DRN-4777892

The complaint

Mr and Mrs H complain about the impact of Assetz SME Capital Limited's ("Assetz") decision to close its platform because this has led to their funds being locked in and a new fee has been imposed reducing the interest they receive on their investments. They have requested their loans are bought out and any fees they have incurred are refunded.

What happened

Mr and Mrs H have been lenders on Assetz's Peer-to-Peer (P2P) platform for a number of years - and have invested across several products.

In December 2022, Assetz announced that it had decided to close its retail platform and conduct a solvent run-off of its retail loan book. Assetz says this was due to the substantial rises in bank interest rates which led to lenders withdrawing from the platform. As part of the run-off process, Assetz announced that it was necessary to introduce a Lender Fee.

Assetz wrote to lenders on 15 December 2022 to explain the following:

"The ceasing of new retail lending means a significant drop in our income for the retail part of the business. We are in the process of reducing overheads to match this new permanent state and in the meantime, have calculated the following Lender Fees to be applied to cover the anticipated costs of adjusting the business to a run-off footing then managing the loan book through run off and returning capital to investors.

- *Through to end of June 2023 - 2.9% pa of performing loans*
- *July to December 2023 - 1.4% pa of performing loans*
- *January 2024 onward - 0.9% pa of performing loans*

(This equates to an average fee level of 2.15% for the first 12 months and a 5-year effective fee of 1.15% pa)

These are estimated fees and subject to review over time. They would be applied to interest received by investors (i.e.: on performing loans only), commencing once software updates are implemented."

Assetz also explained in this notice that it was closing its secondary market, a tool which allowed lenders to sell their loans to other lenders on the platform. As such, lenders like Mr and Mrs H were unable to exit from the loans they were invested in and had to wait for the pro-rata return of capital from loans that repay in the future.

Assetz then wrote to lenders on 17 May 2023 explaining the following Lender Fee amendments:

- Through to the end of December 2023 – 2.9% pa of performing loans
- January 2024 onward – 0.9% pa of performing loans
- This equates to an average fee level of 2.90% for the first twelve months and a five-year effective fee of 1.3% pa

Assetz wrote to lenders again on 16 June 2023 to make them aware of further amendments to the Lender Fee:

- For the period of June-September 2023 – 6.25% pa of performing loans
- October 2023 to December 2024 - 0.9% pa of performing loans
- Post December 2024 no fee expected
- This equates to an average fee level of 3.52% for the first twelve months and lower five-year average fee of 0.88% pa

In July 2023, Mr and Mrs H raised concerns with Assetz about the decisions it had made in respect of closing the platform. In summary they were unhappy Assetz had locked investors in for up to five years when previously they could have exited at almost any time. They also raised the fact Assetz had appropriated a large part of the interest that investors were earning on their loans and felt there was now an increased risk of capital losses for investors.

Assetz treated Mr and Mrs H's concerns as a complaint but didn't uphold it. In summary, it said:

- Its terms and conditions made lenders aware that it could introduce a Lender Fee.
- When deciding to introduce the Lender Fee, it considered that any variation to its terms should strike a fair balance between Assetz's and lender's interests.
- The Lender Fee benefits lenders as it allows Assetz continue to provide its service and provide better outcomes for them.
- Alternatives to the solvent run-off were considered but were assessed to be potentially of much greater detriment to lenders.

Mr and Mrs H didn't accept Assetz's response and so they referred their complaint to this service for an independent review.

One of our investigators considered Mr and Mrs H's complaint but didn't uphold it. In summary, they said they were satisfied that Assetz had considered alternatives to a solvent run-off and that its decision was ultimately fair and reasonable in all the circumstances.

