FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v BHF Solutions Pty Ltd [2021] FCA 684

File number:	NSD 1088 of 2020
Judgment of:	**HALLEY J**
Date of judgment:	23 June 2021
Catchwords:	**CONSUMER LAW** – consumer credit – contraventions of the *National Consumer Credit Protection Act 2009* (Cth) (Act) and the *National Credit Code* (Code) in sch 1 of the Act – prohibition on engaging in credit activity without an Australian credit licence – where second respondent provided loan application services to applicants for credit and first respondent provided loans to successful applicants for credit – whether respondents had arrangement such that amounts payable to them under their respective contracts were each charges for the provision of credit to which the Code applies – whether charges imposed by second respondent were charges for providing credit for the purposes of the exemption in s 6(5) of the Code – whether respondents carrying on a business of providing credit – extended definition of contract in s 204(1) of the Code – whether *Australian Securities and Investments Commission v Teleloans Pty Ltd* [2015] FCA 648 distinguishable, plainly wrong or *per incuriam* – whether second respondent was an agent of the borrower – application dismissed.
Legislation:	*ASIC Corporations (Product Intervention Order – Short Term Credit) Instrument 2019/917* *Consumer Credit (New South Wales) Act 1995* (NSW) (repealed) *Consumer Credit (New South Wales) Code 1995* (repealed) *National Consumer Credit Protection Act 2009* (Cth) ss 3, 5, 6, 7, 8, 9, 29, 35, 166, 175D *National Consumer Credit Protection Act 2009* (Cth) sch 1, *National Credit Code* ss 3, 4, 5, 6, 13, 204 National Consumer Credit Protection Bill 2009 (Cth) Explanatory Memorandum *National Consumer Credit Protection Regulations 2010* (Cth) reg 51
Cases cited:	*ALR17 v Minister for Home Affairs* [2019] FCAFC 182

Appleyard v Westpac Banking Corporation [2017] QCA 316

Australian Finance Direct Debit Limited v Director of Consumer Affairs Victoria (2007) 234 CLR 96; [2007] HCA 57

Australian Securities and Investments Commission v Fast Access Finance Pty Ltd [2015] FCA 1055

Australian Securities and Investments Commission v Teleloans Pty Ltd (2015) 234 FCR 261; [2015] FCA 648

Bahadori v Permanent Mortgages Pty Ltd (2008) 72 NSWLR 44; [2008] NSWCA 150

Bendigo and Adelaide Bank Limited v Brackenridge [2020] SASC 114

BHP Billiton Iron Ore Pty Ltd v National Competition Council (2007) 162 FCR 234; [2007] FCAFC 157

Bob Brown Foundation Inc v Commonwealth of Australia [2021] FCAFC 5

Chief Commissioner of State Revenue (New South Wales) v Dick Smith Electronics Holdings Pty Ltd (2005) 221 CLR 496; [2005] HCA 3

Commissioner of Taxation of the Commonwealth of Australia v Consolidated Media Holdings Ltd (2012) 250 CLR 503; [2012] HCA 55

Cooper Brookes (Wollongong) Proprietary Limited v The Commissioner of Taxation of the Commonwealth of Australia (1981) 147 CLR 297; [1981] HCA 26

Endeavour Energy v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia [2016] FCAFC 82

Fairway Estates Pty Ltd v Federal Commissioner of Taxation (1970) 123 CLR 153; [1970] HCA 29

Hicks v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 757

MB v Minister for Immigration, Citizenship, Migrant Services & Multicultural Affairs [2021] FCA 442

N & M Martin Holdings Pty Ltd v Commissioner of Taxation [2020] FCA 1186

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28

Re Griffin; Ex parte Board of Trade (1890) 60 LJQB 235

Shop and Store Developments Ltd v Commissioners of Inland Revenue [1967] 1 AC 472

Thiess v Collector of Customs (2014) 250 CLR 664; [2014] HCA 12

Tonto Home Loans Australia Pty Ltd v Tavares [2011] NSWCA 389

	Transurban City Link Ltd v Allan (1999) 95 FCR 553; [1999] FCA 1723 *Walker v Consumer, Trader and Tenancy Tribunal of New South Wales* [2013] NSWSC 1432 *Williams v ATM & CPA Projects Pty Limited* [2015] NSWSC 703
Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	164
Date of hearing:	27-28 May 2021
Counsel for the Applicant:	Mr N Williams SC, Ms M Allars SC and Ms C Trahanas
Solicitor for the Applicant:	Australian Securities and Investments Commission
Counsel for the First Respondent:	Mr R McHugh SC and Ms D Forrester
Solicitor for the First Respondent:	Piper Alderman
Counsel for the Second Respondent:	Mr A Pomerenke QC and Mr P Travis
Solicitor for the Second Respondent:	Elliott May Lawyers

ORDERS

NSD 1088 of 2020

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Applicant
AND:	**BHF SOLUTIONS PTY LTD ACN 631 775 123** First Respondent
	CIGNO PTY LTD ACN 612 373 734 Second Respondent

ORDER MADE BY: **HALLEY J**

DATE OF ORDER: **23 JUNE 2021**

THE COURT ORDERS THAT:

1. The amended originating application be dismissed.

2. The applicant pay the costs of the first and second respondents as agreed or taxed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

HALLEY J:

INTRODUCTION

1 In this proceeding the applicant (**ASIC**) seeks declaratory relief against the first respondent (**BHFS**) and the second respondent (**Cigno**), and orders restraining both BHFS and Cigno from engaging in credit activities.

2 The principal issue for determination in this proceeding is whether BHFS and Cigno have provided credit to which the *National Credit Code* (**Code**) in Schedule 1 to the *National Consumer Credit Protection Act 2009* (Cth) (**Act**) applies by operating a business model since September 2019 pursuant to which BHFS provides loans to borrowers and Cigno provides services to borrowers.

Statement of Agreed Facts

3 The parties have agreed much of the relevant factual foundation for the relief that ASIC seeks and that agreement is recorded in a detailed statement of facts that has been agreed for the purposes of s 191 of the *Evidence Act 1995* (Cth) (**SOAF**) relating to the period between 18 October 2019 and 14 April 2020 (**Relevant Period**). The SOAF in turn refers to documents that were tendered at the commencement of the hearing. I make findings of fact accordingly.

4 ASIC supplemented the SOAF by reading the affidavits of Leah Morrow affirmed on 3 September 2020, Edwin Tan affirmed on 9 April 2021, Sharlini Dias sworn on 9 April 2021 and Sarah White affirmed on 9 April 2021 and 20 May 2021. None of the deponents of the affidavits were required for cross-examination and, other than a relevance objection to a limited number of documents annexed to the affidavit of Sarah White affirmed on 9 April 2021, there were no objections to the admissibility of any of that evidence.

Relief sought by ASIC

5 ASIC seeks the following final relief in the originating application as amended by alternative proposed injunctions annexed to its written submissions in reply:

> **Against the First Respondent (BHF Solutions Pty Ltd)**
>
> 1. Declarations pursuant to s 166 of the *National Consumer Credit Protection Act 2009* (Cth) (**NCCP Act**) that the First Respondent contravened s 29 of the NCCP Act by engaging in the following credit activity without holding an Australian Credit Licence (**ACL**) under s 35 of the NCCP Act authorising the

First Respondent to engage in that activity:

a. entering into a credit contract with Leah Morrow on or about 18 October 2019 (**Morrow Credit Contract**) under which the First Respondent was a credit provider;

b. carrying on a business of providing credit, being credit the provision of which the National Credit Code in Schedule 1 to the NCCP Act (**Code**) applies to, from on or around 12 September 2019.

2. The first respondent be permanently restrained, whether by itself, its servants, agents or employees, from:

a. engaging in a credit activity of being a credit provider under a credit contract, within the meaning of item 1(a) of s6(1) of the *National Consumer Credit Protection Act 2009* (**Act**);

b. engaging in a credit activity of carrying on a business of providing credit, within the meaning of item 1(b) of s6(1) of the Act;

c. in any way attempting to engage in or being involved in the activities referred to in subparagraphs (a) and (b) above,

in respect of credit contracts entered into before the date of this order

3. The first respondent be permanently restrained, whether by itself, its servants, agents or employees, for so long as it does not hold an Australian Credit Licence under s35 of the Act authorising it to engage in these credit activities:

a. from being a "credit provider under a credit contract" or "carrying on a business of providing credit, being credit the provision of which the National Credit Code applies to" (as each of these "credit activities" are defined in items 1(a) and 1(b) of the table in s6(1) of the Act (Credit Activities), by lending in accordance with the BHFS/Cigno Agreement, as amended by the BHFS/Cigno Agreement Amendments, as those terms are defined in the Statement of Agreed Facts as agreed between the parties on 9 April 2021;

b. from entering into any agreement on the same terms as the BHFS/Cigno Agreement, as amended by the BHFS/Cigno Agreement Amendments, with any other person to engage in the Credit Activities; and

c. from in any way attempting to engage in or being involved in the activities referred to in subparagraphs (a) and (b) above.

4. Costs.

5. Such further or other orders or relief as the Court thinks appropriate.

Against the Second Respondent (Cigno Pty Ltd)

6. Declarations pursuant to s 166 of the NCCP Act that the Second Respondent contravened s 29 of the NCCP Act by engaging in the following credit activity without holding an ACL under s 35 of the NCCP Act authorising the Second Respondent to engage in that activity:

a. exercising rights of the First Respondent in relation to the Morrow Credit Contract; and

b. providing a credit service to Leah Morrow on or about 18 October 2019,

2 December 2019 and 11 January 2020.

7. The second respondent be permanently restrained, whether by itself, its servants, agents or employees, from:

   a. engaging in a credit activity of exercising the rights of a credit provider in relation to a credit contract, within the meaning of item 1(c) of s6(1) of the Act;

   b. engaging in a credit activity of carrying on a business of providing a credit service, within the meaning of item 2 of s6(1) of the Act;

   c. in any way attempting to engage in or being involved in the activities referred to in subparagraphs (a) and (b) above, in respect of credit contracts entered into before the date of this order.

