

# FEDERAL COURT OF AUSTRALIA

## **Australian Securities and Investments Commission v BHF Solutions Pty Ltd [2022] FCAFC 108**

Appeal from: *Australian Securities and Investments Commission v BHF Solutions Pty Ltd* [2021] FCA 684; (2021) 153 ACSR 469

File number: NSD 716 of 2021

Judgment of: **BESANKO, LEE AND O'BRYAN JJ**

Date of judgment: 27 June 2022

Catchwords: **CONSUMER LAW** – consumer credit – alleged contraventions of the *National Consumer Credit Protection Act 2009* (Cth) (**Act**) and the *National Credit 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 charges imposed by second respondent for “services” were charges for providing credit for the purposes of the exemption in s 6(5) of the Code – whether second respondent was an agent of the first respondent

**STATUTORY INTERPRETATION** – interpretation of the phrase “charge ... for providing the credit” in ss 5(1)(c) and 6(5) of the *National Credit Code* – meaning of “credit contract” in s 4 of the Code – extended definition of contract in s 204(1) of the Code

Legislation: *Acts Interpretation Act 1901* (Cth) s 15AA  
*Consumer Credit Legislation Amendment (Enhancements) Act 2012* (Cth)  
*Evidence Act 1995* (Cth) s 191  
*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 Regulations 2010* (Cth) reg 51  
Explanatory Memorandum, *National Consumer Credit Protection Bill 2009* (Cth)

Revised Explanatory Memorandum, Consumer Credit Legislation Amendment (Enhancements) Bill 2012 (Cth)  
*Consumer Credit (Queensland) Act 1994* (Qld) (repealed)  
*Consumer Credit (Queensland) Amendment Act 2001* (Qld)  
Uniform Consumer Credit Code (repealed) ss 7(1), 7(3)

Cases cited:

*Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564  
*AON Risk Services Australia Ltd v Lumley General Insurance Ltd* [2005] FCA 133  
*Appleyard v Westpac Banking Corporation* [2017] QCA 316  
*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  
*Bahadori v Permanent Mortgages Pty Ltd* (2008) 72 NSWLR 44  
*Bendigo and Adelaide Bank Limited v Brackenridge* [2020] SASC 114  
*Bull v AG for New South Wales* (1913) 17 CLR 370  
*CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384  
*Construction, Forestry, Mining and Energy Union v Hadgkiss* (2007) 169 FCR 151  
*Doyles Farm Produce Pty Ltd v Murray Darling Basin Authority (No 2)* [2021] NSWCA 246  
*Erikson v Carr* (1945) 46 SR (NSW) 9  
*Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503  
*FV v The Queen* [2006] NSWCCA 237  
*Houssein v Under Secretary, Department of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88  
*International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co* (1958) 100 CLR 644  
*Kelly v The Queen* (2004) 218 CLR 216  
*Kwik Finance (Sydney) Pty Ltd v Walker* [2014] NSWCA 73  
*Lyford v Commonwealth Bank of Australia* (1995) 130 ALR 267  
*Minister for the Environment, Heritage & the Arts v PGP Developments Pty Ltd* (2010) 183 FCR 10  
*O'Sullivan v Farrer* (1989) 168 CLR 210  
*Petersen v Moloney* (1951) 84 CLR 91  
*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355

*R v Khazaal* (2012) 246 CLR 601  
*Secretary, Department of Health & Ageing v Prime Nature Prize Pty Ltd (in liq)* [2010] FCA 597  
*SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362  
*Taheri v Vitek* (2014) 87 NSWLR 403  
*Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389  
*Walker v Consumer, Trader and Tenancy Tribunal of New South Wales* [2013] NSWSC 1432  
*Webb Distributors (Aust) Pty Ltd v Victoria* (1993) 179 CLR 15  
*Wentworth v New South Wales Bar Association* (1992) 176 CLR 239

Division: General Division

Registry: New South Wales

National Practice Area: Commercial and Corporations

Sub-area: Commercial Contracts, Banking, Finance and Insurance

Number of paragraphs: 218

Date of hearing: 23 November 2021

Counsel for the Appellant: Mr G Kennett SC with Ms M Allars SC, Ms C Winnett and Ms C Trahanas

