmony structure is that the right to incur a debt was granted by Harmony. Ultimately the effective control proposition was relegated to an explanation for that state of affairs. Indeed at one point it was described as an intermediate concept to organise the Commission’s thinking on the question.

[68] In response Mr Galbraith QC submitted there was a short answer to that proposition: the debt is incurred and the payment is deferred by HITL under the Loan Contract. The Court cannot go beyond the analysis that the Trustee alone enters into the Loan Contract which creates the debt unless it accepts that the documentation is a

sham. The Commission has not advanced that contention and could not do so on a case stated under s 100A.

Analysis

[69] It is convenient to recite again the key definitions. A credit contract means a contract under which credit is or may be provided.⁶⁶ Relevant to the nature of the loan transaction in issue, credit is provided under a contract if a right is granted by a person to another person to incur a debt and defer its payment.⁶⁷

[70] Combining the two definitions, a credit contract means:

A contract under which a right is or may be granted by a person (C) to another person (D) to incur a debt and defer its payment.

C will be a creditor, being a person who provided or may provide credit under a credit contract.⁶⁸ D will be a debtor, being a person to whom credit has been or may be provided under a credit contract.⁶⁹

[71] An evaluation of the Commission's contention that Harmoney grants to the borrower the right to incur the debt necessitates a close analysis of the relevant contractual provisions.

[72] The Borrower Agreement sets out the terms on which the borrower agrees to use the service provided by Harmoney to borrow money on a P2P basis from other persons via HITL. In order to access and use the P2P lending service provided by Harmoney through its website, the borrower must first register as a borrower by completing the Borrower Application.⁷⁰ The Borrower Application is defined to mean the application to become a borrower set out on the website. Neither the website nor the Borrower Application form were in the material before us.

⁶⁶ CCCFA, s 7.

⁶⁷ Section 6.

⁶⁸ Definition of "creditor" in s 5.

⁶⁹ Definition of "debtor" in s 5.

⁷⁰ Clause 5.

[73] Harmony reserves the right not to register any person as a borrower if that person has not completed the registration process to Harmony's satisfaction or does not meet Harmony's eligibility criteria prescribed in cl 6:

Harmony's eligibility criteria for registering as a Borrower are:

- (a) you must be a natural person (that is, not a company, partnership, incorporated society, trust, or other legal entity);
- (b) you must be a New Zealand resident, which Harmony will verify through you having a New Zealand residential address and a bank account with a registered New Zealand bank;
- (c) you must be 18 years of age or older when you register; and
- (d) you must have an acceptable credit record, as determined by Harmony at its discretion.

[74] Having secured registration as a borrower, the borrower may make application for a loan through the Harmony website. The form of the Loan Application, defined to mean the application for a loan set out on the website, was not in the material before us. The Loan Application process is specified in the Borrower Agreement as follows:

12 If you want to take out a Loan using the Service, you must complete a Loan Application in which you nominate:

- (a) the proposed Loan Amount;
- (b) (if the Loan Application provides for this option) the lesser amount you agree to accept if the proposed Loan Amount is not reached by the end of the Listing Period; and
- (c) the Repayment Period.

The proposed Loan Amount and any lesser amount which you will accept must each be expressed as a multiple of \$25. The amount you apply for will include an amount equivalent to the Platform Fee that you must pay Harmony if you obtain the Loan.

13 As part of the Loan Application, you must provide Harmony with details of your bank account with a registered bank in New Zealand, from which payments are to be made by you in respect of your Loan. By providing those details you agree to Harmony establishing a direct debit authority against that bank account on the terms set out in the authority accompanying this agreement in relation to any amount payable by you to Harmony or to the Trustee under this agreement or any Loan Contract.

[75] If the Loan Application is approved by Harmony the procedure is as follows:

14 If Harmony approves your Loan Application for listing on the Website, it will assign a Credit Grade to your Loan Application which will state the maximum Loan Amount and the Interest Rate applicable to that application. You may then select the Loan Amount from the information provided by Harmony. Following this selection, your Loan Application (together with those details, including the Loan Repayments) will comprise your Loan Listing for that Loan.

15 Your Loan Listing will be listed by Harmony on its Website, for consideration by Investors, during the Listing Period. You may withdraw your Loan Listing at any time before the Loan Contract has been concluded (as set out in clause 17) by cancelling your Loan Listing on the Website.