8. The second respondent be permanently restrained, whether by itself, its servants, agents or employees, for so long as it does not hold an Australian Credit Licence under s35 of the Act authorising it to engage in these credit activities:

   a. from "performing the obligations, or exercising the rights, of a credit provider in relation to a credit contract or proposed credit contract, whether it does so as the credit provider or on behalf of the credit provider)", or from "providing a credit service" (as each of these "credit activities" are defined in items 1(c) and 2 of the table in s 6(1) and s 7 of the Act (**Credit Service Activities**) in accordance with the BHFS/Cigno Agreement, as amended by the BHFS/Cigno Agreement Amendments, as those terms are defined in the Statement of Agreed Facts as agreed between the parties on 9 April 2021;

   b. from entering into any agreement on the same terms as the BHFS/Cigno Agreement, as amended by the BHFS/Cigno Agreement Amendments, with any other person to engage in the Credit Service Activities; and

   c. from in any way attempting to engage in or being involved in the activities referred to in subparagraphs (a) and (b) above.

9. Costs.

10. Such further or other orders or relief as the Court thinks appropriate.

6 In summary, ASIC contends, by reference to three separate drawdowns of loans advanced by BHFS to Ms Leah Morrow between 18 October 2019 and 14 April 2020, that both BHFS and Cigno engaged in credit activities within the meaning of s 6 of the Act.

7 Neither BHFS nor Cigno has ever held an Australian Credit Licence (**ACL**). An ACL, as defined in s 35 of the Act, is necessary in order to engage in particular credit activities. ASIC contends that both BHFS and Cigno have contravened s 29 of the Act, which prohibits any person from engaging in a credit activity without holding the relevant licence.

8 ASIC alleges that BHFS engaged in credit activities by being a credit provider under a credit contract and by carrying on a business of providing credit, being credit to which a provision of the Code applied.

9 ASIC alleges that Cigno engaged in credit activities by exercising the rights of a credit provider in relation to a credit contract or proposed credit contract and by providing a credit service.

BHFS business

10 BHFS was first registered on the Australian Securities Exchange on 20 February 2019.

11 On 1 July 2019, BHFS entered into an agreement described as a "Loan Management Facilitation Agreement" with Cigno which was subsequently amended after 12 September 2019 (**BHFS/Cigno Agreement**).

12 At the time of its initial entry into the BHFS/Cigno Agreement, BHFS commenced offering credit to consumers on terms formulated to fall within the s 6(1) exception to the application of the Code. This was the subsection of the Code considered by Logan J in *Australian Securities and Investments Commission v Teleloans Pty Ltd* (2015) 234 FCR 261; [2015] FCA 648 (***Teleloans***).

13 BHFS shortly thereafter altered its business model to advance credit to consumers on terms formulated to fall within the s 6(5) exception to the application of the Code. The alteration to its business model was necessary because ASIC made a product intervention order, the *ASIC Corporations (Product Intervention Order – Short Term Credit) Instrument 2019/917* (**PIO**). The PIO came into force on or about 14 September 2019.

14 The business undertaken by BHFS is described in the following terms in the SOAF:

> 9. During the Relevant Period, BHFS:
>
> 9.1 did not advertise the loans;
>
> 9.2 entered into contracts with borrowers (**Loan Agreements**);
>
> 9.3 did not pay to Cigno or receive from Cigno any referral fees, finder's fees, commissions or any other bonuses or amounts related to the referral of customers from Cigno to BHFS.
>
> 10. During the Relevant Period, although part of its service offering, BHFS provided no loans directly to individual borrowers. All individual borrowers who obtained loans from BHFS during this period did so through Cigno, by completing an online application on the Cigno Website. No individual borrowers chose to deal directly with BHFS, rather than pay for the services offered to customers by Cigno.

Cigno business

15 The business undertaken by Cigno is described in the following terms in the SOAF:

> 11. During the Relevant Period, Cigno carried on the business of providing the following services:
>
> 11.1 assisting its customers with the completion of loan applications for financing with BHFS;
>
> 11.2 verifying the information provided by its customers in accordance with processes that were satisfactory to BHFS and Cigno as relevantly demonstrated in a document titled "BHFS Assessment Criteria – Helper Company Assisted Application" (**Credit Procedure Document**) and a document titled "New Assessment Guidelines – Loan Limits – CIGNO" (**Cigno Assessment Guidelines**);
>
> 11.3 assessing its customers' eligibility for personal loans against lending criteria that were satisfactory to BHFS and Cigno as relevantly demonstrated in the Credit Procedure Document;
>
> 11.4 recommending qualified customers to BHFS for financing;
>
> 11.5 facilitating the Cigno's customers' acceptance of BHFS's offer to advance the loan amount;
>
> 11.6 obtaining approved loan amounts from BHFS on the same day or soon after BHFS approved the loan amounts;
>
> 11.7 assisting its customers to apply for a credit limit increase under their Loan Agreement or to request additional drawdowns on their existing credit limit with BHFS;
>
> 11.8 maintaining accounts and records with respect to its customers;
>
> 11.9 arranging for collection of payments by its customers, including by:
>
> (a) arranging for the customer's account to be directly debited by third party direct debit providers and paid to Cigno;
>
> (b) entering into agreements with third party direct debit providers; and
>
> (c) monitoring direct deposit payments by its customers and direct debit payments by third party direct debit providers to it and taking steps to recover debts from a consumer who fails to make repayments;
>
> 11.10 assisting customers to change the payment terms of their Loan Agreement or Services Agreement;
>
> 11.11 responding to its customers' inquiries and requests, including enquiries as to the repayment schedule and requests for additional drawdowns; and
>
> 11.12 sending account statements, reminders and other communications to the consumer in respect of the loans with BHFS and the Services Agreement; and

11.13 making payments to BHFS.

(the **Cigno Services**).

12. During the Relevant Period, Cigno guaranteed to BHFS the Cigno customer's obligation to repay the amounts advanced by BHFS to the borrower (that is, to the Cigno customer) under the Loan Agreement. Within eight weeks of the date of transfer of funds from BHFS to a Cigno customer, Cigno transferred the amount advanced plus the BHFS Fee to BHFS, regardless of whether the Cigno customer had paid those amounts to Cigno.

13. Cigno did not receive from BHFS, any referral fees for recommending qualified Cigno customers to BHFS. Nor did Cigno receive from BHFS any commissions relating to BHFS's provision of credit to Cigno customers.

14. Cigno charged its customers for the Cigno Services and was paid by its customers for those services under terms of an agreement that the customer entered into directly with Cigno (Services Agreement).

15. Cigno charged its customers for the Cigno Services only if the customer obtained a loan from BHFS.

Relationship between BHFS and Cigno

16 The contractual arrangements between BHFS and Cigno are summarised in the SOAF in the following terms:

16. On 1 July 2019, BHFS and Cigno entered into a Loan Management Facilitation Agreement (**BHFS/Cigno Agreement**).

17. After 12 September 2019, BHFS and Cigno amended the BHFS/Cigno Agreement (**BHFS/Cigno Agreement Amendments**).

18. The BHFS/Cigno Agreement Amendments have not been reduced to writing.

19. The BHFS/Cigno Agreement Amendments which were in effect at all times during the Relevant Period, comprise the following:

19.1 Recital B is amended to reflect that the Lender charges a flat rate of $15.00 on its advances, not a flat rate fee of 5% on its advances;

19.2 in cl 2.6, the reference to the Lender's 5% fee is amended to reflect the Lender's $15.00 fee;

19.3 in cl 2.9, the reference to 5% of loan amount is changed to $15.00 for each request for an advance of funds, up to a maximum of $120.00 in any 12 month period;

19.4 Recital I and cl 6.1 are amended to reflect that the Security Agreement referred to does not exist.

Processing of Morrow loan applications

17 Ms Morrow was an existing customer of Cigno at the time that she applied for each of the three loans that are the subject of this proceeding (**Morrow Loans**). She obtained these loans from BHFS by drawing down on her continuing credit contract. As a returning customer of Cigno,

Ms Morrow was able to complete a request for an online application for a loan through a secure portal on the Cigno website, or she could seek a loan directly from BHFS.

18 On each of 18 October 2019, 2 December 2019 and 11 January 2020, Ms Morrow visited the Cigno website and completed an online application for loans for $200, $300 and $300 respectively (**Morrow Online Applications**).

19 The means by which the first of the Morrow Online Applications (**October 2019 Morrow Application**) was processed and the funds provided to Ms Morrow are described in the following terms in the SOAF:

> 25. The October 2019 Morrow Application was processed by Cigno in accordance with the following verification and documentation procedures:
>
> 25.1 Ms Morrow was requested to confirm and if necessary update her personal details on the Cigno Member Portal;
>
> 25.2 Ms Morrow was asked how much she would like to borrow and the reason that she was applying for the funds. Ms Morrow requested an advance of funds of $200.00. At this point in the online process through the Cigno Member Portal, Ms Morrow was provided with the option of continuing with the "Cigno Premium Service" or to deal directly with "the lender". Ms Morrow continued with the "Cigno Premium Service";
>
> 25.3 Ms Morrow then was asked to provide updated bank account statements, and did so;
>
> 25.4 Ms Morrow then submitted the information referred to above at [25.1]-[25.3];
>
> 25.5 Once the October 2019 Morrow Application was submitted by Ms Morrow to Cigno, Cigno:
>
> (a) checked that Ms Morrow's personal details remained current;
>
> (b) checked that Ms Morrow's income and expenditure information remained current; and
>
> (c) assessed Ms Morrow's payment history;
>
> 25.6 Cigno then recommended the October 2019 Morrow Application to BHFS because Cigno was satisfied that Ms Morrow met the criteria in the Credit Procedure Document and the Cigno Assessment Guidelines; and
>
> 25.7 BHFS then approved the October 2019 Morrow Application and communicated this to Cigno using an API (Application Programming Interface) that communicated between the software systems used by BHFS and Cigno;
>
> 25.8 Cigno then sent Ms Morrow a text message and an email that confirmed that the October 2019 Morrow Application had been approved and provided a link for Ms Morrow to finalise the loan.

25.9 Ms Morrow then clicked on the link in the text message or email referred to in [25.8], where she:

(a) confirmed the bank account into which the advance of $200.00 should be deposited;

(b) selected a repayment schedule of three instalments – the repayment schedule was for the repayment of the advance of $200.00, and the payment of the BHFS Fee and Cigno's fees under the Services Agreement;

(c) was presented with a Services Agreement with Cigno (**Morrow Services Agreement**) and a Loan Agreement with BHFS (**Morrow Loan Agreement**) and asked to confirm whether she agreed with these contracts to finalise the loan.