Solicitor for the Appellant: Australian Securities and Investments Commission

Counsel for the First Respondent: Mr R McHugh SC with Ms D Forrester

Solicitor for the First Respondent: Piper Alderman

Counsel for the Second Respondent: Mr A Pomeranke QC with Mr P Travis

Solicitor for the Second Respondent: Elliott May Lawyers

# ORDERS

NSD 716 of 2021

**BETWEEN:**            **AUSTRALIAN SECURITIES AND INVESTMENTS  
COMMISSION**  
Appellant

**AND:**                **BHF SOLUTIONS PTY LTD ACN 631 775 123**  
First Respondent

**CIGNO PTY LTD ACN 612 373 734**  
Second Respondent

**ORDER MADE BY: BESANKO, LEE AND O'BRYAN JJ**

**DATE OF ORDER: 27 JUNE 2022**

## THE COURT ORDERS THAT:

1. The appeal be allowed with costs.
2. The orders made on 23 June 2021 by the trial judge in Federal Court of Australia proceedings NSD 1088 of 2020 be set aside.
3. The matter be remitted to the trial judge for determination of the applicant's allegations against the second respondent and the determination of relief as against each respondent (including costs).

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

## REASONS FOR JUDGMENT

### BESANKO J:

- 1 I have had the considerable advantage of reading the reasons for judgment of O'Bryan J. I agree with his Honour's reasons and the orders which he proposes. There is nothing I wish to add.

I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment of the Honourable Justice Besanko.



Associate:

Dated: 27 June 2022

## REASONS FOR JUDGMENT

**LEE J:**

2 I have had the considerable benefit of reading the reasons of O’Bryan J, with which I generally agree and which set out all the relevant facts and issues on the appeal. I adopt the abbreviations used in those reasons.

3 The determinative issue is whether the primary judge erred in his assessment of the applicability or otherwise of s 6(5) of the NCCP Act in circumstances where it was contended that the only charge for providing the credit under the Loan Agreements is the BHFS fee (and notwithstanding the existence of the Cigno fees). This involves the narrow question of the meaning to be given to the conception identified by the statutory words: “charge that is or may be made for providing the credit” under the continuing credit contract.

4 It seems to me that a “charge that is or may be made for providing the credit” identifies what it actually is that the consumer pays or promises to pay in order to obtain a provision of credit. Both textually and contextually, ss 5(1)(c) and 6(5) refer to what creates and effectuates the legal obligations governing the deferral of debt under a continuing credit contract. Such an interpretation is consistent with, and also best achieves the purpose or object of, the NCCP Act, as explained by O’Bryan J.

5 It follows, for the reasons explained in depth by O’Bryan J, that the primary judge, with respect, erred in concluding that “charge ... for providing the credit” means a charge imposed solely for the purpose of, or solely in exchange for, the deferment of an existing debt or the creation of a new deferred debt (see J [151], [153]–[157], [159]–[160]).

6 I agree with orders proposed by O’Bryan J.

I certify that the preceding five (5) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Lee.

Associate: *Aoife Hogan*

Dated: 27 June 2022

## REASONS FOR JUDGMENT

**O'BRYAN J:**

### INTRODUCTION

7 The provision of consumer credit has been regulated in Australia for many years with the object of protecting consumers from unscrupulous and unfair lending practices. The Uniform Consumer Credit Code was enacted by the *Consumer Credit (Queensland) Act 1994* (Qld) and was applied in the other States and in the Territories from 1996. By agreements signed in 2008, the Council of Australian Governments agreed to transfer responsibility for regulation of consumer credit to the Commonwealth. This led to the enactment of the *National Consumer Credit Protection Act 2009* (Cth) (**NCCP Act**) and the National Credit Code which forms Sch 1 to the Act (in these reasons, “Code” is used interchangeably with “National Credit Code”). As stated in the Explanatory Memorandum to the *National Consumer Credit Protection Bill 2009* (Cth) (**Explanatory Memorandum**), the new laws replicated the Uniform Consumer Credit Code and also introduced:

- (a) a comprehensive licensing regime for those engaging in credit activities via an Australian credit licence to be administered by the Australian Securities and Investments Commission (**ASIC**) as the sole regulator;
- (b) industry-wide responsible lending conduct requirements for licensees;
- (c) improved sanctions and enhanced enforcement powers for the regulator; and
- (d) enhanced consumer protection through dispute resolution mechanisms, court arrangements and remedies.

