DRN-4813976

Financial Ombudsman Service

The complaint

Mr M complains Assetz SME Capital Limited ("Assetz") has unfairly introduced a new fee to the investments he holds on its peer-to-peer (P2P) platform as part of a business decision to change direction. He says changes made to the business shouldn't be funded by retail lenders on the platform. He has requested a refund of the fees he's been charged.

What happened

Mr M has held a P2P lending account with Assetz since 2018, and has money invested in loan contracts on the platform.

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 M 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

After noticing his monthly interest payments reducing, in March 2023 Mr M raised a complaint with Assetz. In summary he didn't think Assetz had acted fairly by introducing a fee as part of its intended wind-up plan for the platform. He didn't agree the terms relied on were fair, so he requested that any fee charged is refunded. He also said the closure of the platform to retail investors and switching to 100% institutional funding, was Assetz's business decision, so it should be paying for the change of direction, not retail lenders.

Assetz considered Mr M's 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 M didn't accept Assetz's response and so he referred his complaint to this service for an independent review.

One of our investigators considered the complaint. They issued an initial opinion upholding the complaint. Assetz didn't accept this and provided further evidence to support why it needed to introduce the fee. The investigator considered this further evidence and issued a revised assessment, not upholding the complaint. In summary they said, they were now 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 M didn't accept the investigator's revised findings. In summary he said:

- He finds it difficult to understand that despite the unfairness of the terms, Assetz can still get away with introducing the fee. Introducing a fee purely to protect the profits of Assetz by passing on wind-down costs to lenders cannot be a justifiable reason.
- Assetz has now introduced further fees relating to withdrawals. He is sure these new withdrawal fees cannot possibly make the difference between an orderly wind-down of the Assetz loan book and a failure to wind-down orderly – they are simply yet another unfair fee being used to increase profits.
- Assetz has made significant changes on its website to the wind-down information compared to that was set out when he opened his account. Assetz misled everyone with its wind-down plan that made no mention of putting into place unfair and illegal terms and then using those terms to make lenders pay for the wind-down of the loan book.
- He doesn't accept there is a reason for a loan book sale to be a worse outcome for lenders as has been proven by other P2P platform wind-downs.
- He questions why Assetz split its business in two just before introducing the new fee. He feels he is losing interest and paying fees whilst Assetz's is still making profits and keeping them separate from the wind-down plan.
- Assetz is using unfair and illegal changes to terms to introduce fees for lenders whilst

not allowing them to exit their contract if they disagree. Lenders have been unfairly impacted and alternative preferable wind-down strategies have not been implemented or properly considered.

As Mr M 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 M's complaint is that Assetz has unfairly introduced a Lender Fee on his P2P lending account. I can see Assetz notified Mr M 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 M opened his account and I note that these do explain the possibility of charging a fee. The terms said:

"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."

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 Consumer Rights Act 2015 (“CRA”) 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 M 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 M 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). 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 M’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.

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.

Mr M has also mentioned that other P2P platforms have closed down by selling loan books with no loss of money to lenders. I acknowledge that other P2P platforms took a different approach when closing their platforms – and some have taken the decision to sell the loan books wholesale and lenders have received just their capital back or a slight loss on their capital. But I don't think this in itself is sufficient to say Assetz have treated Mr M unfairly by taking a different approach, which it felt was the best option. For the reasons I've explained, I'm satisfied that it has provided evidence to show it did consider the possibility of the loan book sale before deciding on the option it took was in the best interest of its customers.

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.

Mr M doesn't think Assetz's needed to introduce a fee and didn't consider the alternatives or the published wind-up plan properly. He has suggested it was motivated by protecting profits and passing on costs to lenders. He also questions why Assetz split its business in two before introducing the new fee. He feels he is losing interest and paying fees whilst Assetz's is still making profits and keeping them separate from the wind-down plan.

I acknowledge why Mr M feels that Assetz was acting in its own interests. 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. I've provided an explanation to why I've accepted why it felt it needed to introduce a fee to ensure the solvent wind-up of the platform. 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.

Mr M has raised points about changes Assetz made to its website on the published standby plan. He says that it mis-led investors as it hasn't followed the plan it set out, and instead used its terms to make lenders pay for the wind-down of the loan book. 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 explained above. In my view, the fact Assetz didn't follow the plan set out, doesn't mean there has been a failing here or that it misled investors. 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 note Mr M has raised a point about Assetz introducing further fees relating to withdrawals. I've not considered anything relating to any other fees, which were introduced by Assetz at a later point as part of this complaint. If he intends to pursue this matter, if he hasn't already, Mr M will need to raise a separate complaint with Assetz about the other fees

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 M to accept or reject my decision before 12 December 2024.

Daniel Little
Ombudsman