25.10 After Ms Morrow accepted the Morrow Services Agreement and the Morrow Loan Agreement, Cigno sent a text message and an email to Ms Morrow, which communicated that her loan had been finalised. A copy of the Morrow Services Agreement and the Morrow Loan Agreement were attached to the email.

20 On 18 October 2019 Ms Morrow received an email and text message from Cigno that confirmed that her application for a loan from BHFS had been approved (**October 2019 Approval Email and Text**). These communications provided her with a link to finalise the loan.

21 On 18 October 2019, Ms Morrow also received an email from Cigno attaching the Morrow Loan Agreement, noting her application had been finalised and confirming that Ms Morrow had been sent the "Cigno Service Agreement as well as the Lender Agreement where you'll find everything you need to know about repayment dates, amounts, deviations and additional costs in the event of a default" (**October 2019 Welcome Email**).

22 The Morrow Loan Agreement set out, at cl 7, the dates and amounts of the required repayments to be made by Ms Morrow, assuming no further advances of funds. No other fees or charges were payable by Ms Morrow under the Morrow Loan Agreement. The amount and timing of repayments to be made by Ms Morrow were specified in schedules included in documents described as drawdown summaries that were prepared by Cigno on 2 December 2019 and 11 January 2020 (**Morrow Drawdown Summaries**).

23 On 2 December 2019 and 11 January 2020, Cigno also produced documents that identified the amount of the drawdowns requested by Ms Morrow on those dates, namely $300, and the fees and charges payable by Ms Morrow to Cigno, comprising a "Financial Supply Fee" of $193, an "Account Keeping Fee" of $5.95 per week and a "Change of Payment Schedule Fee" of

$22, and provided for three new fortnightly repayments for the payment of these fees, the drawdowns and the BHFS Fee (**Morrow Drawdown Request Summaries**).

24 The Morrow Drawdown Summaries and the Morrow Drawdown Request Summaries were emailed to Ms Morrow by Cigno on 2 December 2019 and 11 January 2020, respectively (**Morrow Drawdown Approval Emails).**

25 The Morrow Services Agreement specified the fees and charges for the Cigno Services and the dates and amounts of the required repayments to be made by Ms Morrow, assuming no further advances of funds.

26 The fees and charges payable by Ms Morrow pursuant to the Morrow Services Agreement and the movement of funds between BHFS, Cigno and Ms Morrow are outlined in the SOAF in the following terms:

> 32. The Morrow Services Agreement set out the following fees that Cigno charged, or could have charged, Ms Morrow:
>
> 32.1 a Financial Supply Fee;
>
> 32.2 an Account Keeping Fee of $5.95/week;
>
> 32.3 a Default Fee (if applicable); and
>
> 32.4 a Change of Payment Schedule Fee (if applicable).
>
> 33. Ms Morrow's Financial Supply Fee was calculated having regard to Ms Morrow's repayment schedule of three instalments. It was calculated as follows: Base $13 + 60% of the Principal in the Morrow Loan Agreement (for the selected three instalments). That is, 60% of $200.00.
>
> 34. On 18 October 2019, BHFS credited $200.00 (**First Morrow Advance Amount**) to Ms Morrow's nominated bank account (**Morrow CBA Account**).
>
> 35. The First Morrow Advance Amount:
>
> 35.1 was advanced by BHFS, in the course of BHFS's business, pursuant to the Morrow Loan Agreement; and
>
> 35.2 was deposited to the Morrow CBA Account within one day of Ms Morrow's application.
>
> 36. Cigno guaranteed Ms Morrow's obligations under the Morrow Loan Agreement and Ms Morrow did not provide further security for the advance of the First Morrow Advance Amount.
>
> 37. From 28 October 2019 to 25 November 2019, three payments to Cigno totalling $377.75 were debited from the Morrow CBA Account. The payments (**First Morrow Payments**) were as follows:
>
> 37.1 $126.00 on 28 October 2019;
>
> 37.2 $126.00 on 11 November 2019; and

37.3 $125.75 on 25 November 2019.

38. The First Morrow Payments were automatically debited by Split Payments Pty Ltd (**Split**), a direct debit provider used by Cigno.

39. The First Morrow Payments consisted of the following payments arising on the Morrow Loan Agreement and Morrow Services Agreement from 28 October 2019 to 25 November 2019:

Principal Amount	
First Morrow Advance Amount	$200.00
BHFS Fees	
BHFS Fee	$15.00
Cigno Fees	
Cigno Financial Supply Fees	$133.00
Cigno Account Keeping Fees	$29.75
Total	**$377.75**

40. The First Morrow Payments were paid entirely to Cigno. Within eight weeks of the date of transfer of the First Morrow Advance Amount, Cigno transferred the First Morrow Advance Amount plus the Morrow BHFS Fee to BHFS.

41. Throughout the above process, Ms Morrow did not have any direct contact with BHFS because she chose to use the Cigno Services, which included Cigno dealing with BHFS on her behalf.

27 During the course of the matters outlined above, Ms Morrow received emails and text messages from Cigno on 24 and 28 October 2019 and 7, 11, 21, 25 and 28 November 2019.

28 An essentially identical process was followed in the course of Ms Morrow's use of the Cigno Services to make the requests for $300 drawdowns under the Morrow Loan Agreement on each of 2 December 2019 and 11 January 2020.

29 ASIC contends that the relationships between Ms Morrow and BHFS, between Ms Morrow and Cigno, and between BHFS and Cigno gave rise to a combination of contracts and arrangements that could be combined into a single continuing credit contract by reason of the extended definition of a contract in s 204(1) of the Code.

STATUTORY PROVISIONS AND RELEVANT PRINCIPLES

30 As explained above, ASIC seeks declarations of contraventions of s 29(1) of the Act by both BHFS and Cigno.

31 Section 29 (1) of the Act provides that:

(1) A person must not engage in a credit activity if the person does not hold a licence authorising the person to engage in the credit activity.

Civil penalty: 5,000 penalty units.

Engaging in a credit activity

32 The term *credit activity* is defined in s 5(1) of the Act by reference to a table in s 6(1) of the Act which relevantly provides:

Meaning of *credit activity*		
Item	**Topic**	**A person engages in a *credit activity* if:**
1	credit contracts	(a) the person is a credit provider under a credit contract; or (b) the person carries on a business of providing credit, being credit the provision of which the National Credit Code applies to; or (c) the person performs the obligations, or exercises the rights, of a credit provider in relation to a credit contract or proposed credit contract (whether the person does so as the credit provider or on behalf of the credit provider); or
2	credit service	the person provides a credit service; or …

33 A *credit provider* is defined in s 204(1) of the Code to be a person "that provides credit, and includes a prospective credit provider".

34 Section 7 of the Act provides that a person provides a *credit service* if the person provides credit assistance to a consumer or acts as an intermediary.

35 The meanings of *credit assistance* and *acting as an intermediary* are respectively defined in ss 8 and 9 of the Act. Each definition in turn refers to a *credit contract*.

Credit contract

36 Section 5(1) of the Act provides that *credit contract* has the same meaning as in s 4 of the Code and that *credit* has the same meaning as in s 3(1) of the Code.

37 Section 4 of the Code provides that a credit contract is "a contract under which credit is or may be provided, being the provision of credit to which this Code applies".

38 In turn, s 3 of the Code provides that:

> **3 Meaning of credit and amount of credit**
>
> (1) For the purposes of this Code, ***credit*** is provided if under a contract:
>
> (a) payment of a debt owed by one person (the ***debtor***) to another (the ***credit provider***) is deferred; or
>
> (b) one person (the ***debtor***) incurs a deferred debt to another (the ***credit provider***).

39 In order to constitute credit provided under a contract it is necessary to establish that the contract included a clause or clauses by which a person deferred payment of a debt or incurred a deferred debt to another person.

Provision of credit to which the Code applies

40 The circumstances in which the Code applies to the provision of credit are set forth in s 5, which provides:

> **5 Provision of credit to which this Code applies**
>
> (1) This Code applies to the provision of credit (and to the credit contract and related matters) if when the credit contract is entered into or (in the case of precontractual obligations) is proposed to be entered into:
>
> (a) the debtor is a natural person or a strata corporation; and
>
> (b) the credit is provided or intended to be provided wholly or predominantly:
>
> (i) for personal, domestic or household purposes; or
>
> (ii) to purchase, renovate or improve residential property for investment purposes; or
>
> (iii) to refinance credit that has been provided wholly or predominantly to purchase, renovate or improve residential property for investment purposes; and
>
> (c) a charge is or may be made for providing the credit; and
>
> (d) the credit provider provides the credit in the course of a business of providing credit carried on in this jurisdiction or as part of or incidentally to any other business of the credit provider carried on in this jurisdiction.
>
> (2) If this Code applies to the provision of credit (and to the credit contract and related matters):
>
> (a) this Code applies in relation to all transactions or acts under the contract whether or not they take place in this jurisdiction; and
>
> (b) this Code continues to apply even though the credit provider ceases to carry on a business in this jurisdiction.
>
> (3) For the purposes of this section, investment by the debtor is not a personal, domestic or household purpose.
>
> (4) For the purposes of this section, the predominant purpose for which credit is provided is:
>
> (a) the purpose for which more than half of the credit is intended to be used; or

(b) if the credit is intended to be used to obtain goods or services for use for different purposes, the purpose for which the goods or services are intended to be most used.

41 The preconditions in s 5(1) for the application of the Code are cumulative. For present purposes, s 5(1)(c) is the critical subsection of s 5. It is directed exclusively at charges *for* providing the credit.

Provision of credit to which the Code does not apply

42 Section 6 of the Code sets forth a series of exceptions to the application of the Code to contracts that provide for the provision of credit and that would otherwise fall within the four limbs of s 5(1) of the Code.