8 Further consumer protections were added to the National Credit Code by the enactment of the *Consumer Credit Legislation Amendment (Enhancements) Act 2012* (Cth) (**Enhancements Act**). Amongst other things, the Enhancements Act introduced caps on the maximum amount that credit providers can charge under credit contracts to which the Code applies, with the level of caps differentiating between small amount credit contracts (defined as a credit contract that is not a continuing credit contract and where the credit limit is \$2,000 or less) and other credit contracts. As summarised in the Revised Explanatory Memorandum to the *Consumer Credit Legislation Amendment (Enhancements) Bill 2012* (Cth), credit providers under small amount credit contracts can only charge an establishment fee of up to 20% of the credit amount plus monthly fees up to 4% of the credit amount (plus default and government fees and charges)

and all other credit contracts are subject to a cap such that the annual cost rate (including credit fees and charges and interest charges) cannot exceed 48%.

9 The proceeding concerns lending arrangements devised by the respondents, BHF Solutions Pty Ltd (**BHFS**) and Cigno Pty Ltd (**Cigno**). The commercial arrangements between Cigno and BHFS were recorded in an agreement titled “Loan Management Facilitation Agreement”. Under that agreement, BHFS is described as being in the business of lending or advancing personal loans to consumers under “Loan Agreements” in respect of which BHFS charges a \$15.00 fee with a maximum loan term of 62 days, while Cigno is described as being in the business of marketing, facilitation, management services and collections in relation to loan agreements. The essential structure of the arrangement was that Cigno would market loans to consumers, process loan applications and manage collections while BHFS would advance the loans to the consumers. Ultimately, though, the credit risk associated with loans advanced by BHFS was borne by Cigno. Under the Loan Management Facilitation Agreement, Cigno guaranteed to BHFS that, if a loan was not repaid within eight weeks, Cigno would immediately pay to BHFS the amount of the loan plus the \$15.00 fee.

10 ASIC alleged that, in breach of s 29 of the NCCP Act, each of BHFS and Cigno engaged in credit activities without an Australian credit licence. ASIC’s case was conducted at two levels. At the micro level, ASIC’s allegations concerned three small personal loans advanced by BHFS to Ms Leah Morrow. In respect of those loans, ASIC alleged that BHFS engaged in credit activities by being a credit provider under a credit contract with Ms Morrow and that Cigno engaged in credit activities by exercising the rights of BHFS in relation to the credit contract with Ms Morrow and by providing a credit service to Ms Morrow. At the macro level, ASIC alleged that BHFS engaged in credit activities by carrying on a business of providing credit, being credit the provision of which the Code applies to, and that Cigno engaged in credit activities by exercising the rights of BHFS in relation to credit contracts and by providing a credit service as part of Cigno’s business.

11 BHFS advanced the following loans to Ms Morrow:

- (a) a loan of \$200 advanced on 18 October 2019 and repayable in three equal instalments commencing 10 days after the loan was advanced, the last such instalment being due on 25 November 2019 (a term of 38 days);



- (b) a loan of \$300 advanced on 2 December 2019 and repayable in three equal instalments commencing seven days after the loan was advanced, the last such instalment being due on 6 January 2020 (a term of 35 days); and
- (c) a loan of \$300 advanced on 11 January 2020 and repayable in three equal instalments commencing nine days after the loan was advanced, the last such instalment being due on 17 February 2020 (a term of 37 days).

12 The loans were obtained by way of requests made by Ms Morrow to Cigno, but with the loans being provided by BHFS. Through her dealings with Cigno, Ms Morrow agreed to the terms of a standard form Loan Agreement with BHFS in respect of the borrowings. The Loan Agreement was described as a continuing credit facility which permitted further advances after the first advance (and thereby governed all three loans to Ms Morrow). The Loan Agreement stipulated that a \$15.00 fee was payable to BHFS for each advance of funds, with a maximum fee of \$120 in any 12-month period.

