DRN-4379416

The complaint

Mr C complains about a fee Assetz SME Capital Limited (Assetz) has introduced to the accounts he holds on its peer to peer (P2P) lending platform. He believes he has been treated unfairly and requests that he is refunded the amounts he has paid towards the new fee.

What happened

In August 2015, Mr C opened an account on Assetz's P2P lending platform and over a number of years invested in several accounts.

On 31 March 2020, Assetz informed Mr C 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. It was called a Lender Loan Servicing Fee ("LLS fee").

Immediately following this Mr C raised concerns with Assetz and sought clarity on the justification for introducing the fee as he didn't agree that it should be charged. Assetz treated Mr C's inquiries as a complaint and issued him with a response. In summary it said, the terms and conditions Mr C agreed to allowed it to introduce a lender membership fee. It referred to a term that said it had the right to introduce a membership fee in the future and another term that it said allowed Assetz to update the terms and conditions.

Mr C wasn't happy with the response. He responded and reiterated that he didn't consent to the imposition of the new fee and wanted a refund of any monies deducted from his funds and accounts in connection with the LLS fee. After considering his position he decided to refer his complaint to this service for an independent review.

I issued my first provisional decision in January 2023 – and didn't propose to uphold the complaint. In summary I said that I did have concerns with Mr C's lack of ability to exit the contract when he was given notice of the LLS fee but I thought even if he was provided with the opportunity to exit the platform and avoid the fee, he wouldn't have taken it.

Mr C didn't agree with the provisional decision and provided further submissions for me to consider. Following this, in August 2023, I issued a second provisional decision, upholding the complaint. This is what I said:

"As previously noted, the crux of Mr C's complaint is about the introduction of a new fee on his crowdfunding accounts which was first charged in May 2020. I can see Assetz notified Mr C 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."

In its justification for introducing the fee 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 C opened his first account. These do explain that there's a possibility of charging a membership fee - the terms say under Clause Two ("C2"):
"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 C, Assetz referred to Clause 20 ("C20") of its terms and conditions to demonstrate that the contract gave it the ability to make updates. The relevant term says:
"20. Altered Circumstances and Changes to the Terms

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.

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.

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."

In respect of Mr C's complaint there are two relevant terms - set out above - which seek to give Assetz the ability to vary the contract. Under C2 the contract attempts to reserve Assetz's right to introduce a "membership fee" in future and under C20 it seeks to give a broader ability to make unspecified changes in relation to a wide range of circumstances.

To be clear, it's not for me to decide whether the terms Assetz has sought to rely on to introduce the fee are lawful or whether there are unfair term in the contract – 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.

Mr C entered into a contract with Assetz in August 2015 when he opened his first P2P lending account. At this time the relevant law under which the terms of a newly entered contract should be assessed is the Unfair Terms in Consumer Contracts Regulations 1999 ("UTCCR 1999".) So, I've had regard for this legislation when considering this complaint.

I note the following sections from the UTCCR 1999 that are of particular relevance to my consideration of Mr C's complaint about Assetz:

UTCCR 1999 Reg 4 says that the UTCCR 1999 apply to contracts between a seller/supplier and a consumer:
4._(1) These Regulations apply in relation to unfair terms in contracts concluded between a seller or a supplier and a consumer._

UTCCR 1999 Reg 5 sets out how fairness should be understood:
5._(1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer._
(2) A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.

UTCCR 1999 Reg 6 sets out how fairness should be assessed:
6._(1) … the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent._
(2) In so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate–
(a) to the definition of the main subject matter of the contract, or
(b) to the adequacy of the price or remuneration, as against the goods or services supplied in exchange.

UTCCR 1999 Reg 7 says that the language of the contract should be clear:
7._—(1) A seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language._
(2) If there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail but this rule shall not apply in proceedings brought under regulation 12.

UTCCR 1999 Reg 8 sets out the effect of an unfair term:
8._—(1) An unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer._
(2) The contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term.,

The UTCCR 1999 (in schedule 2) also sets out a list of terms which may be regarded as unfair – and says that terms which have the following effect may be unfair:
"… _enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract; "_

But it also goes on to say (in schedule 2 2(b)) that some variation clauses in financial services contracts may be fair "…where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately."

