

The complaint

Mr S complains about a fee Assetz SME Capital Limited (Assetz) has introduced on his crowdfunding account. He believes he has been treated unfairly and prevented from closing his accounts without accepting the new terms.

What happened

Over a number of years, Mr S invested in several crowdfunding accounts on Assetz's peer to peer lending platform.

On 31 March 2020, Assetz informed Mr S that it would be introducing a fee that would be payable from 1 May 2020. The fee was charged at 0.9% per annum, which is 0.075% per month of the loans under management – not those in default.

Mr S sought to close his accounts immediately as he didn't want to accept the fee. He also raised a complaint with Assetz about the fee.

Assetz responded to the complaint and didn't uphold it. In summary it said, the terms and conditions Mr S agreed to allowed it to introduce a lender membership fee.

Mr S raised further concerns about the application of terms. He referred to legislation, the Consumer Rights Act, and said Assetz was relying on unfair terms to raise the price of its service unilaterally. He said Assetz was denying his right to close the account rather than accept new charges.

To fully close his accounts, Mr S needed to liquate the funds he held in loans – but, due to the time taken to complete a full withdrawal, he couldn't do this immediately. Mr S said he would not log into his account as this would mean he is accepting the new terms – which is not what he wanted to do.

Assetz responded again and said its terms and conditions had always contained a provision to introduce a lender membership fee. It said the reason for introducing it now was because of the extraordinary circumstances linked to the global pandemic. It was to assist the funding of the platform's costs to ensure the continuation of services for the benefit of investors.

Assetz also said it was intended to be temporary, pending a return to some economic normality. It confirmed, while Mr S is in the process of closing down his account, he is not prohibited from obtaining information about his investments.

Mr S wasn't happy with the response, so referred his complaint to this service for an independent review.

I issued a provisional decision in February 2020 upholding the complaint – this is what I said:

"The crux of Mr S's complaint is about the introduction of a lender membership fee on his crowdfunding accounts in May 2020. I can see Assetz notified Mr S this it would be "...commencing a lender loan servicing fee of 0.9% per annum, which is 0.075% per month of the loans under management, starting on 1st May."

I note Assetz explained that “This fee is permitted in our terms and conditions, however we have never needed to implement it over the last seven years and we hope and expect it to be a short-term measure. It is also a fee that many other peer to peer platforms already charge even in normal market conditions, and our fee is lower than many of those in any case.”

So, I’ve looked at the terms and conditions that were relevant when Mr S opened his first account. These do explain that the possibility of charging a membership fee - the terms say “At present there is no membership or joining fee payable for being a Lending Member. The Assetz Capital Companies reserve the right to introduce a membership or joining fee in future.”

But, Assetz updated its terms on 30 April 2020. This included the following term relevant to this complaint:

“Under normal circumstances there is no membership or joining fee payable for being a Lending Member. The Assetz Capital Companies reserve the right to introduce a membership or joining fee in future. Starting on 1st May 2020 we will be charging a fee which will be referred to as the “Lender Loan Servicing Fee” until further notice. This fee will be 0.9% per annum, which is 0.075% per month of the loans under management. Our intention is that this will be a temporary measure whilst the current “Non-Normal Market Conditions” brought about by the Coronavirus (COVID-19) persist.”

Within its final response letter to Mr S, Assetz referred to Section 20 of its terms and conditions to support that it could make updates. The relevant term says:

“20. Altered Circumstances and Changes to the Terms

1. If there is a change in circumstances or a change in the law, HMRC practice or regulations or the interpretation of them, or if any Assetz Capital Company wishes to make changes to the services which it provides on the Network or Website, the Assetz Capital Companies may amend these Terms from time to time as they think fit.

2. Where a change to these Terms does not affect existing Loan Units and does not disadvantage existing Lending Members or where the changes are reasonably believed by the Assetz Capital Companies to be in the interests of the Lending Members, the Assetz Capital Companies may make any amendments to these Terms at any time with immediate effect. Where it is necessary or desirable to make changes to these Terms which affect existing Loan Units or may disadvantage existing Lending Members, the Assetz Capital Companies will endeavour to provide 30 days notice before any changes take effect. Any such notice shall be posted on the Website.