43 Relevantly for present purposes, s 6 provides:

> **6 Provision of credit to which this Code does not apply**
>
> *Short term credit*
>
> (1) This Code does not apply to the provision of credit if, under the contract:
>
> (a) the provision of credit is limited to a total period that does not exceed 62 days; and
>
> (b) the maximum amount of credit fees and charges that may be imposed or provided for does not exceed 5% of the amount of credit; and
>
> (c) the maximum amount of interest charges that may be imposed or provided for does not exceed an amount (calculated as if the Code applied to the contract) equal to the amount payable if the annual percentage rate were 24% per annum.
>
> (2) For the purposes of paragraph (1)(b), credit fees and charges imposed or provided for under the contract are taken to include the following, whether or not payable under the contract:
>
> (a) a fee or charge payable by the debtor to any person for an introduction to the credit provider;
>
> (b) a fee or charge payable by the debtor to any person for any service if the person has been introduced to the debtor by the credit provider;
>
> (c) a fee or charge payable by the debtor to the credit provider for any service related to the provision of credit, other than a service mentioned in paragraph (b).
>
> (3) For the purposes of paragraphs (2)(a) and (b), it does not matter whether or not there is an association between the person and the credit provider.
>
> …
>
> *Credit for which only account charge payable*
>
> (5) This Code does not apply to the provision of credit under a continuing credit

> contract if the only charge that is or may be made for providing the credit is a periodic or other fixed charge that does not vary according to the amount of credit provided. However, this Code applies if the charge is of a nature prescribed by the regulations for the purposes of this subsection or if the charge exceeds the maximum charge (if any) so prescribed.
>
> …

44 A table prescribing the maximum charges that can be imposed for the purposes of s 6(5) of the Code is contained in reg 51 of the *National Consumer Credit Protection Regulations 2010* (Cth) (**Regulations**). Item 1 in the table to reg 51 provides that if a debtor is not already a party to a continuing credit contract with the credit provider or an associate of the credit provider when the continuing credit contract is entered into, the prescribed maximum charge for the ensuing 12 month period is $200 and then $125 for any subsequent 12 month period.

45 Subsection 6(5) focuses on charges that might be made "under a continuing credit contract" for "providing the credit".

46 A *continuing credit contract* is defined in s 204(1) of the Code to be a credit contract under which:

> (a) multiple advances of credit are contemplated; and
>
> (b) the amount of available credit ordinarily increases as the amount of credit is reduced.

47 Both ss 6(5) and 5(1)(c) of the Code are concerned with charges for *providing* the credit, not with charges *under* a credit contract (unless they are also charges for *providing* the credit), nor with charges for "related matters".

48 Subsection 6(5) is to be contrasted with ss 6(1) to (3), which are directed to credit fees and charges *under* a contract. Relevantly for present purposes, this includes fees or charges payable by the debtor to any person for an introduction to the credit provider pursuant to s 6(2)(a).

49 Subsection 6(3) of the Code provides that there is no requirement for there to be any association between the credit provider and the person for the purposes of s 6(2)(a).

Extended definition of contract

50 It is also necessary to have regard to the definition of a *contract* in s 204(1) of the Code.

51 A *contract* is defined to include "a series or combination of contracts, or contracts and arrangements". In its submissions, ASIC referred to this definition as the "**extended definition of contract**".

52 ASIC refers to s 15AA of the *Acts Interpretation Act 1901* (Cth) in its written submissions but submits that the meaning of the extended definition of contract is clear and does not give rise to any problem of different possible interpretations. I accept that submission.

53 The issue to be resolved in the present proceeding is the application of the extended definition of contract to the task of identifying the scope of the contracts or arrangements that constitute the relevant credit contract.

54 In my view, as the respondents submitted, s 4 of the Code, read together with the definitions of *credit* in s 3(1)(b) and *contract* in s 204(1) of the Code, should be construed as follows:

> For the purposes of this Code, a ***credit contract*** is a contract [including a *series or combination of contracts, or contracts and arrangements: s 204*] under which credit is or may be provided [i.e., under which *one person (the debtor) incurs a deferred debt to another (the credit provider): s 3(1)(b)*], being the provision of credit to which this Code applies.

55 The extended definition of contract in s 204(1) of the Code has been considered in several recent authorities.

Teleloans

56 The most relevant of these authorities is *Teleloans*, given the extent of the factual overlap between the business model considered by Logan J in that case and the business model the subject of this proceeding.

57 Logan J did not accept ASIC's contention that the overall arrangements between Teleloans, Finance & Loans Direct Pty Ltd (**FLD**) and consumers amounted to a tripartite credit contract to which the Code applied.

58 As noted by his Honour at [31], ASIC, relying on the extended definition of contract, had submitted:

> … the "reality of the situation" was that an "arrangement" existed between FLD and Teleloans and the amounts payable to them were each charges for the provision of credit.

59 His Honour observed in response to this submission at [32]:

> The essence of the riposte made to this on behalf of the respondent companies was pithily put on their behalf thus, "The Code is not directed to helpers. Teleloans is nothing more than a 'helper', the provider of a service and an agent of the borrower at that."

60 More central, however, to the Court's reasoning in *Teleloans* was Logan J's acceptance of the respondents' submission, referred to at [33], that the contracts between Teleloans and consumers seeking to borrow money from FLD were not contracts under which credit was provided, because Teleloans provided a service, not credit.

61 Logan J accepted the submissions of the respondents, stating at [39]:

> The case made for the ASIC is, in my view, but a variant of the economic equivalence approach rejected by the High Court in *Australian Finance Direct* [*Ltd v Director of Consumer Affairs (Vic)* (2007) 234 CLR 96]. What was stressed in the joint judgment in that case was the need to apply the terms of the statute. That application is not, in my view, advanced by resort to descriptive slogans such as "truth in lending" (repeatedly employed in the Explanatory Memorandum). Of course it may be said at a general level of abstraction that an objective of the Act and the Code is to ensure that certain classes of borrower know in full the charges they face for borrowing. But the means employed to achieve that objective are the terms of the Act and the Code. Instead, the approach favoured in *Australian Finance Direct* is akin to that favoured in revenue law by the Judicial Committee of the Privy Council in *Europa Oil (NZ) Ltd v Commissioner of Inland Revenue (NZ)* (1976) 5 ATR 744 (*Europa No 2*), an approach later described by Barwick CJ, who had been a member of the Board in *Europa No 2*, as "fundamental" in that area of the law: *Slutzkin v Federal Commissioner of Taxation* (1977) 140 CLR 314 at 321 (*Slutzkin*).

62 Logan J, ultimately concluded in *Teleloans* at [44] that:

> "Arrangement" is a word of such generality that it is apt to capture the relationship between Teleloans and FLD. But the position which obtains remains that credit is provided only under the contract with FLD. There is no credit provided under the contract with Teleloans. The charges made under that contract are a fee for services provided by Teleloans to the would-be borrower. Those charges have no direct relationship with the loan which comes to be made by FLD under its separate contract with the borrower. In these circumstances, the Code is not applicable.

Fast Access Finance

63 ASIC sought to place particular reliance on the reasoning of Dowsett J in *Australian Securities and Investments Commission v Fact Access Finance Pty Ltd* [2015] FCA 1055 (***Fast Access Finance***). Dowsett J concluded that multiple contracts and arrangements would be a *combination* for the purposes of the extended definition of contract if "they are associated in a joint action, or united together for a common purpose": *Fast Access Finance* at [251]. The scheme the subject of *Fast Access Finance* was an arrangement that involved a pair of contracts pursuant to which consumers purportedly purchased and then on-sold diamonds at a loss. The loss, in effect, being the interest payable under the scheme. The Court found the scheme was a sham and that the arrangement was regulated under the Act.

64 It is not suggested by ASIC in this proceeding that any of the contracts entered into by BHFS and Cigno were shams nor in the present case is it necessary to combine contracts, unlike in *Fast Access Finance*, to arrive at a credit contract for the purposes of s 4 of the Code.

65 The respondents submitted, contrary to the position advanced by ASIC, that the sham finding was part of the ratio of the decision in *Fast Access Finance*. They pointed in particular, to the conclusion by Dowsett J at [278]:

> The effect of these findings is that Mr Eadie promised to pay $4,000 in exchange for a payment to him of $2,000. The provisions in the Sales and Purchase Agreements, concerning the sale and purchase of diamonds, were a pretence. The Credit Protection Act and the Code apply to the real transactions between FAF Beenleigh and Mr Eadie, and between him and DCH, with the consequence that in entering into the s 204 Contract, FAF Beenleigh engaged in a credit activity as alleged in the amended statement of claim and contrary to the statutory regime there alleged.

66 The conclusion at [278] must be considered in the context of the reasons as a whole. At [264], Dowsett J concluded that by entering into the "s 204 Contract", the respondent, FAF Beenleigh, had engaged in a credit activity in contravention of s 29 of the Act. At [265] his Honour then explained:

> To this point, I have not found it necessary to rely on the concept of pretence or sham. In my view the definition of the word "contract" in s 204 of the Code makes such reliance unnecessary. Were the relevant contract the Sales Agreement, or a combination of the Sales Agreement and the Purchase Agreement, the general law of contract may have compelled reliance on that concept in order to avoid the need to give effect to the express contractual terms. However inclusion of the preliminary arrangements in the s 204 Contract avoids that problem. The true nature of the arrangements and contracts between the parties is exposed, at least for the purposes of the Credit Protection Act and the Code. That exposure demonstrates that the parties' true purpose and intention was to satisfy Mr Eadie's need for cash, and FAF Beenleigh's desire to profit from meeting such need. The provisions for the sale and resale of diamonds added nothing to the transaction.

67 It would appear tolerably clear that Dowsett J proceeded on the basis of what he describes as "the parties' true purpose and intention" for both the s 204 extended definition of contract analysis and his subsequent sham findings.

Bahadori

68 The approach taken by the Court in *Fast Access Finance* was consistent with the earlier decision of the New South Wales Court of Appeal in *Bahadori v Permanent Mortgages Pty Ltd* (2008) 72 NSWLR 44; [2008] NSWCA 150 ***(Bahadori)*** (Giles, Tobias and Campbell JA). The Court of Appeal in *Bahadori* was concerned with the provisions of the former *Consumer Credit (New South Wales) Code* under the *Consumer Credit (New South Wales) Act 1995*

(NSW) (**former NSW Code**). Tobias JA (Giles and Campbell JJA agreeing) held at [160]-[162]:

> 160 There can be no doubt that the "credit contract" must be one to which the credit provider, against whom relief is sought under the Code, is a party. But that does not require that where the extended definition of "contract" applies, the credit provider, in this case Conway, must have been a party to each and every contract or arrangement that formed the relevant series.
>
> 161 As was pointed out during the course of argument, there is much to be said for the view that where the relevant credit contract comprises a series or combination of contracts or contracts and arrangements which have closely connected parties, it matters not that each of those contracts or arrangements must involve the ultimate credit provider so long as, at the end of the day, it can be said that that credit provider is a party to the credit contract.
>
> 162 It is apparent that one mischief to which the extended definition of "contract" was directed was the necessity to avoid a situation where the requirements of the Code could be avoided by having a last minute switch of credit provider or lender. In other words, the legislature could not have intended that the provisions of the Code could be rendered inapplicable in circumstances where a credit contract had been entered into between a borrower and Lender A without first obtaining a s 11(2) declaration but then the identity of the credit provider or lender was changed to one which, although related to Lender A, was a different legal entity and before the change, a s 11(2) declaration was obtained.