13 Ms Morrow also agreed, through her dealings with Cigno, to the terms of a standard form Services Agreement with Cigno. Under the Services Agreement, Cigno agreed to “facilitate in (sic) all enquiries, management, payments and all other services related to the loan”. In return, Ms Morrow agreed to pay certain fees to Cigno. The fees were charged only if Ms Morrow obtained a loan from BHFS. The Cigno fees included:

- (a) a “Financial Supply Fee” which was calculated as a base amount of \$13 plus 60% of the amount of the loan to be arranged by Cigno;
- (b) an “Account Keeping Fee” of \$5.95 per week during the term of each such loan; and
- (c) a “Change of Payment Schedule Fee” of \$22 in the event Ms Morrow requested a change to her payment obligations under the loan arranged by Cigno.

14 On any view, the aggregate fees charged by BHFS and Cigno for Ms Morrow’s small and short term loans were very high. Assuming the loans were repaid on time, the first loan of \$200 required Ms Morrow to pay \$177.75 in fees (being a total repayment of \$377.75) and the second and third loans of \$300 required Ms Morrow to pay \$231.80 in fees (being a total repayment of \$531.80). If the fees were converted into an annualised percentage interest rate, the rate would be approximately 800% (ignoring, for the simplicity of calculation, the earlier repayment of instalments which shorten the loan term in respect of those instalments). As

discussed below, Ms Morrow was late in making two of the three scheduled repayments on the third loan and incurred additional default fees, all of which were ultimately paid.

15 The lending business conducted by BHFS and Cigno was of significant scale. Information provided to ASIC by Cigno in response to notices issued under s 33 of the *Australian Securities and Investments Commission Act 2001* (Cth) revealed that, in the five and a half month period from 14 September 2019 to 27 February 2020:

- (a) the total dollar amount of credit provided under BHFS loans where Cigno facilitated, managed or distributed payment(s) under a Services Agreement was \$46,679,205.00;
- (b) the total number of Services Agreements entered into by Cigno in relation to the provision and/or distribution and/or management of a BHFS loan was 166,045;
- (c) the total amount of Financial Supply Fees charged by Cigno under those Services Agreements was \$31,880,626.25;
- (d) the total amount of Account Keeping Fees charged by Cigno under those Services Agreements was \$6,795,339.80;
- (e) the total amount of Change of Payment Schedule Fees charged by Cigno under those Services Agreements was \$4,654,407.15;
- (f) the total amount of default fees charged by Cigno under those Services Agreements was \$17,758,849.54; and
- (g) the total amount of fees charged by Cigno under those Services Agreements (ie, the aggregate of the amounts referred to in paras (c), (d), (e) and (f)) was \$61,089,222.74.

16 The central issue that arises in the proceeding is whether, in respect of the loan to Ms Morrow and BHFS's business more generally, BHFS provided credit to which the National Credit Code applied. There is no dispute that BHFS provided credit to Ms Morrow and conducted a business of providing credit (the term *credit* is defined in s 3 of the Code and includes incurring a deferred debt). The relevant question is therefore whether the Code applied to the provision of that credit. Sections 5 and 6 of the Code define the circumstances in which the Code does and does not (respectively) apply to the provision of credit.

17 The respondents rely on s 6(5) of the Code to contend that BHFS did not provide credit to which the Code applied. Section 6(5) provides as follows:

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.

18 Relevantly for present purposes, reg 51 of the *National Consumer Credit Protection Regulations 2010* (Cth) (**Regulations**) stipulates that the maximum charge for the purpose of s 6(5) in the case of a new continuing credit contract is \$200.00 for the period of 12 months commencing when the debtor enters into the continuing credit contract.

19 The respondents contend that the only charge that is or may be made for providing the credit under the BHFS Loan Agreement is the fee of \$15.00, capped at \$120.00 in any 12 month period, charged by BHFS under that agreement, which is a fixed charge that does not vary according to the amount of credit provided and is below the maximum level prescribed by the Regulations.

20 ASIC contends that the Financial Supply Fee, Account Keeping Fee and Change of Payment Fee imposed by Cigno under the Services Agreement (**Cigno fees**) are also charges made for providing the credit under the BHFS Loan Agreement and, accordingly, s 6(5) does not apply. It is common ground that the Financial Supply Fee is a charge that varies according to the amount of credit provided. Accordingly, if it is a charge made for providing credit, s 6(5) is inapplicable.