3. Any amendments will be posted on the Website as soon as reasonably practicable. By continuing to use the Website, each Lending Member agrees to be bound by the amended Terms.”

While I appreciate this is a broad term, it does tend to support that Assetz may vary its terms, but it still needed to consider the impact of any changes it makes on its customers. Mr S has made reference to legislation – the Consumer Rights Act 2015 (CRA) and believes the terms Assetz rely on is unfair. He says there is an imbalance of power between him and Assetz. It’s not for me to decide whether this term is fair or not – that is something only a court can decide. But as a regulated financial business Assetz is under an obligation to treat its customers fairly. And the obligation I am under is to consider what is fair and reasonable in all of the circumstances – which includes having consideration for the relevant law and regulations, regulators’ rules, guidance and standards, codes of practice; and (where

appropriate) what I consider to have been good industry practice at the relevant time.

In December 2018, the FCA published guidance that outlines the factors financial services firms should consider under the CRA when drafting and reviewing variation terms in their consumer contracts. I can consider whether Assetz has applied the terms fairly in the way it introduced the fee. I think this is relevant guidance to help me decide whether Assetz has treated Mr S in a fair and reasonable way when it introduced the loan servicing fee. In considering this complaint, I've had regard for the fact Mr S entered into an agreement which said he wouldn't pay a membership fee on his investments. He'd been warned he might have to pay one in future – but not how much that would be, when it would be payable, and on what basis (e.g. a percentage or a flat rate).

Taking into account the relevant guidance, I'm satisfied it would have been fair and reasonable for Assetz to ensure amongst other things:

- They had a good reason for introducing the fee.*
- They gave investors notice of its introduction.*
- They allowed those who didn't want to pay the fee the opportunity to leave without penalty.*

Indeed, Mr S thinks the term Assetz seeks to rely is unfair because no amount is included for the fee or when it will be introduced. He also raises concerns about his ability to cancel the contract when the price was increased. As explained above, only a court can decide if a term is unfair. I've considered everything to decide overall whether Mr S has been treated in fair and reasonable manner by Assetz – including whether the introduction of the fee provides a fair balance between the legitimate interest of Assetz and Mr S's best interests.

I accept Assetz did make provision within the terms and conditions to make changes. Assetz has explained that it needed to introduce the fee due to the extraordinary circumstances of the global pandemic, so as to assist the funding the platform costs which enables it to continue to service lenders and their loan investments. It also said the fee was set at the minimum necessary and was intended to be temporary pending a return to economic normality. It has provided further information to this service to explain the impact the global pandemic had on its operation and costs.

I note Mr S doesn't believe Assetz has suffered impact as a result of the global pandemic to justify the introduction of the lending member fee. But I am satisfied Assetz has provided evidence that the abnormal market conditions did impact its operation and it sought to make changes to stabilise until normal market conditions returned. It has provided information to explain additional costs it faced as a result of the pandemic. I'm satisfied these include new and increased costs directly related to the impact of the pandemic at a time when income was also suppressed. So, I don't think it is reasonable to say that the pandemic had no impact on Assetz's costs. Assetz has provided information to support that the increased costs were also linked to protecting lenders interests. Some of the additional costs relate to activities to support borrowers in the short-term. Assetz say the purpose of these activities was to prevent lost interest income. And the overall aim was to protect investors' long-term returns by ensuring there was not widespread failures of borrowers to maintain or repay their loans to investors – like Mr S. So, there is evidence that Mr S's best interests were considered by Assetz when introducing the fee.

I also acknowledge the comments Mr S makes in relation to the unfairness of prices increasing. The lender servicing fee was something that hadn't previously been payable – so it doesn't come as a surprise that Mr S was unhappy when he was informed about it. The FCA guidance on the fairness of variation clauses also provides a list of factors that to help determine fairness. The guidance says a relevant factor is:

“Does the contract give the consumer the right to terminate the contract before or shortly after any variation takes effect?”