[76] Persons who wish to participate in the financing of listed loans place offers known as “Orders” with Harmony. The Borrower Agreement contains the following definitions of Fully Funded and Order:

Fully Funded in relation to a Loan Listing or a Loan means that Harmony has received sufficient Orders from Investors to fund the full amount of:

- (a) the proposed Loan Amount; or
- (b) any lesser amount you agreed to accept,

as specified in the relevant Loan Listing

...

Order means an offer by an Investor to participate in funding a Loan (or an offer by a Wholesale Investor within the meaning of the Investor Agreement to fund an entire Loan, where applicable), based on that Borrower’s Loan Listing

[77] A Loan becoming Fully Funded has the following consequences:

16 If your Loan is Fully Funded before the Listing Period expires, Harmony will:

- (a) notify you of that fact; and
- (b) on the Trustee’s behalf, provide you with a Loan Disclosure setting out the key terms of the proposed Loan (as required by the CCCFA). For the purposes of section 35 of the CCCFA, you:
 - (i) nominate the email address specified in the Loan Application (or such other email address as you may notify to Harmony) as the information system to which the Loan Disclosure may be sent; and

(ii) agree that the Loan Disclosure may be provided by sending you an electronic communication that allows the Loan Disclosure to be accessed from a website or by means of the internet. ...

As previously explained, immediately after Harmony has provided the Loan Disclosure to the borrower, a Loan Contract comes into existence in the form set out on the website.⁷¹

[78] When Mr Every-Palmer launched the Commission's refined argument he said:

In my submission it is very natural to say in this case the opportunity to incur a debt and the right to incur a debt was granted by Harmony ...

We readily accept that the borrower registration and loan application processes set out above amount to the grant by Harmony to a borrower of an "opportunity" to incur a debt. The more difficult issue is whether it also amounts to the grant by Harmony of a "right" to incur a debt.

[79] Mr Every-Palmer emphasised that Harmony has the power of deciding whether a loan is listed and setting the terms of the loan. He developed the submission in this way:

It is the gatekeeper. It also, because of the agency delegation, does more than the gatekeeping. It is the one that gives the bank the instruction to transfer the money. It is the one who says yes the funds are there, the debt can be incurred and the loan contract come into existence. It makes all those decisions. The first as principal, the next lot as agent. We say that's enough but we also say, and if you look at the termination rights, *Harmony is the puppet-master here. It has set up the whole structure. It is the one who controls what the loan contract looks like. It controls the website. It is the one that grants the right to incur the debt I guess in a narrow sense by that gatekeeper function because once it has put it up on the website the investors go into it, it is mechanical, the funding will be provided. So by putting its application up on the website, by making that decision it has granted the right to incur a debt. Still conditional on the investors coming through but it is the one who has granted that right.* So you can get it the narrow way but in a broader sense we say step back and look at what is going on here. Harmony can replace HITL, HITL is a numeric link. All it does is hold title for a brief period of time.

(Emphasis added).

⁷¹ Clause 17 of the Borrower Agreement: see [35] above.

[80] The italicised portion of that extract, on which we focus below, serves to highlight aspects of the Commission’s argument which we do not adopt. The first part refers to conduct of Harmony both as principal and as agent for HITL. We are not concerned with actions of Harmony as HITL’s agent. The reference to a “broader sense” in the final part reflects the Commission’s effective control argument which, as earlier noted,⁷² was eventually abandoned.

[81] However the italicised portion is directed at the borrower registration and loan application processes which enable the borrower to access the funding facility which the Harmony platform provides. Those activities are undertaken by Harmony as principal. HITL has no involvement.

[82] We consider that it is fair to say that the dual steps of securing registration as a borrower and then obtaining approval for the listing of a Loan Application on the website involve part of the process comprising the grant of a right to incur a debt, at least conditional upon the placement of Orders by investors with Harmony. Alternatively the state of affairs can be analysed as one where credit “may be provided”, depending on the Loan Application which has been approved by Harmony becoming Fully Funded. The conditional nature of the Harmony-approved loan elapses with the cl 16 advice by Harmony as principal to the borrower that the loan is Fully Funded.