21 The trial judge accepted the respondents' contention, finding that the Cigno fees were in exchange for providing the services pursuant to the Services Agreement and not for the provision of credit. It followed that BHFS did not provide credit to which the Code applied, and the respondents had not contravened s 29 of the NCCP Act by engaging in credit activities without an Australian credit licence.

22 ASIC appeals from the decision of the trial judge. On the appeal, ASIC does not challenge the findings of primary fact made by the trial judge. Indeed, the majority of primary facts were the subject of agreement between the parties under s 191 of the *Evidence Act 1995* (Cth) (**Evidence Act**) and set out in a Statement of Agreed Facts. ASIC's appeal concerns the proper construction of the Code and its application to the primary facts.

23 For the reasons that follow, I would allow ASIC's appeal.

## THE PRIMARY FACTS

### Nature of the evidence

- 24 As already noted, many of the primary facts were set out in a Statement of Agreed Facts, with supplementary evidence being adduced by ASIC. Section 191 of the Evidence Act provides that evidence is not required to prove the existence of an agreed fact and evidence may not be presented to contradict or qualify an agreed fact unless the Court gives leave. As observed by Stone J in *Minister for the Environment, Heritage & the Arts v PGP Developments Pty Ltd* (2010) 183 FCR 10 at [35], the effect of s 191 is to admit the agreed facts as evidence but it still remains for the Court to determine whether the facts are to be accepted as true and to determine what weight to attribute to that evidence.
- 25 There are obvious efficiencies for the parties to agree facts for the purposes of a proceeding and such an approach to the conduct of a proceeding is usually commendable. However, agreed facts are sometimes stated at a high level of generality and omit matters of detail and nuance that may be important to the resolution of the proceeding. Agreed facts may also contain statements in the nature of factual characterisation or argument. In *Secretary, Department of Health & Ageing v Prime Nature Prize Pty Ltd (in liq)* [2010] FCA 597, Stone J observed (at [6]) that s 191 only applies to agreed facts and that the Court is not required to accept as evidence statements of argument and conclusion. A further difficulty can arise when matters addressed by agreed facts are also the subject of other evidence, for example documentary evidence. In the present case, for example, certain of the agreed facts relate to underlying agreements where the terms of the agreements were also adduced in evidence (as annexures to the Statement of Agreed Facts); other facts relate to the content of the websites owned and operated by BHFS and Cigno respectively where screenshots of the websites were also adduced in evidence. The documentary evidence may reveal detail that elaborates on or clarifies the agreed fact.
- 26 The meaning of the word “qualify” in s 191 has received little judicial attention. There is *obiter* support for the proposition that evidence which supplements or elaborates upon an agreed fact does not contradict or qualify it: see *FV v The Queen* [2006] NSWCCA 237 at [42]-[44] per Kirby J (with whom McClellan CJ and Hoeben J agreed). There may be a fine distinction, though, between evidence that elaborates upon an agreed fact and evidence that qualifies an agreed fact.

- 27 In the present case, the trial judge made findings of fact in accordance with the Statement of Agreed Facts (at J [5]) and also received into evidence additional affidavits read by ASIC (at J [6]). In those circumstances, the parties should be treated as having accepted that the supplementary evidence did not contradict or qualify any agreed fact, but was an elaboration of the agreed facts.
- 28 The trial judge recorded that, at trial, ASIC made no submission that any of the contracts entered into by BHFS and Cigno were shams (at J [64]). Consistently with that position, the appeal was conducted by the parties on the basis that the contracts between BHFS and Cigno and between each of BHFS and Cigno and their customers took effect in accordance with their terms.
- 29 The following description of the primary facts is drawn from the trial judgment, with additional detail drawn from the Statement of Agreed Facts and other evidence to which the Court was referred on the appeal.