Mr and Mrs H didn't accept the investigator's findings. They said they didn't think there was adequate justification for the closure of the secondary market and the locking in of their capital or the introduction of the Lender Fee. They provided further submissions. In summary they said:

- Assetz's modelling, the data and the relationship between the variables (which are assumptions) have been used to produce the answer it wanted – without independent scrutiny of the model. It could have followed the existing published wind-down arrangements, which have allowed outstanding loans to run down, retained the secondary market without the need for fees. But Assetz preferred to create a monopoly position by preventing investors exiting the market, knowing that they were then free to impose extra fees.
- The income Assetz obtains from the continuing loans is much larger than just the monthly monitoring fee. It also receives its monthly interest rate margin, end of loan fees, and additional fees when loans are extended beyond the original term. Anything owed to Assetz by the borrower takes precedence over anything owed to investors – so it is reasonably certain of getting its money while investors wait in line for anything that might be left.
- They don't accept Assetz forecasts about investors returns through the wind-up arrangements to be accurate – specifically that lenders would be better than the alternatives that didn't include a fee. Since Assetz put in place the wind-up arrangements they have seen new defaults and they expect there will be more over the next four years as the loan book runs off.
- They don't think Assetz has been transparent about the mix of retail/institutional lending on the platform. Following the success of the retail platform, Assetz decided to piggyback another arm of its group on to it to take selected loans. These loans weren't offered to retail investors, and anything the institutional side did not want proceeded to the retail side. It could be argued the retail side was closed down because it had done its job in creating opportunities for another Assetz arm. This can't be proved because insiders at Assetz are not going to reveal exactly what went on.
- They don't think the Lender Fee is required. They don't accept there has been an increase in operational costs when the loan book is shrinking. Assetz hasn't acted "fairly and reasonably" and the issues haven't been examined in detail, rather Assetz has been listened and not the investors whose money provided the launchpad for its success.

As Mr and Mrs H didn't accept the investigator's findings, the complaint has been passed to me to decide.

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.

Fairness of Assetz's term changes

The crux of Mr and Mrs H's complaint is that Assetz has treated them unfairly in the decisions it has made in winding up the platform - including how it introduced a Lender Fee on their P2P lending accounts. I can see Assetz notified them of this in its mailout dated 15 December 2022 and on its website.

Assetz says that it made lenders aware that it could introduce the Lender Fee in the terms and condition which lenders had to agree to in order to continue investing on its platform.

I've looked at the terms that were relevant when Mr and Mrs H opened their joint account and I not that these do explain the possibility of charging a fee. The terms said:

"At present there is no fee payable for being a Lending Member. The Assetz Capital Companies reserve the right to introduce a membership fee in future."

When they later opened individual accounts – the terms contained similar information bout the introduction of lender fees.

I note that 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..."

Assetz has referred our service to Section 21 of its terms to support that it could make updates to its terms. The relevant term says:

"2. Where a change to these Terms does not affect existing Micro Loans 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 Micro Loans 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, by either logging in or leaving investments within Investment Accounts or Access Accounts on a daily basis, each Lending Member agrees to be bound by the amended Terms."

While I appreciate this is a broad term, it does support that Assetz may vary its terms, but it still needed to consider the impact of any changes it made on its customers.

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.

The term is a 'variation clause' in that it allows Assetz to make changes to the terms of the contract. Assetz relied on this to introduce the Lender Fee. In December 2018, the Financial Conduct Authority ("FCA") published guidance that outlines the factors financial services firms should consider under the relevant legislation when drafting and reviewing variation terms in consumer contracts. I consider this to be relevant guidance to help me decide whether Assetz has treated Mr and Mrs H in a fair and reasonable way when it introduced the Lender Fee.

Factors that are typically considered when determining the fairness of variation clauses include things like whether the term creates a significant imbalance in the parties' rights and obligations, to the detriment of the consumer and whether customers are free to exit the contract if they don't accept the changes.

I think there are issues with the term which do touch on things that might suggest unfairness. This includes the fact the term relied on isn't specific as to when, and for what reason, the new charge might be introduced. It also doesn't make lenders aware of how much such a change would cost them and it doesn't allow for lenders to exit without penalty if they don't accept the change.

Arguably, the nature of the platform itself made it impractical for investors to always be able to exit if they objected to changes to the terms and conditions, as selling their loans on the secondary market was never guaranteed. I'm also aware that the secondary market closed permanently shortly after the changes were introduced. All that said, even if I was to conclude that a court would likely deem this an unfair contract term, I don't think this complaint should be upheld. I will set out why below.