[83] All these activities occur before any steps are taken by HITL via the agency of Harmony. We do not consider it realistic to say that the giving of CCCFA disclosure by HITL via Harmony is the grant of the right to incur the debt. Nor do we consider the fact that a Loan Contract then automatically materialises, as provided in cl 17 of the Borrower Agreement, is the first incident of the grant of the right to incur the debt the subject of the listed loan.

[84] Rather in our view the process whereby Harmony vets borrowers, approves registered borrowers’ Loan Applications for listing on its website, assigns a credit grade, specifies key terms of the proposed loan (maximum amount and interest rate) and then, upon the loan being Fully Funded, gives notification to the borrower of that

⁷² At [67] above.

outcome, comprises at least a significant part of the conduct of the grant to a borrower of the right to incur the debt.

[85] The Commission also relies upon several powers reserved exclusively to Harmony referred to in the memorandum of intention to support the decision on other grounds.⁷³ While we recognise that such powers are not exercised by Harmony as the agent of HITL and that in a practical sense the exercise of those powers would be expected to be undertaken by a creditor, we do not consider that they assist in the task of the identification of the entities involved in the activity of the grant to a borrower of the right to incur a debt.

[86] For the reasons noted above⁷⁴ it is unnecessary to engage with the effective control proposition which was the basis of the Commission's argument in the High Court. Nor, having regard to the way the appeal evolved, do we consider it appropriate to engage with the Judge's undisclosed principal analysis. In that regard we note that the amended case stated recorded that the High Court was requested to consider whether or not Harmony acted as an agent in performing any or all of its specific roles or functions. The undisclosed principal concept was not one which the parties advanced.

[87] It remains to consider the second of the additional matters in the memorandum of intention to support the decision on other grounds. As noted above⁷⁵ s 11(1)(d)(iii) of the CCCFA provides that a credit contract will be a consumer credit contract where the creditor, or one of the creditors, makes a practice of entering into credit contracts in the creditor's name as creditor on behalf of, or as trustee or nominee for, any other person.

[88] The Commission contends that it is implicit in this section that the concept of "providing" credit is not limited to the party with the legal interest in the funds advanced but that an agent may also be a creditor. From this it was said to follow that Harmony would be a creditor even if it was only acting as HITL's agent in advancing

⁷³ At [66] above.

⁷⁴ At [67].

⁷⁵ At [17].

the loan (not as the undisclosed principal) and irrespective of how the credit contract was defined.

[89] Harmony accepts that s 11(1)(d)(iii) would apply to HITL which is a creditor and makes a practice of entering into a contract as trustee for another person, namely the investors. But it submits that nothing turns on the reference in s 11(1)(d)(iii) to the possibility of there being more than one creditor. It contends that the provision simply contemplates that where there are two creditors it is sufficient if one of them makes a practice of entering into credit contracts in its own name or as a trustee.

[90] We agree with Harmony's submission that there is no basis to infer from s 11(1)(d)(iii) that the concept of "providing" credit is not limited to the party with the legal interest in the funds advanced (to continue to use the Commission's phrase). We do not consider that the provision provides any support for the Commission's assertion that Harmony would be a creditor by virtue of its being an agent of HITL.

Conclusion

[91] The High Court did not err in its conclusion that Harmony was a creditor. However our conclusion that Harmony was a creditor is based on the reasons at [79]-[84] above which are different from the High Court reasons.

[92] It follows from the parties' agreement that the Platform Fee comes within the second limb of the credit fee definition. Our discussion below of Questions 3(a) and (b) addresses whether the Platform Fee could alternatively constitute a credit fee under the first and third limbs.

Question 2(b): Did the High Court err in finding that the investors were creditors?

[93] Consistent with their statements of position in the case stated, neither party contended in the High Court that the investors were creditors for the purposes of the CCCFA. However, and without the benefit of argument, the Judge concluded:⁷⁶

⁷⁶ High Court judgment, above n 8, at [37].

The investors must be creditors because, although not named as such in the Loan Contract, it is they who have the beneficial right to the loan repayments and the named creditor (HITL) is stated to be a bare trustee for them. The issue between the parties, however, is whether Harmony is also a creditor.

[94] Neither party presented argument on the appeal in support of that proposition. We agree with the joint position that the investors are not parties to either the Loan Contract or the Loan Disclosure. The Judge was in error in reaching a contrary conclusion.

Question 3(a): Did the High Court err in finding that the Platform Fee was a credit fee on the basis that it was a “fee ... payable by the debtor under a credit contract”?