69 It is apparent that the mischief that arose in *Bahadori* was the last minute switch of credit provider or lender. The use of the phrase "ultimate credit provider" is telling. The Court was concerned with a situation in which two sets of contracts had been entered into with related lenders and declarations of business or investment purposes had been signed between the first and second sets of contracts. The Court ultimately relied on the extended definition of contract to find that the credit contracts were entered into before the relevant declarations were signed and therefore the declarations were ineffective to avoid the operation of the Code to those contracts. The apparent breadth of the reasoning in [160] and [161] needs to be understood in the context of the specific mischief with which the Court was concerned in [162].

70 In contrast to the present proceeding and *Teleloans*, there was no separate contract with a service provider and no question of whether separate contracts for the provision of services could form part of a series or combination of contracts under which credit was provided.

Walker

71 A similar approach to the extended definition of contract was also taken by Hall J in *Walker v Consumer, Trader and Tenancy Tribunal of New South Wales* [2013] NSWSC 1432 (***Walker***),

a proceeding under the former NSW Code. The Court found that the respondents' integrated operations were conducted with close consultation and cooperation and noted at [198]:

> … It is a situation in which the provision of the Code could easily be rendered inapplicable by two closely related companies devising a plan, an arrangement, whereby the credit provider provides credit without an interest charge or any form of charge, but that the cost of providing the so-called "*interest-free*" finance is effectively included in whole or in part by the retailer making an off-setting or compensatory allowance in the retail sale price for the motor vehicle.

72 The findings of Hall J at [200]-[01] in *Walker* were critical to his Honour's subsequent conclusion at [202] that there was an extended contract for the purposes of the former NSW Code that comprised a sale contract, a loan contract and a document described as a deal fee arrangement were the findings of Hall J at [200]-[201]:

> 200 I have concluded that the Sale Contract, the Loan Contract and the Deal Fee Arrangement formed the constituent parts of a *"contract"* within the extended definition of that term under which an amount was included in the Sale Contract intended to provide the means for compensating, at least in part, Kwik for its funding costs associated with the credit it provided the plaintiff to enable her to complete the purchase of the Landcruiser under the Sale Contract which she entered into with MFW.
>
> 201 Upon a close examination of the evidence I have concluded that the Sale Price for the Landcruiser vehicle included an amount which was intended to provide, and did provide, for an amount in the nature of a *"charge"* which was to be subsequently paid or credited by MFW to Kwik for Kwik financing the purchase of the Landcruiser by the plaintiff.
>
> 202 Accordingly on that basis, *"the credit contract"*, being the extended contract consisting of the Sale Contract, the Loan Contract and the Deal Fee Arrangement, was one which met the requirements specified in s 6(1)(c) of the Code, namely "a charge is or may be made for providing the credit".

Statutory construction

73 Further, as the respondents submit, in attributing meaning to statutory text through the process of statutory construction it is necessary to consider the text in context, including the relevant legislative history: *Thiess v Collector of Custom*s (2014) 250 CLR 664; [2014] HCA 12 at [22]; *Commissioner of Taxation of the Commonwealth of Australia v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; [2012] HCA 55 at [39]. In that context, it is important to bear in mind the following observations of Logan J in *Teleloans* at [42]:

> In any event, a difficulty with any such development would be that, even though there is no general anti-avoidance provision in either the Act or the Code, s 6(2) of the Code contains some particular anti-avoidance measures. The presence of these would make it difficult to conclude that some more general doctrine ought to be imported. It is to be remembered, too, that the Act and the Code were enacted after *Australian Finance Direct* and *Bahadori*. Had Parliament wished further to extend the definition of

> "contract" or the anti-avoidance measures found in earlier State consumer credit models so as to extend to "helpers", it could have done so.

74 The High Court in *Australian Finance Direct Debit Limited v Director of Consumer Affairs Victoria* (2007) 234 CLR 96; [2007] HCA 57 at [19] (Gleeson CJ, Gummow, Hayne and Crennan JJ) emphasised with respect to the Code's predecessor, the Uniform Consumer Credit Code, that it is the specific legislative purpose, evident from the text of the provision in question as well as the wider statutory context, that is relevant when construing provisions.

Evidentiary Burdens

75 There were two stipulated evidentiary burdens in the Act and the Code that were the subject of submissions during the course of this hearing.

76 *First*, s 13(1) of the Code provides:

> In any proceedings (whether brought under this Code or not) in which a party claims that a credit contract, mortgage or guarantee is one to which this Code applies, it is presumed to be such unless the contrary is established.

77 *Second*, s 175D of the Act provides:

> (1) If, in proceedings for a declaration of contravention, a pecuniary penalty order, a relinquishment order or any other order against a person for a contravention of a civil penalty provision, the person wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating the civil penalty provision, then the person bears an evidential burden in relation to that matter.
>
> (2) In subsection (1), ***evidential burden***, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

78 ASIC submitted that the contentions advanced by the respondents as to why the Morrow Loans were not subject to the Code were subject to both evidentiary burdens. The respondents resisted this submission, contending that s 13(1) was limited to *particular* credit contracts and not directed at the *carrying on* of the business of being a credit provider and that s 6(5) was not the law creating the relevant civil penalty provision, in this case s 29 of the Act. I do not accept the respondents' submissions. The Morrow Loans were drawdowns made under a particular credit contract, namely the BHFS Contract, and by reason of s 3 of the Act, s 29 picks up the relevant underlying contravention provisions in the Code, including the exculpatory provision in s 6(5).

CONSIDERATION

79 The critical issue for determination in this proceeding is whether the Cigno Services fees and charges fell within the meaning of a charge for providing credit in ss 5(1)(c) and 6(5) of the Code.

80 Before addressing that issue it is necessary to answer the following questions:

(a) were BHFS and Cigno carrying on a business?

(b) can ASIC rely on the extended definition of contract to make Cigno a party to the relevant credit contract?

(c) is *Teleloans* distinguishable or was the relevant reasoning *per incuriam* or plainly wrong?

(d) was Cigno relevantly the agent of BHFS or the agent of Ms Morrow?

Were the respondents carrying on a business?

81 The respondents contend that ASIC has failed to establish that they were carrying on a business of providing credit, being the provision of credit to which the Code applied, because evidence of engagements with a single consumer is not sufficient to establish the carrying on of a business.

82 Objection was taken by the respondents to certain annexures to the affidavit of Sarah White affirmed on 9 April 2021 on the ground that those annexures sought to introduce evidence of the provision of credit to persons outside the scope of the pleaded case. I admitted the annexures subject to relevance. Given my reasoning below, I do not need to place any weight on that evidence and I do not do so in reaching my conclusion that the evidence establishes that at least BHFS was carrying on a business of providing credit.

83 *First*, the recitals and terms of the BHFS/Cigno Agreement and the BHFS/Cigno Agreement Amendments make plain that at least BHFS was engaged in the carrying on of a business of providing credit. The following examples are sufficient to make good that proposition. Recital A states that BHFS is "in the business of lending and/or advancing personal loans to consumers secured by Loan Agreements". Clause 2.1 provides that BHFS and Cigno agree that BHFS "will, for the duration of this agreement, make available and lend funds to the clients" of Cigno under a loan agreement.

84 *Second*, as ASIC submitted, Ms Morrow obtained the loans from BHFS by accessing a publicly available website offering access to the credit, not through "some bespoke privately-negotiated arrangement".

85 *Third*, given the overarching and generic nature of the BHFS/Cigno Agreement and the BHFS/Cigno Agreement Amendments, I can readily infer that BHFS intended to continue to carry on providing credit of the character provided to Ms Morrow. The drawing of such an inference is supported by the reasoning of Ball J in *Williams v ATM & CPA Projects Pty Limited* [2015] NSWSC 703 at [70], in which his Honour noted that, generally, repetition and continuity are necessary to establish the carrying on of a business but then stated that "an isolated activity with the intention of repeating is sufficient". In support of that statement, Ball J relied on the following statement of Lopes and Kay LJJ in *Re Griffin; Ex parte Board of Trade* (1890) 60 LJQB 235 at 237, cited with approval by Barwick CJ in *Fairway Estates Pty Ltd v Federal Commissioner of Taxation* (1970) 123 CLR 153; [1970] HCA 29 at 165:

> [I]f an isolated transaction, which if repeated would be a transaction in a business, is proved to have been undertaken with the intent that it should be the first of several transactions, that is, with the intent of carrying on a business, then it is a first transaction in an existing business.

Can ASIC rely on the extended definition of contract?

86 A related but not necessarily determinative issue is whether a contract or arrangement that provides for the provision of a service that is related to, but does not in itself constitute the provision of credit, may fall within the extended definition of a credit contract for the purposes of s 204 of the Code. I do not consider that this issue is determinative because s 5(1)(c) is not confined to payments under a credit contract.

87 ASIC pleads two alternative formulations of a credit contract:

(a) the **BHFS Contract** (encompassing the Morrow Loan Agreement and the Morrow Drawdown Summaries);

(b) the **Composite Contract** (encompassing the Morrow Online Applications, the October 2019 Approval Email and Text, the Morrow Loan Agreement, the Morrow Drawdown Summaries, the Morrow Services Agreement, the Morrow Drawdown Request Summaries, the October 2019 Welcome Email, the Morrow Drawdown Approval Emails, the BHFS/Cigno Agreement and the BHFS/Cigno Agreement Amendments).

88 ASIC relies on the extended definition of contract in s 204(1) for the purposes of establishing the existence of the Composite Contract.

89 The respondents submit that ASIC has failed to establish the existence of the Composite Contract. The respondents' primary submission is that the extended definition of contract is directed at a situation in which it is necessary to combine multiple contracts in order to establish that there is relevantly a *provision of credit*, namely the creation of a deferred debt. They contend that ASIC's reliance on the "associated in a joint action or united together for a common purpose test" postulated by Dowsett J in *Fast Access Finance* at [251] is misplaced because the test was a "bit of a gloss", without the benefit of argument and limited to dictionary definitions. In any event, they submit, for reasons developed by Cigno, that even if that test were to be applied, it was not satisfied in the present case.

