DRN-4816784

Financial Ombudsman Service

The complaint

Mr G complains Assetz SME Capital Limited ("Assetz") has introduced an unfair fee on his crowdfunding account.

What happened

Mr G has been investing on Assetz peer-to-peer crowdfunding platform since April 2014.

In December 2023, 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)*
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> *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 G 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

Mr G complained to Assetz in March 2023 as he was unhappy with the introduction of the Lender Fee. In summary, Mr G said he couldn't understand why there would be wind-down costs as each loan has its own costs covered by the standard fees and enhanced monthly interest rate paid by the borrower. He also said that the Lender Fee isn't being applied equally to lenders who have invested in the manual lending accounts ("MLA") and those invested in the access accounts ("AA").

Mr G suggested the real reason for introduction the Lender Fee was to cover costs of funding development loans as Assetz had failed to attract enough new money on to the platform to fund further development loan tranches. Mr G said he was prepared to allow the Lender Fee taken from his interest to be used to finance development loans if he received future repayments in respect of this.

Assetz considered Mr G's complaint but didn't uphold it. Assetz said the Lender Fee is deducted from the MLA rate for performing loans only, invested in via either the MLA or the AAs. This deduction is made fairly to both MLA investors, who would normally receive the MLA rate as their rate of interest, and AA Investors, who receive a lower rate after deductions from the MLA rate have been made in order to fund the Provision Fund linked to the AA. It provided an example of a loan with an MLA rate of 6.9%, explaining that the resultant outcome for MLA Investors would be a reduction in their rate of interest e.g. an MLA rate of 6.9% would drop to 4% when the 2.9% Lender Fee is deducted. Assetz said this shows that the resultant outcome for AA investors, in the same loan as detailed above, would be no change to their 4% AA rate of interest but the 2.9% previously being paid into the Provision Fund would now be taken in fees. This means that both the MLA and AA Investors in the same loan would actually be receiving the same rate of interest with no money set aside to fund the Provision Fund.

Mr G didn't accept Assetz's findings so he referred his complaint to this service for an independent review.

One of our investigators considered Mr G'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 G didn't accept the investigator's findings. In summary, he said the Lender Fee had been good for those lenders who had invested in the AAs as they had their fees capped at 4%. However, he paid a very high fee over a relatively short period of time as he was invested in the MLA. He also felt the retail side of Assetz had been unfairly affected with the institutional lending side was unaffected.

As Mr G 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 G's complaint is that Assetz has unfairly introduced a Lender Fee on his crowdfunding account. I can see Assetz notified Mr G 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 G opened his account and I not 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 G 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 G 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 G'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 been provided with the financials it has used to demonstrate its decisions were fair and reasonable. 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.

So, on balance, I'm persuaded Assetz's decision to introduce the Lending 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).

MLA and AA investors

I understand Mr G believes investors with MLAs are worse off because of the Lender Fee than those investors in AAs. I've thought carefully about this, but I'm not persuaded this is the case.

Whilst I acknowledge that investors in the MLA and AA may, depending on the underlying MLA rate on a loan, receive similar interest payments after the Lender Fee has been applied, I'm satisfied both sets of investors are ultimately paying the same Lender Fee amount. But I acknowledge the application is different and that Assetz set this out in the FAQs section of its 15 December 2022 notification. This explained:

> *"For investors in the Access Accounts, the fee will be taken from the Manual Lending Account rate of the loan and the amount left will be used to seek to pay the target interest rate firstly, and any excess would be used as usual to top up the Provision Fund. If the amount of interest left net of the fee is less than the target interest rate, then that lower rate will be paid. So it is possible over time that Access Account lenders may see a reduction in their actual interest rates paid versus target rates.*
>
> *For Manual Lending Account investors, any interest payments due to be paid to a lender whilst they have an outstanding fee balance from the first of each month would be used to pay the fee first, with remaining interest paid to the lender. This is also how other discontinued accounts will operate like the Property Secured Account etc."*

I accept that by paying the Lender Fee as a direct deduction from the MLA rate on a loan, MLA investors such as Mr G appear to have seen a greater reduction in their overall interest rate. However, AA investors are paying the same Lender Fee amount but will see less of a reduction in their overall interest rate as they are paying the Lender fee, either fully (with no reduction in their 4% interest rate) or partially (with a haircut of their 4% interest rate), by way of surrendering their payments into the Provisional Fund and the level of protection afforded by it.

Assetz needs to treat all of its investors fairly, and I don't think it could be fairly argued that it would do so by having different rates of Lender Fee depending on which account an investor initially decided to invest in. I've explained in detail above the reasons why Assetz needed to introduce the Lender Fee and the type of account a lender has invested in has no bearing on that decision. So it follows, that the same level of Lender Fee should apply to all investors.

I also appreciate Mr G feels the AAs are riddled with bad loans which investors in the MLA are supporting by way of the Lender Fee. Having seen a snapshot of the performance of Assetz's overall loan book, it would appear that the AAs have a higher percentage of performing loans than in the MLAs and so I'm not persuaded by Mr G's comments.

Overall, I'm satisfied Assetz has applied the Lender Fee fairly and equally to all its investors and I don't think it was its intention to treat a certain group of investors differently.

The level of fees applied

I understand Mr G feels he has paid a disproportionate amount of fees, due to his loans performing. Whilst I accept it is unfortunate, that the makeup of his loan portfolio may mean that he has performing loans with terms ending within the period where Assetz has introduced the highest level of Lender Fee, I don't think this means he's been treated unfairly. Assetz has applied a broad-brush approach with a level of Lender Fee that applies to all investors. Also, if Mr G's loans have short terms, he should be able to benefit from withdraw his money sooner and won't be subject to any Lender Fee. Whereas loans with longer terms may have an eventual reduced fee but the Lender Fee will apply for longer.

Overall, I don’t think it would be fair, reasonable or even practicable for it to apply a different level of Lender Fee depending on the makeup of an investor’s loan portfolio.

Retail and institutional lenders

Mr G has questioned why the institutional lenders with Assetz are not supporting the retail wind-down, and questions whether the closed retail section was loaded with costs. I haven’t seen evidence that the retail section (where Mr G held his investments) has been loaded with costs not associated with its operation. 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 G in his position as a customer of the retail part of the business. And I haven’t seen evidence to say Assetz has acted against the interests of retail investors in this respect.

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 G to accept or reject my decision before 13 December 2024.

Ben Waites
Ombudsman