[95] As noted above⁷⁷ the definition of “credit fees” incorporates three limbs. Question 3(a) concerns the first limb, namely fees or charges payable by the debtor under a credit contract.

[96] In the High Court Harmony contended that the Platform Fee was not “payable under” the credit contract because the obligation to pay the fee arose under the Borrower Agreement and was charged for Harmony’s performance of services under that agreement. While the Loan Amount included the amount required to cover the Platform Fee, it was Harmony’s case that that was merely a mechanism for payment of the fee and did not make it “payable under” the credit contract.

[97] Courtney J rejected that submission, stating:⁷⁸

[83] Although the obligation to pay the Platform Fee arises under the Borrower Agreement, payment is not required until settlement and then it must be by way of deduction from the amount of the loan. It is because the Platform Fee forms part of the loan amount, and therefore attracts interest, that it should be treated differently from the way it would be treated if, for example, it had been payable in cash. If it were payable in cash directly to Harmony it would not be payable under the credit contract; it would genuinely be a brokerage fee paid to Harmony for arranging the loan. But the borrower must incur the cost of credit under the Loan Contract and pay the fee from the loan monies. This is not merely mechanical. In ordinary language, the fee is payable under the Loan Contract.

⁷⁷ At [59] above.

⁷⁸ High Court judgment, above n 8.

[98] As explained in our consideration of Question 1(b), we reach a different conclusion from the Judge on the issue whether the Borrower Agreement forms a part of the credit contract. As the Commission submits, in those circumstances it appears to be uncontroversial that the Platform Fee is payable under the credit contract. We did not hear any argument to the contrary.

[99] However even if, as the Judge found, the credit contract comprises only the Loan Contract and the Loan Disclosure, we would agree with the Judge's conclusion that the Platform Fee was payable under the credit contract, albeit for slightly different reasons than those of the Judge quoted above.

[100] As explained earlier, the Loan Contract records that the Trustee agrees to advance the Loan Amount and the definition of Settlement in the Loan Contract provides that Harmony will apply the Loan Amount as provided in the Loan Disclosure.⁷⁹ Both versions of the Loan Disclosure provide for the amount of the Platform Fee to be paid to Harmony from the sum advanced and for the balance to be credited to the borrower's bank account.

[101] It follows that, irrespective of the terms of the Borrower Agreement, the Loan Contract and the Loan Disclosure in conjunction specify that the Platform Fee is to be paid from the Loan Amount to Harmony. Hence, as the Judge said, albeit by reference only to the Loan Contract, in ordinary language the fee is payable under the credit contract comprising the Loan Contract and the Loan Disclosure.

Question 3(b): Did the High Court err in finding that the Platform Fee was not a credit fee on the basis that it was not a “fee ... payable by the debtor ... for the benefit of ... the creditor in connection with a credit contract”?

[102] This question concerns the third limb of the definition of credit fees.⁸⁰ The question assumes (contrary to our conclusions on Questions 2(a) and 1(b) respectively) both that Harmony was not a creditor and that the Borrower Agreement was not part of the credit contract. Thus the benefit must be for HITL alone.

⁷⁹ At [36]–[37] above.

⁸⁰ See [59] above.

[103] In the High Court the Commission argued that a benefit accrued for HITL in two ways:

- (a) HITL charged interest on the Loan Amount comprising both the Platform Fee and the amount of the loan dispersed to the borrower; and
- (b) the collection of the Platform Fee enabled HITL to provide loans which in turn conferred an entitlement to receive an agreed fee from Harmony.

[104] The Judge rejected the contention that a benefit was derived by HITL, reasoning:⁸¹

[91] The direct benefit [is] said to be that the creditor (whether Harmony or HITL) charges interest on the increased loan amount. But interest is specifically excluded from the definition of credit fee. Interpreting “benefit” so as to include interest would be contrary to the clearly stated ambit of the definition.

[92] The Commission’s alternative argument is that the fee provides an indirect benefit to the creditor because, without payment of the fee, HITL would not be able to make the loan nor receive its fee from Harmony. This is not a viable interpretation. Although it is self-evident that HITL’s fee depends on the success of Harmony’s platform, that does not mean that the payment of the fee is *for the benefit* of HITL in its capacity as a creditor (as opposed to Harmony’s agent providing trustee services).