90 Before addressing the respondents' primary submission it is necessary to address their characterisation of the test postulated by Dowsett J in *Fast Access Finance.*

91 Contrary to the contentions of the respondents, I do not consider that there is any material tension between the test postulated by Dowsett J in *Fast Access Finance* and any acceptance of the respondents' primary submission as to why ASIC has not established the existence of the Composite Contract. I do not consider that Dowsett J was suggesting that any contracts entered into pursuant to any joint action or common purpose *in relation* to the provision of credit to a consumer could be combined pursuant to the extended definition of contract in s 204(1) and treated as a single credit contract. Rather, particularly when regard is had to the factual context that his Honour was addressing, he was identifying a necessary, but not sufficient, requirement to combine separate contracts and arrangements to constitute a credit contract.

92 In each of *Bahadori*, *Fast Access Finance* and *Walker*, as discussed above, it was the combination of discrete contracts that gave rise to the relevant provision of credit. None of the constituent contracts in and of themselves provided for the provision of credit.

93 The respondents' primary submission is also consistent with the following statement of Doyle J in *Bendigo and Adelaide Bank Limited v Brackenridge* [2020] SASC 114 at [379], relying on the judgment of the Queensland Court of Appeal in *Appleyard v Westpac Banking Corporation* [2017] QCA 316 (***Appleyard***):

> I do not consider that the extended definition of "contract" under s 204 of the *National*

> *Credit Code* assists the defendant in this context. While it allows for a particular credit contract to be constituted by a series of contracts or arrangements, its operation is in my view confined to the amalgamation of those contracts or arrangements constituting a particular provision of credit. It does not operate to require the amalgamation of all related contractual arrangements as though they involve one overall credit contract.

94 Although Doyle J was concerned with the question of whether a guarantee could be part of a credit contract within the extended definition of contract in s 204(1), the statement of principle reproduced above is not limited to guarantees.

95 The specific statement from *Appleyard* that Doyle J relied upon was that of Fraser JA (Philippides and McMurdo JJA agreeing) at [21]:

> … The extended definition of "contract" in s 204 does not have the effect of amalgamating with the only "credit contract" (the Home Loan contract), or the credit supplied under it, a separate contract to which s 5(1) does not attract the application of the Code (relevantly, the Business Loan contract), or the credit supplied under it. As the New South Wales Court of Appeal explained in a case dealing with indistinguishable provisions of the Consumer Credit (New South Wales) Act 1995 (NSW), [*Bahadori v Permanent Mortgages Pty Ltd* (2008) 72 NSWLR 44 at [172]] the extended definition "applies only to a series of contracts or arrangements with respect to a particular loan" and "[e]ach credit contract (whether it be constituted by one or a series of contracts and arrangements) relates only to the loan to which it refers". There is no other basis in the Code for applying its restrictions upon enforcement of a credit contract in a way that amalgamates those different contracts or the credit supplied under them.

96 In the present case, it is not disputed that the BHFS Contract (encompassing the Morrow Loan Agreement and the Morrow Drawdown Summaries) is a credit contract. It relevantly creates and provides for the deferral of a debt owed by Ms Morrow to BHFS.

97 Before expressing a concluded view as to whether ASIC has established the existence of the Composite Contract it is necessary to determine whether *Teleloans* can be distinguished, the reasoning was *per incuriam* or it was plainly wrong.

Is *Teleloans* distinguishable?

98 In its written submissions, ASIC contended that *Teleloans* can be distinguished on the facts, the reasons for judgment were *per incuriam* and the decision was plainly wrong. In its oral submissions, ASIC disavowed the plainly wrong submission but for the reasons developed below, unless I am able to reach that conclusion, I consider that for all practical purposes I am bound to follow *Teleloans*.

99 ASIC contends that *Teleloans* can be distinguished on the basis of the findings by Logan J at [44] that the charges issued by Teleloans had "no direct relationship with the loan which comes

to be made by FLD under its separate contract with the borrower" and there was no arrangement between FLD and Teleloans at [36] (as accepted at [38]).

100 I do not accept that submission. The relationships between the parties in *Teleloans* were materially the same as in the present proceeding. On the basis of those relationships, Logan J made the findings that there was no "direct relationship" between Teleloans and FLD and the arrangements between them did not establish the existence of any arrangement for the purposes of the extended definition of contract in s 204(1) of the Code.

101 As recorded in the statement of agreed facts annexed to the reasons of Logan J in *Teleloans* and reproduced in the unreported judgment (**Teleloans SOAF**), the business model used by BHFS and Cigno is in substance the same business model used by Teleloans and FLD. The exception is that the "no more than 5% of the maximum amount of credit" exclusion in s 6(1) of the Code was relied upon rather than the "no fixed or periodic charge that varies according to the amount of credit provided" exclusion in s 6(5).

102 Relevantly for present purposes, the Teleloans SOAF records that Teleloans:

(a) carried on a business of assisting customers completing loan applications with FLD;

(b) verified that its customers' information satisfied FLD's requirements;

(c) recommended qualified customers to FLD;

(d) arranged for the expeditious deposit of approved loan amounts to its customers' bank accounts;

(e) maintained account records for its customers;

(f) arranged for collection of amounts owed by its customers to FLD;

(g) marketed the Teleloans services for the purpose of attracting new customers;

(h) maintained the Teleloans website;

(i) guaranteed to FLD the Teleloans' customers obligations to repay loans advanced by FLD;

(j) referred at no charge to either customers or FLD, customers who wished to deal directly with FLD;

(k) did not pay to FLD, and did not receive from FLD, any referral fees or commissions relating to the provision of credit to its consumers; and

(l) charged its customers for the services outlined above and is paid by its customers pursuant to the terms of a services agreement that it enters into with its customers directly, in circumstances in which the Teleloans services are only provided and charges under its service agreement, including a "financial supply fee" and an "account keeping fee" are only imposed if the customer obtains a loan from FLD.

103 Equally relevantly, the Teleloans SOAF records that FLD:

(a) carried on a business of providing various forms of credit;

(b) entered into loan agreements with consumers for personal loans for periods of less than 62 days at a fixed rate of 5% of the loan amount, inclusive of all interest, fees and charges;

(c) the loan agreements provided credit wholly or predominately for personal, domestic or household purposes;

(d) did not charge consumers anything above the 5% fixed rate, including for any service related to the provision of credit;

(e) did not engage in any marketing activities for short term consumer loans;

(f) did not pay to Teleloans or receive from Teleloans any referral fees, finder's fees, commission or any other bonuses or amounts related to the referral of customers from Teleloans to FLD; and

(g) received approximately 12 applications each year from consumers to obtain credit directly rather than through Teleloans, but generally those consumers changed to seeking to obtain credit through Teleloans when they realised that applying directly was "slower and requires more work from the applicant".

104 Further, it is apparent from the Teleloans SOAF that the loan amounts advanced by FLD and the 5% FLD charge under the FLD loans together with the Financial Supply Fee and Account Keeping Fee payable under the Teleloans services agreement were combined and paid by way of a single direct debit from the consumer's bank account to Teleloans. Teleloans then remitted from this payment the loan amount and the FLD charge payable to FLD. Throughout the entire process, the consumer did not have any direct contact or dealings with FLD.

105 In the circumstances I do not consider that the facts in the present case can be relevantly distinguished from the facts considered by Logan J in *Teleloans*.

Is the reasoning in *Teleloans per incuriam* or plainly wrong?

106 Plainly wrong is well established as the requisite standard for a single judge in the original jurisdiction of the Federal Court who has been asked to depart from an earlier decision of a single judge in the same jurisdiction: see *Hicks v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 757 at [75]-[76] (French J) and the cases cited therein. The authorities warn against the formulation of exhaustive criteria, noting that a finding of plainly wrong will "depend upon the nature of the controversy, the strength of the arguments and the particular circumstances attendant upon the case": *Transurban City Link Ltd v Allan* (1999) 95 FCR 553; [1999] FCA 1723 at [31] (Black CJ, Hill, Sundberg, Marshall and Kenny JJ). Relevant to the present circumstances, an example of a "transparent error" that would generally give rise to a plainly wrong finding was given by Greenwood J (Sundberg J agreeing) as a "failure to consider a provision of an Act relevant to the disposition of the cause, thus causing the analysis to fall into error": *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2007) 162 FCR 234; [2007] FCAFC 157 at [83].

107 The Full Court in *Bob Brown Foundation Inc v Commonwealth of Australia* [2021] FCAFC 5 (***Bob Brown Foundation***) at [78] (Griffiths, Moshinksy and SC Derrington JJ) defined *per incuriam* with reference to the Latin meaning of the expression: "through want of care". The Full Court said *per incuriam* would include decisions "given in ignorance or forgetfulness of an earlier relevant case or inconsistent legislative provision". The Full Court considered that the label "through want of care" did not seem apposite in circumstances where an argument was not presented to the Court. The Full Court ultimately rejected the *per incuriam* submission in *Bob Brown Foundation* because it was not fully elaborated by counsel for the appellant and the earlier decision in question did in fact expressly refer to the contentious legislative provision in its written reasons.

108 The authorities do not appear to have taken a uniform approach in distinguishing between contentions that an earlier decision was plainly wrong and that it was made *per incuriam*. The distinction appears at times to be elusive or somewhat arbitrary. On one view, it might be construed as a more polite way for a court to decline to follow a court of the same status in the judicial hierarchy and avoid the need to find expressly that the relevant judge or judges were plainly wrong. It is difficult to conceive of a situation, however, in which a judge at first instance could decline to follow a decision of another judge of the same court at first instance on the basis that the judge's reasoning was *per incuriam* unless the first judge was persuaded that it was plainly wrong.

109 The Full Court in *Endeavour Energy v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2016] FCAFC 82 at [15] (North, Jessup and Reeves JJ) drew a distinction between a *per incuriam* submission, where an earlier decision fails to refer to a relevant legal authority, and a plainly wrong submission, where an earlier decision fails to address an argument that was advanced during the hearing.