It goes further and says:

“When drafting variation terms, firms should consider the consumer’s freedom to exit the contract if they do not accept the variation, and how they can actually do so. This should include the financial and practical barriers in the contractual terms which may prevent them from doing so. Examples of barriers could be exit charges or requiring the consumer to give a long period of notice.”

I’ve taken this into account when looking at how Assetz introduced the new fee on Mr S account. Mr S has said he had no way of avoiding the fee if it didn’t want to pay it. I’m satisfied Mr S sought to exit the contract when he found out about the fee. I can see that he wanted to avoid accepting the terms and put his loans up for sale on the secondary market almost immediately. But due to the queuing system introduced by Assetz and prevailing market conditions he wasn’t able to exit until some months later and he did pay a loan servicing fee during the time he was waiting to exit.

In my view the way Assetz sought to vary the terms didn’t fairly take into account Mr S’s ability to exit. I appreciate due to the nature of P2P investments – and in taking into account the prevailing market conditions, liquidity and ability to exit isn’t easily possible compared to other financial services contracts. But having reviewed the circumstances – and taking into account the above FCA guidance – I’m currently not persuaded Mr S has been treated fairly. I don’t find it fair that because it took time to sell Mr S’ loans, he should be bound by a new fee for the duration of that sell down. Mr S has provided consistent and plausible evidence that he didn’t accept the fee and wanted to exit immediately to avoid paying it. As far I’m aware he didn’t invest further or seek further lending after being notified of the fee.

So while I have taken into account the reasons why Assetz felt it needed to introduce the fee and the aims of it, I think it should have made consideration for Mr S’s request to exit the contract without accepting the fee. The lending terms for using the platform are clear that an account can only be completely terminated when the lending member doesn’t have any current loans outstanding. But I think Assetz could have allowed Mr S to avoid the fee during the time it took to sell his tradable loans (i.e. those not in default).

Overall, Mr S agreed to utilise the services Assetz provided on its platform on a certain basis and at a certain cost. When Assetz unilaterally changed that – Mr S revaluated the nature of the bargain. He chose not to use Assetz’s services on the new basis, and I don’t think it would be fair or reasonable for Assetz to require him to have to pay for something he didn’t agree to. For this reason, I think Assetz should refund Mr S the lender service fee he paid, while waiting to sell his tradable loans.”

Mr S responded and had nothing further to add.

Assetz responded and provided further information and comments for me to consider. In summary it said:

- Mr S agreed to investing on the platform knowing that a fee could be introduced at any time and the ability to sell his loans on the secondary market was dependent on there being willing buyers. So, he knew as long as he still held loans, Assetz would still need to service his loans – which became more challenging with the onset of the global pandemic.
- The terms and conditions reserved the right to introduce a fee, though this was only

done when the pandemic made it a necessity. Utilisation of the services provided wasn't varied. A terms and conditions amendment was made, as opposed to a variation to apply a fee. The amendment did not introduce any restrictions to exit that were not already in existence – i.e. the only way to “withdraw” is for another investor (lender) to replace an existing Investor.

- There are important distinctions in the way Mr S invested, the way services were provided and continued receipt of interest. For Access Account the fee was taken from the margin between the relevant target rate and the manual lending account rate – so there was no decrease in the interest actually received by investors due the implementation of the fee.
- There is a distinction between a request for account closure and a withdrawal request. Mr S knew that membership can be terminated only once loan holdings are sold or repaid. Other than for seven days for the Access Accounts, all other accounts and the associated aftermarkets have operated as normal throughout the time frame in question.
- A fee for loans under management reasonably includes all loans under management, including those that investors would like to sell but can't through no fault of ours, especially given how actively the loans were having to be managed during the pandemic. Withdrawal times have never been guaranteed and warnings were displayed on the website and in other notices provided. The inability of investors to withdraw was as a result of withdrawal requests outstripping deposits.
- Mr S was given more than the required 30 days' notice of the implementation of a fee.
- The introduction of the fee did not impose any barriers to exit that were not already in existence at the time. For example, by reference to the the FCA guidance to which the ombudsman refers, there was no exit charge or notice period required.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I've considered the additional comments and evidence that Assetz has provided. Having done so, I haven't found reason to change the conclusion I reached in my provisional decision. I'll explain why.