Assetz's reasoning for introducing the Lender Fee

In considering this complaint, I've had regard for the fact Mr and Mrs H entered into an agreement which said he wouldn't pay a membership fee on their investments. They'd been warned they 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). However, I've thought carefully about the reasons given by Assetz for the need to introduce the Lender Fee in the context of the financial situation of Assetz and with our service's broader remit of determining what is fair and reasonable in the circumstances. This includes whether the introduction of the Lender Fee provides a fair balance between the legitimate interest of Assetz and Mr and Mrs H's interests.

Assetz has explained that it needed to introduce the Lender Fee as a result of a variety of unanticipated events, including substantial economic factors which conspired to raise interest rates in historic fashion in the autumn of 2022. Assetz says these economic shocks included but were not limited to:

- The war in Ukraine.
- The on-going impact of Covid and the knock-on effects of public economic support during the pandemic (and its subsequent withdrawal).
- The economic turmoil caused by the mini budget of 23 September 2022 and spiralling inflation.

Assetz says that, given the significant and sudden rise in interest rates, its peer-to-peer loans were no longer as attractive to new and existing lenders and new loans stopped being originated. It says that this meant its fee structure which operated under normal circumstances was no longer suitable or sustainable. It says that without new loans being written there were no origination fees to fund the platform. It says the platform still had significant ongoing costs which were necessary to support the existing loan book and to ensure maximum returns for existing lenders.

I think it's worth explaining at this point that it's not my role to determine whether Assetz could decide to close its retail platform. I consider that to be a legitimate business decision that Assetz could fairly make. Rather, it's my role to determine whether, as a result of that decision, Assetz has fairly considered the impact of the introduction of the Lender Fee on lenders. And in doing so, it fairly considered the alternatives.

Assetz says it considered triggering its stand-by plan and wind down arrangements as an alternative to introducing the Lender Fee. Assetz says this would involve taking one of the following possible actions:

- Selling the business as a whole.
- Selling the loan book and use the proceeds to repay lenders (retail and institutional).
- Closing its origination business and focus solely on managing the run-off of the loan

book whilst remaining solvent (and without any additional fees being charged) – essentially winding down the loan book over the normal term of the loans.
- Appointing administrators over to undertake an insolvent wind-down.

Assetz has provided our service with a comprehensive response to why each of these actions were considered to be unsuitable. I shall summarise the points provided under each heading below.

Selling the business as a whole

Assetz says that the economic turmoil of late 2022, which had substantially triggered the decision to close the retail platform in the first place, meant that any prospect of selling the business was considered highly unlikely – at any price.

In brief, it says a sale of the business would have involved the appointment of professional advisors; marketing the business for sale; receiving offers and identifying a willing buyer; due diligence assessments on the business and loan book income; and transaction processes. All of which it says would have taken a substantial time to implement. Assetz also says that any buyer would have had to dealt with the significantly changed inflationary and high interest rate economic environment.

Whilst I can't say with any certainty what the result of a sale of Assetz's business would have been for lenders, I'm satisfied that Assetz fairly considered this as an option and, on balance, I'm persuaded by the concerns it has raised regarding the timescales and prevailing economic factors involved. As such, I think it was fair and reasonable for Assetz to conclude, on balance, that this option would have likely resulted in worse outcomes for lenders than introducing the Lender Fee.

Selling the loan book

Similarly to selling the business, Assetz says selling the loan book would have involved the appointment of professional advisors; marketing the loan book for sale; receiving offers and identifying a willing buyer; due diligence assessments on the loan book income; and transaction processes. All of which it says would have taken also taken a substantial time to implement.

Additionally, Assetz says as part of the process, lenders would have had to be willing to sell their loans and it's likely that lenders would have wanted to receive a full return of their capital. However, Assetz says any buyer would have likely wanted to pay a steep discount in order to get a return on their investment. It says the loans have fixed interest rates and so become increasingly unattractive to prospective buyers as commercial interest rates rise – which they did very quickly in late 2022 and beyond.