#### **The business conducted by BHFS**

- 30 BHFS was incorporated on 20 February 2019 (although the trial judge referred to BHFS being registered on the Australian Securities Exchange at J [10], it is clear from the evidence that BHFS was not a publicly listed company and his Honour must have meant registered under the *Corporations Act 2001* (Cth)). During the relevant period, BHFS had one director, Mr Brenton Harrison and one shareholder, B. J. Harrison Investments Pty Ltd. It did not hold an Australian credit licence. Its share capital comprised 100 ordinary shares on which \$10.00 was paid.
- 31 On 1 July 2019, BHFS entered into the Loan Management Facilitation Agreement with Cigno (J [11]). At the time of its initial entry into that agreement, BHFS commenced offering credit to consumers on terms formulated to fall within s 6(1) of the Code (J [12]). However, BHFS shortly thereafter altered its business model to advance credit to consumers on terms formulated to fall within s 6(5) of the Code. The alteration to its business model was necessary because ASIC made the ASIC Corporations (Product Intervention Order – Short Term Credit) Instrument 2019/917 which came into force on or about 14 September 2019 (J [13]). It was an agreed fact that, by oral agreement, BHFS and Cigno amended the Loan Management Facilitation Agreement to reflect the fact that BHFS was seeking to provide credit within the terms of s 6(5) of the Code.

32 A copy of the Loan Management Facilitation Agreement was in evidence. In the agreement, BHFS is called the “Lender” and Cigno is called the “Provider”. The agreement recited that, amongst other things (incorporating the agreed amendments):

- (a) BHFS is in the business of lending and or advancing personal loans to consumers “secured by” loan agreements. BHFS charges a flat rate of \$15.00 on its advances.
- (b) Cigno is in the business of marketing, facilitation, management services and collections in relation to loan agreements and can charge a fee for those services at its discretion. The agreement also recited that Cigno “does not charge any fees related to the provision of credit”.
- (c) Neither party is entitled to referral fees, commissions or similar for the services provided by either party under the agreement.

33 The key terms of the Loan Management Facilitation Agreement were set out in cl 2 headed “Operative Provisions” and were as follows (incorporating the agreed amendments):

- 2.1. The parties hereby agree that the Lender will, for the duration of this agreement, make available and lend funds to the clients of the Provider under a Loan Agreement.
- 2.2. The Lender may stipulate any conditions and/or provisions (the ‘loan conditions’) under which the funds are to be lent.
- 2.3. The Provider must follow any required loan conditions stipulated by the lender. The Lender can amend, change or alter the loan conditions at any point in time at the discretion of the Lender.
- 2.4. The parties agree that the maximum loan amount is never to exceed \$2,000.00 on any one loan.
- 2.5. The Provider will manage the loan agreements on behalf of its clients in accordance with the conditions of this agreement.
- 2.6. The Provider guarantees to the Lender that, in the event the Lender's funds are not repaid within an 8 week period, the Provider will immediately pay the Lender the principal sum plus the Lender's \$15.00 fee.
- 2.7. The Provider will accept or carry any loss it may suffer in relation to the Guarantee provided for in item 2.6 above.
- 2.8. If a customer requests not to use the services of the Provider and requests to deal solely with the Lender, the Provider, must immediately refer the customer to the Lender. The Provider must not charge a fee for this referral.
- 2.9. Notwithstanding item 2.8 above, the loans provided by the Lender under this agreement will:
  - (a) not exceed a maximum contract term of 62 days and,
  - (b) have a total cost that does not exceed \$15.00 for each request for an

advance of funds, up to a maximum of \$120.00 in any 12 month period.

2.10. For accounting purposes, all monies collected by the Provider is to be allocated firstly towards the Lender's principal sum, secondly to the Lender's interest and thirdly to the Loan Manager and Guarantors fees and charges.

34 Clause 5 of the Loan Management Facilitation Agreement stipulated that nothing in the agreement will create an agency relationship, partnership or joint venture between the parties.

35 Clause 2.8 of the Loan Management Facilitation Agreement, set out above, is of significance in understanding the commercial relationship between BHFS and Cigno. It stipulated that, if the consumer borrower had not repaid the loan plus fee to BHFS within eight weeks, Cigno would do so. As noted earlier, the effect of that clause was that BHFS had the benefit of a guarantee from Cigno for the repayment of all loans and Cigno ultimately bore the credit risk on all loans.