Firstly, I acknowledge the points made about the existing terms and conditions including a section that indicates a fee could be charged. It isn't in dispute that there was a term that says Assetz “...reserve the right to introduce a membership or joining fee in future”. But what this term didn't include was the amount that could be charged, what it was for, or in what situation it would be charged. So, there was no basis from the existing terms for Mr S to understand the scenario when he could end up paying an increased cost. The variation to the terms in April 2020 gave this information – and it did actually introduce a specific name for the fee, a Lender Loan Servicing (LLS) fee (as oppose to calling it a membership fee).

Assetz says when it introduced the fee the utilisation of services provided wasn't varied and it made an amendment to the terms and conditions as oppose to a variation to apply a fee. But while the service may not have been amended the cost to Mr S was varied – so I'm not persuaded by Assetz's arguments on this point. As I mentioned above the amendment to section two of the terms provides significant detail about a newly named fee with a specific start date for introduction, an amount to be charged and the conditions under which it will be applied. In my view this is something very different to just being a minor amendment to an existing term – specifically because it changed the cost of the product for investors. There is a material change in the price for Mr S because he had been investing on the platform for many years without paying this fee – a fairly vague term that says a membership fee could

be introduced is replaced with a direct change in price with full details of fee. So I think the FCA guidance on variation terms has relevance when considering whether Mr S has been treated in a fairly.

I have noted Assetz has provided its rational for introducing the fee and provided reasons relating to the impact of the pandemic, and that it gave Mr S 30 days' notice. In my provisional decision, I accepted that there was evidence that Assetz had considered investors interests when it decided to introduce the fee. But key to my findings was that Mr S had no way of avoiding the fee if he didn't accept it – which is something that Mr S was clear that he didn't want to do. The communication Mr S had with Assetz immediately after the notice of the fee shows that he rejected the update to the terms and when he was told he couldn't immediately withdraw his funds to avoid the charge, he asked for his account to be closed.

Assetz say the change to the terms didn't introduce any restrictions to exit that weren't already in existence. I acknowledge the points made about supply and demand on the secondary market being the reason for no guarantee of immediate exit. I have also noted the points made about the difference between withdrawal request and account closure. This includes all the information Assetz has provided from its website detailing the operation of the different sub-accounts Mr S held. But I don't think this information is sufficient to say Mr S has been treated fairly when the LLS fee was introduced.

It is understood Mr S wasn't told he could withdraw invested funds whenever he wanted and without any delay – and effectively close his account with immediate effect. But at the time the fee was introduced Assetz was aware that there were liquidity issues in completing withdrawals due to what it described as an end to normal market conditions in mid-March 2020. So, while it may be correct that the mechanism to withdraw invested funds didn't change, the ability to exit was very different to that available in normal market conditions. In this situation, Mr S was faced with having to pay a higher price for his investment (because of a change to the terms) and no ability to avoid this because of the prevailing market conditions. While the market conditions were outside of Assetz's control, the way the fee was introduced wasn't. So I still think it would have been fair for Assetz to waive the fee in the scenario where Mr S was seeking to terminate his relationship and the thing preventing him from doing that was the liquidity issues caused by the market conditions. I acknowledge that Mr S's loans were still being serviced when they were waiting to be sold (or repaid) but I don't agree this means that it is fair for him to be bound by a fee that he clearly rejected by asking for his account to be closed.

I've noted Assetz comments about the different types of sub accounts and how fees are applied. It says there are distinctions in the way Mr S invested, the way services were provided and continued receipt of interest – meaning for the Access Accounts there was “no decrease” in the interest due the implementation of the fee. In this scenario, I accept that there is no need for Assetz to refund fees if they had no impact on interest payments. But for other sub-accounts where interest paid was reduced because of the introduction of the fee this should be returned.

Putting things right

To put things right Assetz should refund Mr S the LLS fee he paid (where it reduced the interest paid to him).

My final decision

I uphold Mr S's complaint and direct Assetz SME Capital Limited to refund him the lender loan servicing fee as described above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 22 April 2022.

Daniel Little
Ombudsman