I'm also aware that other peer-to-peer platforms have taken the decision to sell its loan books wholesale at a similar time and lenders have received just their capital back or a slight loss on their capital.

Whilst any loss is unquantifiable at this stage, I'm persuaded by Assetz's comments that it's likely a sale of the loan book would've required its lenders to agree to receiving less than their invested capital back. As such, I'm satisfied that Assetz fairly considered the sale of the loan book as an option and, on balance, I'm persuaded the concerns it has raised regarding the timescales and prevailing economic factors involved, mean its decision to not take this action was fair and reasonable.

Closing its origination business and focus solely on managing the run-off of the loan book whilst remaining solvent

Assetz says an assessment was made of the expected income from the loan book over its remaining term and it compared this to the costs expected to be required to complete the process of collecting the loan book and returning the funds to respective lenders.

Assetz says that having done so, it anticipated that a five-year wind down period would result in an operational loss of around £720,000. However, in addition to the staff costs relating to collecting the loan book and returning funds to lenders, Assetz says it was also carrying staff costs relating to originating new business which would not be needed in the wind-down. It says that the estimated costs of notice period pay, redundancy payments and associated costs, would result in a total operation loss of closer to £2.6 million.

I can confirm that Assetz has provided evidence of financial projections to support this. So, it follows that, faced with the prospect of such a substantial expected cash deficit in a managed wind-down, I'm persuaded by Assetz's claims that it wasn't financially viable to pursue this course of action. Assetz also claims that had this action been pursued, the directors would have likely had to move immediately to appointing administrators to operate the wind-down plan in an insolvent administration. I also find this persuasive given the significant costs needed and the lack of funds to meet them.

Appointing administrators

Assetz says it considered appointing administrators to operate an insolvent wind-down but felt it would have resulted in significant additional costs. Assetz says it undertook an analysis of the expected level of administrator fees over a five-year wind-down period and estimated it to be at least £3.26 million. In addition, it found that an administrator would charge recovery fees of up to 8% on any loans where they needed to take recovery action – which could lead to significant further fees over and above the £3.26 million. It also anticipated that another £2 million of fees was likely, if for example £50 million of lending was subject to recovery fees of 4%.

Assetz says that any shortfall between the income expected to be received from the loan book, in addition to the costs to operate the wind down, would be deducted by an administrator from lenders' returns. It says that taking the expected operational deficit of £720,000 and adding administration fees of at least £3.26 million and also factoring in the prospect of some redundancy costs and a reduction to expected income due to the insolvency process, the expected level of deductions from lender income over the insolvent wind-down was calculated to be in excess of £5 million.

Considering Assetz's assessment of the impact on lender returns through an insolvent wind-down was significant, I'm persuaded that Assetz's reasoning to not take this action was also fair and reasonable.

Was Assetz's decision to introduce the Lender fee fair and reasonable?

Taking all the above into account, I'm persuaded it was fair and reasonable for Assetz to conclude that there were significant risks of poor outcomes for lenders by taking any of the actions considered above. And bearing in mind Assetz's obligation to have regard for lenders best interests and to treat them fairly, I'll now go onto explain why I consider Assetz's decision to introduce the Lender Fee was fair and reasonable in these particular circumstances.

Assetz says that having considered its historic recovery rates, it estimated a return of close to 100% of capital, plus some interest. It says the front loading of the Lender Fee was necessary to protect the capital position, but the tiered approach would still result in a five-year effective fee of just 1.15% per annum. And so, introducing the Lender Fee was considered to be the most viable option to maintain the platform and provide better outcomes for its lenders.

Assetz says the introduction of the Lender Fee has been successful. To support this, Assetz says that as of 15 December 2022 (date of introduction of the Lender Fee), there were 337 loans with a principal amount of £194.9 million – this included 63 loans marked as default with a principal value of £33.3 million with expected losses of £25 million and provision funds of £9 million. In the first ten months of the run-off to 31 October 2023, the total number of loans has reduced from 337 to 280 – equating to a repayment of 57 loans or 17% of the portfolio. It also says the total principal amount of loans has reduced from £194.9 million to £159.7 million – equating to a reduction of £35.2 million or 18% of the portfolio.