In December 2018, the FCA published guidance FG18/7: Fairness of variation terms in financial services consumer contracts under the Consumer Rights Act 2015 (CRA 2015). While this guidance is focused on the CRA 2015, the FCA makes clear that the guidance is also relevant to the UTCCR 1999. I've also considered this guidance, but acknowledge it was published after Mr C entered into the contract with Assetz.

I note the following from Chapter 3 para 49 of this guidance – which has relevance to this complaint and Assetz's ability to fairly make changes to the contract: "A reason which allows the firm to make changes to reflect changes to legislation, changes in regulatory requirements (including prudential requirements) or to reflect case law, is generally likely to be a valid reason."

Taking into account the relevant law I have set out; I've considered whether the introduction of the LLS fee was fair and reasonable in all of the circumstances. In making this assessment, I've firstly thought about whether the terms Assetz's seek to rely on cause a significant imbalance in the parties' rights and obligations under the contract, to the detriment of Mr C.

When Mr C first entered the contract, my understanding is that there were no fees that were paid by lenders. He did have the ability to exit the contract, but this wasn't completely straightforward – because in order to release his funds from existing loan it would require a replacement lender to be available to take on his loan parts. In seeking to introduce the LLS fee, Assetz were introducing a fee that wasn't previously payable.

On face value C2 would seem to immediately fall foul of UTCCR 1999, as it allows Assetz to unilaterally introduce charges without notice and without giving lenders the ability to terminate the contract. But I need to consider C2 in light of the whole contract – with C20 being relevant as this sets out how Assetz's could make changes more generally.

It appears Assetz sought to use C20 to amend C2 – as it did change and provide full details of the LLS fee in the updated terms it introduced in late April 2020. Looking at C20 some of the contents appears to align with the guidance set out in FG18/7 within the potentially 'fair' reasons for amending the terms – for example the reference to changes in the law, HMRC practice and regulations. But other parts of C20 – specifically the part that says Assetz's reasons for making a change might include "change in circumstances… or if any Assetz Capital Company wishes to make changes to the services which it provides on the Network or Website" – appear to fall outside FG18/7's potentially 'fair' reasons. So, this does raise concerns about fairness as it makes it difficult for lenders, like Mr C, to understand when changes might be made or the level of changes that might introduce new charges.

But Mr C's contract with Assetz is open-ended. I note the following European case law from the case of Vertrieb – which acknowledged in open-ended contracts, the firm has a legitimate interest in being able to adjust the fees they charge. This says: "the legislature recognised, in the context of contracts of indeterminate length… the existence of a legitimate interest of the supply undertaking in being able to alter the charge for its service..." This opinion is also supported by the FCA guidance in FG18/7. So relying on C20 to introduce the LLS fee doesn't automatically mean Assetz is treating Mr C unfairly.

A further consideration of fairness is whether the contract provides that notice of the variation/new fee should be given and, if not accepted, whether the consumer had the ability to dissolve the contract immediately. I've looked at what the terms said about what notice is given and the ability to leave the contract. In respect of notice the original terms say: "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."*

This indicates that only in some circumstances notice will be given and this is likely to be through updates to the website.

The ability for a lender to exit the contract is also covered. This says there was a ways in which a lender could stop participating in this investment, but only one way in which a lender could free themselves. These are:

- *Through transfer - Clause 8 says that a lending member could transfer their interest in a loan to another lender, which would bring the lender's commitment to an end, thereby freeing the lender;*
- *Though termination - Clause 16 says that a lender may terminate their membership with immediate effect, but that "complete termination will only be possible if the Member does not have any current Loans outstanding" and that "Termination of a Lending Membership will not affect any outstanding Loans."*

This means while there is a general (and limited) ability to terminate the contract, there isn't a specific power to leave in response to a variation.

The previously mentioned case law in Vertrieb says that a consumer must actually be able to exercise their power of termination – this says:
"With respect… to the consumer's right to terminate the supply contract he has concluded in the event of a unilateral alteration of the tariffs applied by the supplier, it is of fundamental importance… that the right of termination given to the consumer is not purely formal but can actually be exercised."

Mr C was given notice of the LLS fee on 31 March 2020 – which was a month before it started to be charged on the 1 May 2020. But his ability to reject the change and end the contract was significantly impaired at the time. As previously mentioned, the ability to close a P2P account was dependent on other lenders taking on loan parts. But importantly, in late March 2020, Assetz had communicated to P2P lenders that abnormal market conditions was impacting the secondary market and the ability to make withdrawals. Effectively this meant at the time the LLS fee was introduced there was little prospect of Mr C being able to fully exit the contract and there was ongoing uncertainty around his ability to sell loan parts.

