DRN-4976697

The complaint

Mr C complains about the decision made by Assetz SME Capital Limited ("Assetz") to wind-up its peer-to-peer (P2P) platform as this locked his funds in and imposed a new fee. He has requested he be allowed to terminate his contract and his funds are returned with any fees deducted.

What happened

Mr C has held a P2P lending account with Assetz for many years and has 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 C 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.

In February 2023, Mr C raised a complaint with Assetz. In summary he raised concerns about the decisions Assetz's made in respect of winding up the platform. He felt that he had been locked into the investment incurring an additional fee. He requested Assetz let him exit the contract and refund his monies and any fees it had already deducted.

Assetz considered Mr C's complaint but didn't uphold it. In summary, it said:

- Its terms and conditions (T&Cs) 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 to 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 C didn't accept Assetz's response and so he referred his complaint to this service for an independent review.

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

One of our investigators considered Mr C'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 C didn't accept the investigator's findings. In summary, he said:

- In the period prior to closure, retail investors were offered only the lowest percentage return loans, with the more attractive loans being offered to institutional investors only. Assetz then concentrated on only offering loans to institutional investors. By taking this route Assetz engineered its desired outcome, the 'failure' of the retail arm.
- The T&Cs relevant to his ISA account contain a clause about changes to fees not applying to sums already lent out. Given that no new lending has been possible and the term specifically references fees, he thinks this superseded the fee variation in the general terms.

The investigator responded to Mr C's points to say they didn't change the view they set out.

In summary they said Assetz was entitled to make a business decision to close the retail platform. Assetz has supplied information that explained institutional lending business contributed funds to the operating costs of the retail platform. And that, at the time, the group as a whole was not making a profit. So the evidence doesn't show retail lenders were required to pay for Assetz's wind-down to protect profits.

Mr C responded to say he accepted the findings reached on the original complaint he made. But he wanted to contest the issues relating to his ISA and the application of the lender fees to his ISA with reference to the terms at 9.1 which state "Any amendment that adversely affects you will not apply to sums already lent out." He says, since the fees are being levied on sums that have already been lent out (the loans that he has made) and are subsequently

deducted from interest payments as they are made, in his view this has an 'adverse affect' on him.

The investigator issues an assessment covering this issue. They didn't think the complaint should be upheld on this basis. In summary they said:

The ISA terms clearly say that they would run alongside the general terms rather than replacing them. As the general terms were still in force at the time the Lender Fee was imposed, the assets in the ISA would have been subject to the fees. And it wouldn't be fair to customers overall for ISA holders to avoid the fee where other account holders would pay it.

Mr C responded with further comment. He agreed the ISA terms would run alongside the general terms rather than replacing them. And he acknowledged he had previously accepted that Assetz has the right to introduce fees under the general terms. But said the point of his argument, is:

- The two sets of T&Cs are inconsistent and cannot fairly or sensibly be read together.
- Clause 9.1 of the ISA terms says, "Any amendment that adversely affects you will not apply to sums already lent out.". The imposition of fees is an 'adverse affect' and the fee was being charged on the sums in his ISA were already lent out.
- The ISA terms are special conditions and as such take precedence over the general terms. So whilst the terms do run in conjunction, the ISA terms are designed to work in a different framework from those applicable to non ISA accounts.
- It could be viewed that clause 9.1 by its very wording removes the deemed unfairness in the standard terms by excluding "sums already lent out".

As no resolution could be found, 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.

I note Mr C has accepted the position set out by the investigator in respect of Assetz introducing a Lender Fee as part of the wind-up plan. So, I haven't commented on this other than to say I'm also satisfied overall 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.

The issue that remains in dispute relates to whether Assetz has treated Mr C fairly by charging a fee on his ISA. Mr C has highlighted a term from the specific ISA Innovative Finance ISA T&Cs, which he believes supports the argument that the Lender Fee shouldn't apply to the invested funds he holds in his ISA.

I've reviewed the T&Cs Mr C has highlighted. At the start of the ISA T&Cs it confirms that they are to be read in conjunction with Assetz's T&Cs for P2P lending. I'm satisfied the purpose of these terms is to set out specific terms that only impact ISA holders. Having reviewed the terms, it sets out a number of relevant issues impacting the ISA such as tax implications, subscription limits and other HMRC requirements. There are also specific

requirements set out for withdrawals, transfers and death and bankruptcy events. Again, these all set specific conditions due to the ISA status of the investment.

The term Mr C has highlighted relates to Section 9 'Changes to Terms and Conditions' and the specific term he quotes is:

"9.1 We may, at any time, change the Terms and Conditions by giving you written notice. Such amendment will take effect on the date specified in the written notice. For the avoidance of doubt, these changes may impact our fees and charges or the level of service provided. Any amendment that adversely affects you will not apply to sums already lent out."

Mr C argues the introduction of the Lender Fee has had an 'adverse affect' on him, so it shouldn't apply to the funds he already has lent out in loans awaiting repayment. He also says the ISA terms are special conditions which should take precedence over the general terms.

Assetz says the ISA T&Cs relate solely to the operation of the ISA but should be read in conjunction with the general T&Cs for P2P lending. It says this is because it is not possible to have an ISA without first opening a standard account and agreeing to the main platform T&Cs first. And section 9 of the ISA T&Cs relates solely to changes to any ISA fees contained within them.

I acknowledge the points Mr C makes but I don't agree that the ISA terms support his argument that it is unfair to charge the Lender Fee on the funds lent in his ISA. I'll explain why.

Mr C accepts the ISA T&Cs do run in conjunction and they are designed to work in a different framework from those applicable to the investments in other accounts. In my view, the purpose of the ISA T&Cs is so that specific issues relating to the operating of ISA accounts could be set out. I'm not persuaded the Lender Fee as it was described has any specific features that either relate or don't relate to ISAs – and its operation isn't impacted by the ISA status of a product. I also don't consider it is reasonable to infer the ISA terms supersede the main platform terms. I accept Assetz's point that the main terms set out the overall platform T&Cs, and the ISA terms supplement this for issues that relate to specific features of an ISA product. As referred to above, this mainly relates to tax and subscription issues specific to ISAs.

The fee was introduced as a platform wide announcement in December 2022 and there was nothing to indicate that ISAs were excluded or to be treated differently. In fact, Assetz included a question and answer section which asked *'Does the fee apply to all investors?'* this was answered '*Yes, all investors operating under our Terms and Conditions will be charged this fee during this run-off period.'* There was information given for separate arrangements for how the fee would be collected between manual lending and access accounts, but nothing that would indicate the loans held ISAs in either type of account would be excluded.

In conclusion, I'm not persuaded it would be fair and reasonable to reach a finding the ISA terms support that no fee should be charged on the funds Mr C had lent out in his ISA. The Lender Fee isn't a fee that has specific features applicable to the operation of ISA products, so I don't find they support that Mr C's investments held in this account should be treated differently when applying the Lender Fee. 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 C to accept or reject my decision before 12 December 2024.

Daniel Little
Ombudsman