110 In other cases, the distinction is not drawn and the concept of *per incuriam* is either treated as a basis for a finding of "plainly wrong" or the terms are used interchangeably. In *MB v Minister for Immigration, Citizenship, Migrant Services & Multicultural Affairs* [2021] FCA 442 at [52], Kerr J held that the "per incuriam error [the Judge] is asserted to have made", being a failure to consider a purportedly relevant legislative provision, "neither undermines the authority of his reasoning nor provides a basis for this Court to proceed on the premise that the conclusion his Honour reached and the decision his Honour made was 'plainly wrong'". The Full Court in *ALR17 v Minister for Home Affairs* [2019] FCAFC 182 at [30] (Nicholas, Griffiths and Gleeson JJ) appeared to use the terms "plainly wrong" and "per incuriam" interchangeably in relation to circumstances where the earlier Court "had not been presented with the contentions made in these two appeals".

111 Steward J did not expressly use the term *per incuriam* in *N & M Martin Holdings Pty Ltd v Commissioner of Taxation* [2020] FCA 1186 at [47] but he did draw a distinction within the umbrella of "plainly wrong" submissions. His Honour noted that the applicants' plainly wrong submission was not based on assertions that the primary Judge "applied the wrong provisions; or because he applied the wrong version of the provisions; or because he overlooked a provision; or because he failed to apply binding precedent; or because of some other glaring error that needs correction". Rather, Steward J acknowledged that the applicants had "attacked his Honour's construction of the [statutory provision], largely based on arguments or contentions that they submitted had not been drawn to [the primary Judge's] attention".

112 The *per incuriam* contention advanced by ASIC in this proceeding proceeds on the basis that a critical element in the reasoning of Logan J was that Teleloans (as a service provider) was a *helper* and since the Code is not directed to *helpers*, Teleloans, notwithstanding the apparent width of the extended definition of contract in s 204(1), was not a party to any credit contract. If Teleloans were not a party to any credit contract then the charges payable to Teleloans could not be included in charges payable under the credit contract for the purposes of s 6(1) of the

Code. The quantum of the charges payable for the purpose of determining whether the s 6(1) exemption from the application of the Code was engaged was therefore limited to the charges payable to FLD.

113 The ultimate conclusion that Logan J relevantly reached at [44] is that although the word "[a]rrangement" is apt to capture the relationship between Teleloans and FLD, the "position which obtains remains that credit is provided only under the contract with FLD. There is no credit provided under the contract with Teleloans".

114 ASIC submits this reasoning must have proceeded "*per incuriam* of key provisions of the Act, which are not referred to at all". These key provisions are alleged to be items 1(c) and 2 in the table contained in s 6(1) and ss 7, 8 and 9 of the Act (**Nominated Provisions**). As explained above, the Nominated Provisions extend the definition of persons engaging in credit activities to persons:

(a) performing obligations or exercising rights on behalf of a credit provider;

(b) providing a credit service by providing credit assistance to a consumer by suggesting a consumer should apply for a loan; and

(c) acting as an intermediary.

115 It can readily be accepted that the Nominated Provisions evince a clear intention that the Code applies to *helpers*, consistently with the extrinsic materials: National Consumer Credit Protection Bill 2009 (Cth) Explanatory Memorandum at [1.27]-[1.31]. Further, contrary to the submissions of the respondents, I do not accept that Logan J was confining his use of the term *helper* by his statement at [32] of *Teleloans* that "Teleloans is nothing more than a 'helper', the provider of a service and an agent of the borrower at that". The addition at the end of the sentence of "at that" demonstrates that the references to a "provider of a service" and "an agent of the borrower" are additional flourishes to the primary finding that Teleloans was only a *helper*.

116 The respondents contend that it is inconceivable that Logan J simply overlooked the Nominated Provisions of the Act because the relief sought by ASIC in *Teleloans* included an order that Teleloans be restrained from providing *credit assistance* as defined in s 5(1) of the Act, which is defined by reference to s 8 of the Act. This submission, however, overlooks that Logan J did not consider relief in his reasons given his findings on the alleged application of the Code.

117 More fundamentally, the respondents submit that in any event, the concept of *helpers* is not relevant to the threshold issue of whether the Code applied to the credit provided by FLD. They submit that the statement made by Logan J that the Code does not apply to *helpers* must be understood in the context of that specific threshold enquiry and if that is answered in the negative then the question of any liability of any *helpers* simply does not arise and therefore it would not be necessary to consider the Nominated Provisions.

118 Moreover, the Nominated Provisions highlight the distinction drawn in the Act between the "credit provider" and a person providing "credit assistance" to the consumer or a person acting as an intermediary between the "credit provider" and the consumer.

119 Section 8 of the Act focuses on a person providing credit assistance to a consumer by, inter alia, suggesting a person "apply for a particular credit contract with a particular credit provider" or suggesting a person "apply for an increase to the credit limit of a particular credit contract with a particular credit provider". It provides no support for the proposition that the person providing credit assistance should be a party to the "credit contract". To the contrary, it proceeds on the premise that the person providing the credit assistance is not the credit provider nor a party to the credit contract.

120 Similarly, s 9 of the Act is directed at a person who acts as an intermediary between a credit provider and a consumer for the purpose of securing a provision of credit for the consumer "under a credit contract for the consumer with the credit provider". It also proceeds necessarily on the premise that the person acting as the intermediary is not the credit provider nor a party to the credit contract.

121 I therefore do not accept that the failure of Logan J to have regard to the Nominated Provisions caused him to proceed *per incuriam* in reaching his ultimate conclusion that the Teleloans services were not incorporated into the relevant credit contract by reason of the extended definition of contract in s 204(1). The alleged *per incuriam* error neither undermined the authority of his reasoning nor provides a basis for this Court to proceed on the premise that the conclusion his Honour reached was "plainly wrong". Further, the above analysis would appear to suggest that if the Nominated Provisions had been expressly considered in his Honour's reasons in *Teleloans* they would have fortified, not detracted from, his conclusion that the services provided by Teleloans were not provided under the relevant credit contract.

122 It is therefore not apparent how the failure to refer to the Nominated Provisions could lead to a conclusion that Logan J proceeded *per incuriam* in finding that an entity providing services in connection with an entity providing credit was not, by reason of the extended definition of contract in s 204(1) of the Code, a party to the relevant credit contract between the entity providing the credit and the borrower.

Composite Contract conclusion

123 Notwithstanding any evidential burden imposed on the respondents to demonstrate that the Code does not apply, I am not satisfied that ASIC has established the existence of the alleged Composite Contract for the following reasons:

(a) a finding that the Composite Contract existed would be inconsistent with the statements of principle in previous authorities as to the operation and application of the extended definition of contract in s 204(1) of the Code;

(b) there is no allegation that the arrangements entered into between Ms Morrow and Cigno were a sham or that the Cigno Services were illusory or not otherwise provided to Ms Morrow;

(c) the facts in *Teleloans* are not materially distinguishable from the facts in this proceeding*;*

(d) the reasoning in *Teleloans* leading to the conclusion that Teleloans was not a party to the relevant credit contract was not *per incuriam* or plainly wrong*;* and

(e) the provisions of the Act and the Code, including the Nominated Provisions and the extended definition of a contract in s 204(1), must be construed in a harmonious manner.

Was Cigno the agent of BHFS or Ms Morrow?

124 It is next necessary to address the parties' competing submissions on agency.

125 In their written submissions the respondents sought to characterise Cigno as a "facilitator for and on behalf of the borrower" and as the agent of Ms Morrow because she had decided to engage Cigno as the service provider "rather than dealing directly with a lender or provider".

126 ASIC submitted in response that "Cigno's primary function was to act as agent for BHFS in collecting monies towards the repayment" of the Morrow Loans and the BHFS fees and charges and in "allocating monies to the repayment" of those amounts.

127 On balance, I accept that at all relevant times Cigno was acting as the agent of Ms Morrow or on its own behalf.

128 *First*, the BHFS/Cigno Agreement contained an express acknowledgement that there was no agency arrangement between BHFS and Cigno. I accept that this is not determinative and the true character of their relationship is to be gathered from all the surrounding circumstances, but it remains a significant consideration in determining whether there was any such agency relationship. As the New South Wales Court of Appeal stated in *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389 at [182] (Allsop P with Bathurst CJ and Campbell JA agreeing):

> Clause 3.1 [stating nothing in the deed created the relationship of partnership or agency] is not determinative. The true character of the parties' relationship is to be gathered from an examination of all the surrounding circumstances, including, in particular, the provisions of the deed. Though agency is consensual, it is sufficient that the parties have agreed to what amounts in law to such a relationship. **The labelling of the relationship as not agency does not determine the question, though, unless a sham, the relevant provision is to be given proper weight.** There was no dispute about the relevant governing principles in this regard: see *South Sydney v News* at 645-646 [133]-[134] per Finn J; *NMFM Property Pty Ltd v Citibank Ltd (No 10)* [2000] FCA 1558; 107 FCR 270 at 408-409 [629] per Lindgren J. [emphasis added]

129 *Second*, the Morrow Services Agreement supports the existence of an agency relationship between Cigno and Ms Morrow rather than between Cigno and BHFS.

130 ASIC relies on the inclusion of the direct debit arrangements for payments to both Cigno and BHFS in the Morrow Services Agreement, that BHFS did not collect any money from Ms Morrow (rather Cigno allocated repayments between itself and BHFS) and that BHFS and Cigno communicated with Ms Morrow about her repayment schedule and sent her payment notices and default notices. The matters relied upon by ASIC, however, were all services provided by Cigno pursuant to express entitlements and obligations in the Morrow Services Agreement.

131 Further, the Morrow Services Agreement expressly provided:

> Upon collection **and on your behalf**, repayments will be allocated proportionally between the amount owing to the lender and the amount owing to the Service Provider, in accordance with the relative amounts owed by you under this Service Agreement and your loan contact with the lender. [emphasis added]

132 In the course of oral submissions, ASIC placed particular emphasis on a default notice that appeared on its face to be on joint Cigno/BHFS letterhead. As senior counsel for BHFS

observed at the conclusion of the hearing, however, the entitlement of Cigno to issue default notices is provided in the Morrow Services Agreement in these terms:

> **A Default Event**
>
> A Default Event occurs when you are unable to meet your obligations under your agreement (which, for the avoidance of doubt, includes a direct debit request being dishonoured by your bank).

133 In this context, the Morrow Services Agreement provided that in the event of a default event:

> … the Service Provider will make all reasonable attempts to inform you of the Default Event as well as negotiating with the lender a new arrangement for repayments to assist you in fulfilling your obligations.