In my view, there is a strong argument to say that C2 and C20 cause a significant imbalance in the rights and obligations of Assetz and Mr C, to Mr C's detriment. In law, if significant imbalance is caused, then the term is unfair and cannot bind the consumer. The European case of Aziz (approved by the Supreme Court in ParkingEye v Beavis [2015] UKSC67) says the court should consider what the consumer's position would be at law, if they hadn't entered into the contract:
"68 …in order to ascertain whether a term causes a 'significant imbalance' in the parties' rights and obligations arising under the contract, to the detriment of the consumer, it must in particular be considered what rules of national law would apply in the absence of an agreement by the parties in that regard. Such a comparative analysis will enable the national court to evaluate whether… the contract places the consumer in a legal situation less favourable than that provided for by the national law in force…"

And - whether the business could reasonably assume the consumer would have agreed to the relevant term, if the contract had been individually negotiated:
"69 With regard to the question of the circumstances in which such an imbalance arises 'contrary to the requirement of good faith'… the national court must assess for those purposes whether the seller or supplier, dealing fairly and equitably with the consumer, could

reasonably assume that the consumer would have agreed to such a term in individual contract negotiations."

Contrary to COBS 6, when he first entered the contract, Mr C wasn't aware when the LLS fee might be charged or how much the LLS fee would be. Indeed, the information given at the outset suggested he would pay no fees, and there was no information about how any future fee might be calculated. It seems unlikely that a reasonable consumer would have agreed to an individually negotiated contract which left them vulnerable to fees of an unspecified amount, calculated via an unknown method, which could be introduced at the discretion of the business.

So, the evidence does point towards the likelihood that a court would find that both C2 and C20 are unfair under the UTCCR 1999. This scenario is covered in the UTCCR 1999 - Reg 8(2), says: "The contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term". I understand this to mean Mr C should be able to continue the contract without the relevant unfair terms – and would effectively mean Assetz couldn't introduce the LLS fee.

However, I'm not bound by the law – rather I must decide the complaint based on what is fair and reasonable in all the circumstances of the case. Having done, so I'm minded to reach a conclusion that Mr C hasn't been treated fairly by Assetz.

I acknowledge that Assetz has provided some justification for introducing the fee in light of the market conditions caused by the impact of the global pandemic. I recognise 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. I've also had regard for the information provided to explain the additional costs it faced as a result of the pandemic – which do bear relation to the impact of the pandemic at a time when income was also suppressed. And as I've previously mentioned, Assetz did give notice of a month to Mr C ahead of the introduction of the LLS fee.

But overall, considering all of the evidence, I'm satisfied that it is not fair or reasonable for Assetz to introduce a new fee that changed the price of the contract – without giving Mr C the opportunity to reject this. The LLS fee introduced a new charge that Mr C was unaware of when he first opened his account – and had no reasonable understanding of when such a fee would be applied or how much it would cost him. I don't find the terms of the contract can be fairly applied to introduce this fee in the way that it was. The practical result of this conclusion is that I don't think it was fair or reasonable for Assetz to introduce the LLS fee to Mr C's account in May 2020.

As I've reached a conclusion that it wasn't fair and reasonable for Assetz to rely on the variation clauses in the contract to introduce a new fee, I need to decide how it should put this right. I consider that my aim should be to put Mr C as close to the position he would probably now be in if fee wasn't introduced. To do this any LLS fee that Mr C has been charged should be refunded to him by Assetz as if it hadn't ben deducted from the interest paid into his accounts."

Assetz responded. It didn't accept the findings and provided further submissions for me to consider. In summary it said:

- The terms were fair in the context of a contract of indeterminate duration.
- The terms were fair under the UTCCRs when properly considered at the time the contract was entered.
- The terms could (and did) operate to the benefit of lenders (including Mr C).
- Assetz had a legitimate interest in the terms such that they were not contrary to the

requirement of good faith.
- Putting the strict law aside, Mr C was treated fairly and reasonably. The fee was introduced to protect his investments and, even with the introduction of the fee, Assetz remained (on Mr C's own evidence) the best place for him to invest his money.