[105] On appeal in addition to the propositions advanced in the High Court, the Commission identified a third benefit, namely that the payment of the fee to Harmony (which carried out all of the steps necessary to provide the loans) allowed HITL to avoid the costs of either establishing loans itself or paying Harmony, or any other party, to establish such loans.

[106] We agree with the view expressed by the Judge that the definition of “credit fees”, although designed to capture both payments made to a creditor and payments which, although not specifically made to a creditor, are nevertheless for the creditor’s benefit rather than the payee’s benefit, does not capture every payment that has

⁸¹ High Court judgment, above n 8.

a positive effect on a creditor. We also agree with the Judge’s reasons for rejecting the benefits for HITL advanced by the Commission in the High Court.

[107] Turning to the additional benefit which was introduced on the appeal, the Commission submits that this characterisation is perhaps the simplest of the three. The argument is that, if Harmony was not paid the Platform Fee by the borrower, then HITL would need to either:

- (a) itself incur the costs required to provide loans — including the costs of processing and considering applications for credit, documenting the contract and advancing the credit; or
- (b) pay Harmony or another party to carry out these steps.

[108] Each payment of a Platform Fee is therefore said to be for HITL’s benefit as it avoids the need for HITL to incur the costs of arranging loans. The Commission submits that Harmony acknowledged as much in its submissions in the High Court, observing that the payment of the Platform Fee meant that the “Trustee (and Investors) do not incur the cost of arranging a loan”.

[109] The Commission submits that such characterisation also highlights the avoidance potential if a creditor can task an agent with performing steps in relation to the provision of credit (such as establishment or enforcement steps) and arrange for the agent to enter into a direct contract with the borrower to avoid the constraints in the CCCFA as to the levels of such fees.

[110] Harmony responds that the Commission’s assumption that HITL would have to carry out the arrangement of the loan itself is inconsistent with the P2P context where, under the regulations, there is a clear distinction between the licensed intermediary, who matches borrowers and investors, and the provider of the loan.⁸² More persuasive in our view is Harmony’s submission that, even if the borrowers did not pay the cost of arranging the loan and HITL had to take those steps (contrary to the P2P structure), HITL would undoubtedly recoup that cost. Hence for HITL it

⁸² Financial Market Conduct Regulations 2014, reg 185.

would be neutral either way. We agree the fact that a creditor merely avoids a cost it would otherwise bear is too indirect and remote in order to give HITL “the benefit” of the fee.

[111] Hence there was no error in the High Court’s conclusion that the Platform Fee was not a credit fee on the basis that it was a fee payable by the debtor for the benefit of the creditor in connection with a credit contract.

Result

[112] The appeal is allowed in relation to Question 2(b) as we agree with the parties’ joint position that the investors were not creditors. The appeal is otherwise dismissed. The Commission’s cross-appeal is allowed.

[113] The answers to the questions posed on appeal are:

Question 1(a): Did the High Court err in finding that the credit contract comprised both the Loan Contract and the Loan Disclosure?

Answer: No.

Question 1(b): Did the High Court err in finding that the credit contract did not also comprise the Borrower Agreement?

Answer: Yes. Any credit contract formed comprising the Loan Contract and the Loan Disclosure will also comprise the related Borrower Agreement.

Question 2(a): Did the High Court err in finding that Harmony was a creditor?

Answer: No. However the reason is that the process whereby Harmony vets borrowers, approves borrowers’ Loan Applications for listing on its website, assigns a credit grade, specifies key terms of the proposed loan (maximum amount and interest rate) and then, upon the loan being Fully Funded, gives

notification to the borrower of that outcome, comprises at least a significant part of the conduct of the grant to a borrower of the right to incur the debt.

Question 2(b): Did the High Court err in finding that the investors were creditors?

Answer: Yes.

Question 3(a): Did the High Court err in finding that the Platform Fee was a credit fee on the basis that it was a “fee ... payable by the debtor under a credit contract”?

Answer: No.

Question 3(b): Did the High Court err in finding that the Platform Fee was not a credit fee on the basis that it was not a “fee ... payable by the debtor ... for the benefit of ... the creditor in connection with the credit contract”?

Answer: No.

Costs

[114] The appellant must pay the respondent costs for a standard appeal on a band A basis together with usual disbursements. We certify for second counsel.

Solicitors:
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