134 *Third*, the SOAF contains an agreed fact with respect to the process by which Ms Morrow obtained each of the three loans from BHFS in these terms:

> Throughout the above process, Ms Morrow did not have any direct contact with BHFS because she chose to use the Cigno Services, which included Cigno dealing with BHFS **on her behalf**. [emphasis added]

What charges were imposed for providing credit?

135 The fundamental issue for determination in this proceeding is whether the Cigno Services charges can properly be characterised as charges *for* providing the loans made by BHFS to Ms Morrow. Unlike in *Teleloans*, a failure to establish the existence of a "composite contract" would not be fatal because this proceeding is concerned with s 6(5), rather than s 6(1), of the Code. It would be sufficient to establish that the Code applied if it could be established that the Cigno Services charges were charges *for* the provision of credit.

136 ASIC's principal contention was that the Cigno Services charges are charges encompassed by the phrase a charge "for providing the credit" for the purposes of ss 5(1)(c) and 6(5) of the Code. It submitted that it thereby followed that neither limb of s 6(5) was satisfied. It submitted that the first limb of s 6(5) was not satisfied because the level of the Financial Supply Fee component of the Cigno Services charges varied by reference to the amount advanced by BHFS to Ms Morrow. It submitted that the second limb of s 6(5) was not satisfied because the quantum of the Financial Supply Fee had the effect of increasing the charges beyond the prescribed maximum charges in reg 51 of the Regulations.

137 ASIC advanced the following submissions in support of its principal contention.

138 *First*, it submitted that the distinction between "the provision of credit" and the "credit contract and related matters" in ss 5(1) and (2) indicated that "the rights and obligations arising under

the identified credit contract do not describe the full scope of the meaning of the 'provision of credit'". The provision of credit for the purposes of s 5(1)(c) was "plainly, intended as a broad encompassing phrase and it's given extended meaning by the words in parentheses" in the chapeau to s 5(1), "rather than being limited".

139 It further submitted that construing charges for providing the credit as including charges imposed by third parties for the provision of the credit was "consistent with the beneficial and protective purpose and object of the Code". ASIC contended that this purpose would be undermined if these words were construed as having no application where a charge, which in substance was a charge for the provision of credit, was "structured as an obligation incurred outside the credit contract to a person other than the credit provider".

140 These general propositions are of limited assistance, however, in determining what is a charge *for* the provision of credit and what is a charge *related* to the provision of credit.

141 *Second,* ASIC submitted that the charges are "entirely parasitic" upon the provision of the loans made to Ms Morrow irrespective of whether the credit contract is the BHFS Contract or the Composite Contract. In its written submissions, ASIC submitted that *but for* the provision of credit by BHFS, Cigno could neither offer nor charge money for the supply of the Cigno Services. At the same time, ASIC submitted Ms Morrow could not receive the loans from BHFS unless she paid the Financial Supply Fee, the Account Keeping Fee and where applicable, the Change of Payment Schedule Fee.

142 In his oral submissions, senior counsel for ASIC clarified that ASIC was not propounding any *but for* test, rather ASIC was advancing the *in exchange for* test advanced by Dowsett J in *Fast Access Finance*.

143 In *Fast Access Finance* at [256]-[257], Dowsett J, relying on dictionary definitions, concluded that a charge *for* the provision of credit, for the purposes of s 5(1)(c) of the Code "clearly involves the notion of exchange, the charge being made for the provision of credit".

144 The approach taken by Dowsett J is consistent with the approach taken by Lord Hodson in *Shop and Store Developments Ltd v Commissioners of Inland Revenue* [1967] 1 AC 472 (***Shop and Store***) at 498, where he held that "[w]hatever extended definition is given to 'consideration' it must represent a quid pro quo for that which passed by the transfer or conveyance". The High Court in *Chief Commissioner of State Revenue (New South Wales) v Dick Smith Electronics Holdings Pty Ltd* (2005) 221 CLR 496; [2005] HCA 3 at [72]

(Gummow, Kirby and Hayne JJ) cited with approval the following statement by Lord Wilberforce in *Shop and Store* at 503:

> In the first place, the phrase "consideration for the transfer or conveyance" seems to me to refer clearly and naturally to that which passed to the transferor company "for" the transferred properties.

145 Senior counsel for ASIC described the Cigno Services charges as an "essential quid pro quo for the provision of the credit", "an essential precondition to the loan in the present case" and the "sine qua non" of the loans made to Ms Morrow. Counsel contended that it "simply can't be said that the Cigno services, the charges for the Cigno services, have no direct relationship with the loan".

146 The respondents submitted that these submissions were unjustified in circumstances where ASIC did not plead that Ms Morrow could not have obtained any loans from BHFS without the involvement of Cigno and in circumstances where the SOAF expressly stated that Ms Morrow had the choice of proceeding with Cigno or proceeding directly with BHFS. They submitted that the evidence established that Ms Morrow would have been referred to a page on the BHFS website that "made perfectly clear the availability of personal finance" independently of Cigno, but acknowledged that there was no specific evidence of how this might have occurred.

147 In the circumstances, it is not possible to reach any conclusion that Ms Morrow could not have obtained loans directly from BHFS, independently of Cigno. Any practical difficulties or hurdles, including the cost and potential delay in obtaining finance directly from BHFS, were not addressed in the SOAF or otherwise in the affidavit evidence relied upon by ASIC.

148 Further, any *but for* test would tend to obscure rather than illuminate a determination of whether a charge is *for* the provision of credit or a charge for something that is a *precondition* for the supply of credit or is otherwise a charge for a service *related* to the provision of credit. As senior counsel for BHFS submitted, an accountant may verify a borrower's financial positon on their behalf as a necessary precondition to a loan approval but that could not sensibly be characterised as the provision of credit.

149 *Third*, ASIC placed particular emphasis on the fee or charge described as a Financial Supply Fee in support of its contentions that the Cigno Services charges were imposed *for* the provision of credit to Ms Morrow.

150 There was no allegation that the services supplied by Cigno were not genuine services provided pursuant to a genuine agreement or that the stipulated purposes for which those services were provided was a sham or any allegation that the services were not in reality provided.

151 In the absence of any suggestion that the Financial Supply Fee was a sham, the more relevant enquiry is the identification of the purpose of the payment rather than its description. As noted above, the Cigno Services charges that were principally comprised of the Financial Supply Fee were stated to be payable in return for Cigno facilitating "in all enquiries, management, payments and all other services relating to the loan or financial product" in circumstances where the client had "chosen to engage" Cigno to "assist, rather than dealing directly with a lender or provider".

152 *Fourth*, ASIC submitted that whether a charge was for the provision of credit was not answered by adopting a binary approach. It contended that a charge could conceivably be both a genuine charge for services *relating* to the provision of credit and a charge *for* the provision of credit.

153 In theory, it is certainly conceivable that a charge might be imposed for multiple purposes. However, ss 5(1)(c) and 6(5) of the Code are confined to "charges for the provision of credit". Unlike the text employed in ss 5(1)(b) and 5(1)(b)(iii), the familiar drafting language of "wholly or predominately" is not used to address a situation in which there may be multiple purposes.

154 It is important to pay careful attention to the precise statutory language to be construed. Here it is s 6(5) that exempts credit provided under a continuing credit contract with specified attributes from the provisions of the Code. The exemption is only engaged "if the only charge that is or may be made *for* providing the credit is a periodic or other fixed charge that does not vary according to the amount of credit provided" (emphasis added). The provision of credit is not the advance of funds, but rather the deferment of an existing debt or the creation of a new, deferred debt: *Fast Access Finance* at [261].

155 Unlike s 6(2) of the Code, charges for the purpose of s 6(5) do not extend to any charge "for any service related to the provision of credit". Nor, unlike the definition of "credit fees and charges" in s 204(1), is s 6(5) directed at "fees and charges payable in connection with a credit contract".

156 Further, in contrast to ss 6(1) to (3) of the Code, s 6(5) is not limited to charges *under* a credit contract; it focuses only on a charge for the provision of credit. Charges may be made other

than under a credit contract for the provision of credit. It also follows, however, that charges may be made under a credit contract that might constitute a service that is "related to the provision of credit" but not be charges *for* the provision of credit.

157 Finally, as observed above, unlike ss 5(1)(b) and 5(1)(b)(iii) of the Code, s 6(5), does not employ the familiar drafting language of "wholly or predominately".

158 It is logical that s 6(5) picks up the language in s 5(1)(c) in stating a rule providing for the inapplicability of the Code, and it should be given the same meaning, consistent with the principle that provisions of the Code should be construed to give effect to harmonious goals: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 at [70].

159 The respondents submit, and I accept, that:

(a) the fees charged by Cigno were in exchange for, or the *quid pro quo* for, providing the services pursuant to the Morrow Services Agreement, not for the provision of credit; and

(b) it is not possible to ignore the terms of the Morrow Services Agreement and "the reality that Cigno provided services pursuant to that agreement, and the reality that the fees paid to Cigno were fees for providing those services".

160 If follows that the only charges made in exchange *for* the provision of the credit to Ms Morrow were the charges payable under the Morrow Loan Agreement, namely the $15 BHFS Fee. The Cigno Services fees and charges were paid in exchange for the provision by Cigno of application, management and collection services. In reaching those conclusions, I am satisfied that the respondents have satisfied the evidentiary burden otherwise imposed by s 175D of the Act and s 13(1) of the Code.

161 On one view, given the beneficial and protective purpose and object of the Code, it might be thought that this produces a result that could not have been intended, but as the High Court stated in *Cooper Brookes (Wollongong) Proprietary Limited v The Commissioner of Taxation of the Commonwealth of Australia* (1981) 147 CLR 297; [1981] HCA 26 at 305 (Gibbs CJ), when construing a provision "it must be given its ordinary and grammatical meaning, even if it leads to a result that may seem inconvenient or unjust".

162 Unlike in other related provisions of the Code, the phrases "provided wholly or predominately", "any service related to the provision of credit" and "fees and charges in connection with a credit contract" are starkly absent from the text of ss 5(1)(c) and 6(5).

RELIEF

163 In the light of my findings above, it is unnecessary for me to consider the form of declaratory and injunctive relief sought by ASIC.

164 For the reasons outlined above, the application must be dismissed with costs.

I certify that the preceding one hundred and sixty-four (164) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Halley.

Associate: 

Dated: 23 June 2021