Mr C responded to the provisional decision and provided further submissions in relation to the remedy proposed. In summary he said:

He is concerned about the reference to the LLS fee being deducted from interest. He refers to a section of the findings that explains as a remedy Assetz should refund him any fee as if it hadn't been deducted from the interest paid into his accounts. He has requested any reference to fees being deducted from interest be deleted. He requested this to be consistent with the wording and clear intent of the rest of the decision letter. He also argues this is necessary to ensure that Assetz are in no doubt whatsoever what they are required to do as it has maintained that in the AAs the LLS fee was not paid out of interest received by Lending Members. He is concerned a misinterpretation could lead to the refund of fees being limited to only that part of the LLS fee deducted from interest.

Mr C also refers to another decision issued by this service about the introduction by Assetz of the same LLS fee and says this shouldn't have a binding influence on the ombudsman's determinations for his complaint – again in relation to repaying the LLS fee where it reduced the interest paid to him.

Lastly, he has requested that I consider awarding interest on the award until payment by Assetz in order to put him in the position that he would have been in if the LLS fee had not been deducted. He says the payment of interest would compensate him for the loss of the opportunity to invest the money taken and retained by Assetz for a period of well over two years.

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 reminded myself that in considering what's fair and reasonable, I have to have regard to relevant law and regulations, but I am not necessarily bound to follow them. In the present case:

1. It's necessary for me to consider whether the variation clauses were potentially unfair as a matter of law. The court is the ultimate arbiter of whether as a matter of law is unfair, so I have considered whether I think a court would have a reasonable basis to conclude that a term was unfair; and
2. The effect of unfair contract terms as a matter of law is that they will not bind the consumer, However, I think the primary question for me is whether in substantive terms Mr C was, in fact, treated in a way that I consider to be unfair.

I've considered the further submissions made by the parties. Firstly, I will comment on the response received from Assetz. The basis of the main argument put forward is that my provisional conclusion incorrectly finds that Mr C has been treated unfairly when the LLS fee was introduced. While I have not addressed every single point Assetz has made, I have considered them in detail and am satisfied that my findings below address the substance of the arguments that Assetz has put forward. I will take the main points in turn.

Assetz says my findings fail to give sufficient weight to the fact that the contract between itself and Mr C was of indeterminate duration. It refers to the UTCCR stating that the indeterminate duration of a contract has a clear bearing on whether a variation clause is unfair. And this is also recognised by the FCA at paragraph 53 of FG18/7 guidance. It says this hasn't refenced in the decision so has fallen into error as a result.

The indeterminate duration of the contract was taken into account in reaching my finding. I explained this point in the context of open-ended contracts and firms having a legitimate interest in being able to adjust the fees they charge. I also made reference to legislature and the FCA guidance in FG18/7. So, I don't accept that this wasn't taken into account in my considerations. I think that what Assetz is really saying is that I didn't give this factor as much weight as it thinks I should have done.

And I'm not satisfied that the fact that Assetz may have had a legitimate interest in adjusting its fees, or the fact that this was a contract of indeterminate duration *necessarily* makes the clauses that Assetz relied on in introducing the LLS fee fair as a matter of law. In deciding whether a court may have a reasonable basis to conclude that C2 and C20 are unfair as a matter of law, I have to consider whether, contrary to the requirements of good faith, a court would consider that they cause a significant imbalance in the rights and obligations of the parties to the detriment of the consumer. The indeterminate nature of the contract is something I have had regard to in particular in considering (i) the extent of Assetz's legitimate interest in introducing the LLS fee and (ii) whether C2 and C20 were sufficiently transparent (which are two matters the case law and FCA guidance suggest need to be taken into account).

Assetz also says C20 is not as broad as an "any reasons" clause but instead only allows Assetz to makes changes if: (i) there is a change in circumstances; (ii) there is a change in the law; (iii) there is a change in HMRC practice or regulation; and (iv) if Assetz wishes to make changes to the services it provides. In then references the impact of the global pandemic as a relevant "change in circumstances" and this is what Assetz relies upon. It argues this an error to rely on the list of "potentially fair clauses" in FG18/7 as an exhaustive list. It says just because "change in circumstances" does not appear in the FCA's list, that raises concerns about fairness.