I think for the reasons I've given, it was fair and reasonable for Assetz to conclude that this alternative was better, overall, for its lenders than the options it considered and the facts above show that, with hindsight, it had a positive effect on returning capital to investors.

In reaching its decision, it's clear from the evidence I've outlined above that Assets gave due and careful consideration to the potential outcomes for lenders and I'm satisfied it examined the data it had available, as well as the forecasts it was able to produce, in order to conclude that of all the options, introducing the fee would likely provide the best overall outcome for its lenders. In other words, I'm satisfied that Assetz has had regard for its lenders' interests as it is obliged to under the FCA's principles, and that looking at the circumstances as a whole, it has treated its lenders fairly.

I've considered the submissions Mr and Mrs H have made about Assetz' modelling and the assumptions made using the data it holds. I also note they believe the existing published standby plan should have been followed as this would have allowed outstanding loans to run down and retain the secondary market without the need for fees.

Assetz does have regulatory responsibilities to ensure arrangements are in place in the event of wind-up. Prior to the Lender Fee announcement, it did have a published plan on its website. But I accept this didn't include the potential for a Lender Fee. The website did detail there were risks to carrying out the published plan. Assetz said it felt there was sufficient funding to cover the cost of implementing the plan. But I note it did warn there was a risk that assumptions made during the planning process may prove to be incorrect as they haven't been tested in practice and/or the operating environment subsequently changes. There is evidence that the operating environment had changed as already set out. I appreciate lenders weren't expecting a fee to be part of any future wind-up, but this isn't sufficient for me to find Assetz has acted unfairly.

I appreciate Mr and Mrs H don't think the closure of the secondary market was justified or required. As previously explained, the ability to sell loan parts wasn't guaranteed. I accept in the circumstances where the platform was being closed and not operating in normal market conditions, there is significant uncertainty of the level of demand that would allow for this to operate effectively and a level of complexity to pricing. Assetz has explained that the closure of the secondary market was part of the overall strategy for a solvent wind-up – to help lower costs. Having considered this point, I don't find Assetz was required to provide a secondary market, or that it acted unfairly in the decision it made in this respect.

I understand Mr and Mrs H feel further scrutiny should be placed on the modelling Assetz has used to reach its operational decisions. Ultimately, we are an informal service that seeks to resolve disputes between financial businesses and their customers. My role is not to provide a forensic analysis of the data. Although I accept that some of the financials provided are forecasts or estimations, the methodology and assumptions seem to me to be reasonable as they were based on historic actual data. I must also consider that Assetz had to take action based upon events that had not yet occurred and the financials provided were consistent with the approach it has taken. I've also explained above why I'm persuaded that the evidence provided shows Assetz did consider the available options before taking the decisions it did, and for this reason I'm satisfied that it did take into account Mr and Mrs H's interest when it made the decision to introduce the Lender Fee.

I also acknowledge Mr and Mrs H's comments about Assetz favouring the institutional lending side of its business to the detriment of the retail side. But I have not seen sufficient evidence to show its decision to introduce the Lender Fee was as a result of a plan to protect profits at the expense of retail customers. Assetz is entitled to make commercial decisions about how it operates its business. I'm not able to comment on the institutional lending operation as this is not something that can be considered in relation to the complaint brought by Mr and Mrs H in their position as customers of the retail part of the business. I'm satisfied from the evidence available it was considering what was best for its customers when introducing the fee. For these reasons, and the other points I've set out above, I haven't found Assetz failed to meet its obligations to act in the best interests of its customers.

On balance, I'm persuaded Assetz's decision to introduce the Lender Fee was fair, as it was consistent with the objective of maintaining the solvent run-off of the platform, whilst allowing lenders to continue to benefit from capital repayments and some interest (albeit less than expected).

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H and Mrs H to accept or reject my decision before 9 January 2025.

Daniel Little
Ombudsman