While I agree that C20 is not as broad as an "any reasons" clause, it is still <u>very</u> broad. "Change in circumstances" gives the consumer no real insight into when Assetz may decide that it is necessary to amend the agreement. I remain satisfied that C20 significantly lacks transparency, in the sense that it doesn't give the consumer any substantial ability to foresee, on the basis of clearly intelligible criteria, the economic consequences for them that derive from C20. And I'm satisfied that this is an issue that I need to give appropriate weight when considering whether a court may decide that the term is unfair.

I note that Assetz suggests that as a matter of law implied terms <u>may</u> in practice restrict how the agreement might be varied and fees charged. However, I note that this is not absolute, and I've reminded myself that footnote 45 of FG18/7 states that *"the FCA considers that an express term whose scope is narrowed by an implied term, with the result that its effect is different from what a consumer would reasonably believe from the wording of the term, may lack the required transparency."* In the present case, I'm satisfied that a court would have a reasonable basis to conclude that, even with the existence of the implied terms to which Assetz has referred, C20 would still significantly lack transparency, and that this may be something a court would think was significant in considering whether it is a fair term as a matter of law.

Assetz has referred to paragraph 56 of FG18/7. This says:

"Firms should consider whether it is practicable to give the consumer a simple explanation, which the average consumer could understand, of the firm's likely approach to changing prices, and in particular an explanation of (1) the circumstances in which these may change, (2) in general terms how the new price would be determined and (3) the potential size of any price increases. Firms could give this information in the contract, or in supporting materials before the contract. Depending on the nature and type of the contract, this information could include examples or explanations of variations that could be made under their variation terms. While this could include examples of past variations the firm has made, a firm should consider whether the average consumer would understand that past variations are not necessarily a guide to the future use of the variation term. When considering the above, firms should also consider their obligations under competition law, (including not sharing any commercially sensitive information with their competitors)."

I agree, given the ongoing nature of the contract, it is not possible for the trader to anticipate <u>all</u> the ways in which circumstances might change and specify with precision what variations may be required. But Assetz didn't include <u>any</u> information about the potential for a change in price. The above guidance indicates that a simple explanation on the likely approach to changing prices may be sufficient. But I haven't found Assetz did or tried to do this, and I consider that Assetz has bluntly suggested that this would not have been practicable without giving any adequate explanation why. So I'm not satisfied that Assetz's suggestion that *'in a contract of indeterminate duration, a clause which allows a change to the terms and conditions when there is a change in circumstances is clearly a fair one'.* I think that overstates the case, and fails to engage with the specific circumstances I am considering.

As explained previously, there wasn't any way Mr C could have understood when or how a variation could impact the price he paid. While Assetz say C2.2 put Mr C on notice that a membership fee <u>may</u> be introduced in the future, I consider that this did little or nothing to give any sort of indication as to of (1) the circumstances in which a fee may be introduced, (2) in general terms how the fee would be determined and (3) the potential amount of any fee.

I also don't agree that any implied term that any fees would be reasonable and would be proportionate to the objective for which that fee was introduced was sufficient to mitigate what I consider to be an almost total lack of transparency. I repeat the point above regarding footnote 45 from FG18/7 – in my opinion, a court would be entitled to conclude that the term significantly lacked transparency, which may be a significant factor in considering whether it is a fair term as a matter of law.

Assessment at the time the contract is entered

Assetz say under regulation 6(1) of UTCCRs, the fairness assessment has to be carried out by reference to the circumstances existing at the time the contract is entered not when the term in question is exercised. It says I failed to do this because I erroneously looked at whether Mr C could actually exit the contract in March 2020. It goes on to say, by looking at the time the contract was entered into, it is clear that Assetz's intention was to enable lenders (including Mr C) to leave in response to a variation – subject to practicalities inherent to P2P sector investments. The nature of Mr C investment meant his loans cannot simply be called in – so the illiquid nature of the investment meant it would take time.

The points are understood – particularly in relation to the practical hurdles of fully exiting the contract. However, the factors that existed in March 2020 that prevented Mr C from easily exiting the contract were not only foreseeable when he entered into the agreement with Assetz but were, in fact, inherent in the nature of the arrangements As Assetz has said, *'this is an obvious and inescapable consequence of the fact that investments in peer-to-peer loans are illiquid.'* The terms and conditions make clear that a lender could not exit the agreement unless either (i) an alternative lender was available, or (ii) the loans in question were redeemed. Both of those factors were matters wholly outside of Mr C's control.

Assetz say it is an essential part of the fairness assessment to consider whether the term under challenge could operate to the benefit of the consumer (see Mohamed Aziz v Caixa d'Estalvis (C-415/11) at paras 71–74 and Cavendish V El Makdessi, ParkingEye Ltd v Beavis [2015] UKSC 67 at para 105(4).) And it should also be considered whether the term has operated to the customer's benefit (see CJEU Freiburger (C-237/02) at paras 16 and 23). In this case, Assetz says, the term operated to Mr C's benefit. I note that paragraph 69 of the FCA guidance says *'a variation term may indirectly serve the consumer's interests in circumstances where other restrictions on the firm mean that the ability to flex rates fairly on existing products enables the firm to continue to exist and the customer to continue to receive the product/service in question.'*

I agree that this is relevant to the fairness assessment, but I'm not satisfied that this factor carries the weight that Assetz suggests. First, on any reading, C2 caused Mr C direct financial detriment, in that he was required to pay a fee of 0.9% per year of his total investment. While it could be said that this was of *some* benefit to Mr C, that is only because – according to Assetz – the alternative was that the whole platform would have been in jeopardy. So I think it is fair to say that any benefit was relative – it was more beneficial than a worse alternative, but both would have involved some detriment to Mr C. That is different from e.g. an interest rate variation clause that may go up or down due to changes in a mortgage company's costs of funds. In addition, the fact that Assetz considered it necessary to introduce the LLS fee might be said to be at least partly linked to the way in which the business was structured and funded in the first place, which was Assetz's choice.

Assetz also raises a point in relation to applying an immediacy requirement. It doesn't agree with the reference in the provisional findings to a consumer being able to exit the contract "immediately". It says the immediacy requirement only applies to interest rate variation clauses in financial contracts not to variation clauses in contracts of indeterminate duration (see UTCCRs, Schedule 2, paragraph 2(b)). Mr C could exit the contract but not immediately – in a contract of indeterminate duration that satisfies the requirements of Schedule 2, paragraph 2(b).

Assetz is right to point out that the requirement to be able to dissolve a contract <u>immediately only</u> applies to terms under which a supplier of financial services reserves the right to alter the rate of interest payable by or due to the consumer, or the amount of other charges for financial services without notice where there is a valid reason. In an indeterminate contract such as that between Assetz and Mr C, the requirements are that the business is required to inform the consumer of the change 'with reasonable notice and that the consumer is free to dissolve the contract.'

However, I'm not satisfied that this takes things much further. First, the requirement as I understand it is that the consumer should be free to dissolve the contract within the reasonable notice period. I'm not satisfied that this would have been possible with Mr C's investments because they were illiquid and a consumer in his position could only withdraw if either another lender was found, or the borrower redeemed the loan. Even if the consumer only needed to be free to dissolve the contract within a reasonable period of time (and not by the end of the reasonable notice period) I am still satisfied that in practical terms this would have been very difficult. And the case law in unequivocal about the way in which consumers must practically be able to dissolve the contract, rather than merely have the legal right to do so under the terms of the contract.

I am not satisfied that Assetz's suggestion that Mr C *could* dissolve the contract (while acknowledging that it might take some time) answers this concern. And I'm conscious that in the RWE case the court confirmed at paragraphs 51 and 52 that a lack of transparency in the variation terms could not in principle be cured by providing a right to terminate. If anything, I consider that in the circumstances of this agreement it is arguable that the fact that there were significant practical hurdles to overcome before a consumer could exit the contract meant that there was a greater onus on the business to do all it could to achieve as much transparency as possible in how the introduction of fees would work in practice.

Assetz refers to the economic environment at the start of the pandemic. It says the introduction of the LLS fee protected Mr C's position as a lender and so he has benefited as a result. It also argues the abnormal circumstances in the wider economy at the time provided a legitimate interest in a variation clause which enabled it to respond to a change in circumstances. To support this makes a point that a clause is not unfair if the trader has a legitimate interest in its inclusion (see ParkingEye Ltd v Beavis [2015] UKSC 67). Further, it believes this legitimate interest is even stronger when considering the nature of the service it is providing – including P2P platforms being susceptible to changes in wider economy.

I acknowledge and understand the points Assetz make about the impact of the pandemic on the economy in and around March 2020. I have taken this into account and recognise why it had a legitimate interest in exercising C2 and C20 (as referred to in my provisional findings). But while I think that a legitimate interest is likely to be necessary for a contractual term to be fair, it is not – in and of itself – sufficient.

Lastly, Assetz argues it could reasonably assume that Mr C would have agreed to the variation clause in an individual negotiation. It says a reasonable consumer would understand that in a contract of indeterminate duration, circumstances may change such that the terms of the contract might need to be varied and a new fee might need to be introduced - provided they were reasonable variations and the consumer would have the right to exit the contract. But, in my view, this argument fails to recognise the broad nature of the clauses relied on here to introduce a new fee. Would a hypothetical consumer in Mr C's position, or indeed Mr C himself have individually negotiated to allow for a new fee to be introduced without any of understanding in of the circumstances in which it would be introduced and how it would be calculated? I don't think so. There was no basis from the contract for Mr C to understand how a new fee may be applied, so I don't find it reasonable to say he would have agreed to this in an individual negotiation.

Overall, having consider the points made by Assetz I haven't found reason to change the conclusion I reached in my provisional decision about whether a court would have a reasonable basis to conclude that the terms allowing Assetz to introduce the LLS fee were unfair as a matter of law. So, it follows that I find it wasn't fair and reasonable for Assetz to rely on the variation clauses in the contract to introduce a new fee. I note that Assetz has criticised my conclusions, but I am satisfied Assetz has largely disputed the weight I have given to various factors. While there may be issue where, on the available evidence, there could be reasonable differences of opinion, I am not satisfied that the points Assetz have made are sufficient to change my overall conclusions on this issue.

On that basis, I think there are good reasons to conclude that it was not fair or reasonable to Assetz to introduce the LLS fee. The circumstances in which it might do were insufficiently clear from the beginning, it was not possible for Mr C or others like him to understand the mechanics of how it might be done (and therefore the economic consequences to him when he entered into the contract), and the nature of the service meant that Mr C or others like him were never likely to have had any practical choice other than to accept the fee.

So, I think that there are good reasons to suggest that the fact that C2 and C20 were arguably unfair as a matter of law directly led to Mr C being treated unfairly. However, I am conscious that a court may not agree with my interpretation of the law. And while I have to have regard to relevant law and regulations, I am not bound to follow the law. My job is to decide what is fair and reasonable in all the circumstances of the case. So even if a court may disagree with how the law applies to the facts, I've gone on to consider whether, in a broader sense, it was fair and reasonable for Assetz to introduce the LLS fee in the way that it did.

I note that Assetz has indicated I should consider: (i) the fact that the covid pandemic led to an unprecedented economic shock; (ii) the fact that its aim was to stabilise the platform; (iii) 99.9% of lenders accepted the fee without complaint; (iv) Mr C did not seek to withdraw his funds; (v) even after paying his fee, Mr C accepts that he was better off investing with Assetz; and (vi) Mr C actually increased his investment. Assetz argues that, considering those facts, *'the only reasonable conclusion is as the Ombudsman reached in his initial Provisional Decision: Mr C was treated fairly and reasonably and his complaint should not be upheld.'*

I don't agree that this is the only reasonable conclusion. This is not a case where a clause may be technically unfair, but this unfairness is academic because of the way the customer was treated. To all intents and purposes – especially given the fact that the terms and conditions said that by continuing to use the website he was deemed to have accepted the variation – I think that Mr C had little choice but to put up with price increases introduced in reliance on C2 and C20. I don't think it can be said that he 'accepted' the increases – Assetz gave him little choice.

The fact that Mr C could have sought to extricate himself from the platform (on what I think was a relatively protracted timescale) does not, in my opinion, mitigate the unfairness of having a fee imposed on him where, when he entered into the agreement with Assetz, he had almost no visibility as to when it might be levied and how it would operate. While the fact that he remained on the platform and the fact that significant numbers of other customer did not complain may tend to illustrate that any unfairness was not particularly severe, I don't agree that it means that there was no unfairness whatsoever. Whether to stay on the platform, whether to leave, and whether to complain are not simple, binary questions, and I consider that it would be disproportionate to expect Mr C to have exited the platform altogether before being able to conclude that he had been treated unfairly.

While I do agree that in an open-ended contract it is more difficult to give the same sort of specificity about when a fee may be made and how it would be charged, I would have expected a fair clause to try to give greater detail than the one I have had to consider. That would at least have given customers like Mr C a greater understanding of the potential consequences for them of joining the platform and enabled them to make a better-informed decision about their options.

In conclusion, for the reasons described above and those in my provisional decision, I uphold this complaint.

Putting things right

I consider that my aim should be to put Mr C as close to the position he would probably now be in if fee wasn't introduced. This means he should receive the return that he would have had the LLS fee not been introduced.

In response to my provisional findings Mr C has provided comments on the proposed remedy. Firstly, I acknowledge his comments about providing clarity on exactly what should be refunded and his request to remove reference to fees that were deducted from his interest payments.

To be clear, I require Assetz to refund any LLS fee that has been paid by Mr C that has seen a reduction in his interest payments. I understand that Assetz deduct the fee differently depending on the type of account held. This is relevant to Mr C as he held a number of account types.

I acknowledge the information Mr C has provided about the operation of the AAs. And also, his comments about the different mechanisms used to collect the LLS fee between AAs and manual accounts. He doesn't accept Assetz's position that AAs lending members haven't suffered a loss where the collection of the LLS fee is from the margin (between the manual rate and target rate) and this has still allowed him to receive the interest due. He refers to AA lending members losing out as the provision fund and cash balances were reduced due to the collection of the LLS fee. He also highlights reductions in target interest rates for the AAs between April and September 2020 to support that even if target rates were met actual interest was reduced.

The basis of my direction is that Mr C should be refunded any LLS fee that has resulted in him seeing a reduction in his returns from his investment regardless of the account it was charged. Mr C cannot profit from the refund, so he shouldn't receive higher returns than he would have done if the LLS wasn't introduced. In the AAs he was entitled to receive the target rate – so if he didn't receive this because an LLS fee was applied, he will have suffered a loss. But I don't agree that it would be reasonable to pay him a LLS fee refund in the situation where he has received the target rate. My understanding of the AAs is that the target rate is a variable rate with a cap, and the rate wouldn't fall below a specific level. I understand Mr C feels the reduction in the target rate is evidence that the LLS fee reduced the interest he received. But I haven't found the AAs have operated outside of described variable capped target rate. I can see why Mr C aligns the changing in the cap with the LLS fee – but I don't accept this means he has received less interest as a direct result of it.

Mr C has also argued that he should be paid interest in addition to the refund of fees from the date he paid it until the date when settlement is made. I've considered this point. I've taken into account the information I've available about Mr C's running of the account – including his intention to remain on the platform. I recognise from the information Assetz has provided that the platform was operating under non-normal market conditions when Mr C incurred the LLS fee. Had the fee not been deducted then I've assumed that it would have been available for reinvestment (i.e. the funds could have been used to purchase loan parts). So, I think it is reasonable for him to receive a return on these funds. It is unclear exactly which loans Mr C could have invested in – and this will depend on which accounts the LLS fees are being refunded from.

I've noted Mr C's preference for a specified numerical rate of interest to be given. He has raised concerns about uncertainty of interpretation if a specific number isn't given. He has also referred to the 8% interest rate that is mentioned on our website as a suggestion. I've considered these comments, but I don't agree that it is appropriate to provide a numerical figure in the circumstances. The rate of return is given on the basis that the money would be invested on the platform, so it is reasonable for it to be linked to this. The 8% simple interest detailed on our website is awarded only in specific scenarios and not when considering a return on invested monies.

So, I find it is reasonable for Mr C to receive an average rate of returns based on the performance of the specific account that he was invested in for the period he didn't have access to the fees taken from his interest payments. This should be based on the average returns achieved on loans within that account and before fees are deducted.

What should Assetz do?

To compensate Mr C fairly, Assetz must:

- Refund any LLS fee that Mr C has paid leading to a reduction in the interest paid to him.
- Assetz should also add interest to the fee refunds from the date they were taken to the date of settlement. The rate of interest should be based on the average return on loans on the platform for the relevant accounts the fee was charged on. The rate should be taken on a monthly basis but compounded annually.

I required Assetz to set out the refund of the LLS fee it has been applied to Mr C's accounts in line with my direction above.

My final decision

I uphold this complaint and require Assetz to pay Mr C compensation in line with the above methodology.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 21 March 2024.

Daniel Little
Ombudsman