36 As noted above, the Loan Management Facilitation Agreement contemplated that BHFS would advance consumer loans pursuant to a Loan Agreement. The only Loan Agreement that was in evidence was the Loan Agreement between BHFS and Ms Morrow dated 18 October 2019. It appeared to be common ground that that Loan Agreement was in the form of the Loan Agreements contemplated by the Loan Management Facilitation Agreement. In the Loan Agreement, BHFS was described as the Lender and Ms Morrow was described as the Borrower. The Loan Agreement contained the following terms:

- (a) By cl 1, BHFS agreed to provide Ms Morrow with a “line of credit” of up to \$200.00 and Ms Morrow agreed to repay all monies advanced by BHFS plus any fees payable under the agreement.
- (b) By cl 3, Ms Morrow was required to pay a fee of \$15.00 each time that an advance of funds was requested from BHFS, up to a maximum of \$120.00 AUD in any 12 month period.
- (c) Clause 5 stipulated that the agreement was a continuing credit contract such that, if the outstanding advances did not exceed the credit limit, Ms Morrow might request a further advance. Clause 6 stipulated that BHFS may refuse to provide a further advance if Ms Morrow had defaulted on a payment obligation and had not remedied the default at the time of the request, or BHFS had reasonable grounds to believe that Ms Morrow would not be able to comply with the obligations to make repayments.
- (d) Clause 7 specified the repayment schedule for the initial advance to Ms Morrow (being the loan amount of \$200.00 plus the fee of \$15.00) which was as follows:

- (i) \$72.00 by 28 October 2019;
  - (ii) \$72.00 by 11 November 2019; and
  - (iii) \$71.00 by 25 November 2019.
- (e) The agreement recorded that, if further advances were made under the agreement, Ms Morrow would be given a new repayment schedule.
- (f) By cl 9, the agreement continued until the loan amount was zero for 12 consecutive months or Ms Morrow repaid the entire loan amount and notified BHFS that she wished to terminate the agreement.

37 It was an agreed fact that, at all relevant times:

- (a) BHFS did not advertise loans and provided no loans directly to individual borrowers;
- (b) all individual borrowers who obtained loans from BHFS did so through Cigno, by completing an online application on the Cigno website (being the website with domain name [www.cignoloans.com.au](http://www.cignoloans.com.au));
- (c) no individual borrowers chose to deal directly with BHFS, rather than pay for the services offered to customers by Cigno; and
- (d) BHFS did not 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.

38 It was also an agreed fact that BHFS owned and operated the website with domain name [www.bhfsolutions.com.au](http://www.bhfsolutions.com.au) (the **BHFS website**) through which, upon enquiry, information about applying for personal and business finance was accessible. That agreed fact is to be understood alongside the documentary evidence concerning the BHFS website in the form of screen shots of the website. The screen shots included a page titled "Enquire Today" which enabled a visitor to the site to make an enquiry of BHFS. The page does not, though, make any reference to applying for personal and business finance. Indeed, none of the pages of the BHFS website that were in evidence suggest that BHFS offered loans of any kind. On a page titled "Who we are", the website states:

BHF Solutions is Australia's leading expert in business consulting and financial advisory. We provide the fundamental principles and foundations for you and your business to prosper. With online and in person business planning as well as financial advisory, we operate and exist to spread our passion for business.

Our Professional Services:

- Business coaching and consulting



- Finance and Financial Advisory
- Marketing and Planning
- Bookkeeping service and advice

39 The evidence of the BHFS website is consistent with the agreed fact that BHFS did not advertise loans.

### **The business conducted by Cigno**

40 During the relevant period, Cigno had one director, Mr Mark Swanepoel, and one shareholder, Swan Group Holdings Pty Ltd. It did not hold an Australian credit licence. Its share capital comprised 10 ordinary shares on which \$10.00 was paid.

41 The following description of Cigno’s business was an agreed fact:

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.

42 The Statement of Agreed Facts did not elaborate on the above business activities of Cigno. However, aspects of Cigno's business activities were the subject of additional evidence.

43 The "Credit Procedure Document" referred to in the Statement of Agreed Facts was in evidence. It was a short, half-page document. It required Cigno to obtain a bank statement from the customer for the most recent 90 days. The document then stated two assessment criteria based solely on the customer's income as follows:

(a) the applicant could not be approved for a credit limit where there was no repayment option that would allow the applicant to make repayments that did not exceed 20% of the applicant's total income for the relevant payment cycle including payments due to BHFS and Cigno; and

(b) if the applicant requested a payment schedule that exceeded the maximum 20% in order to facilitate faster settlement, Cigno was permitted to approve the credit limit provided Cigno had confirmed that the applicant could return to a payment schedule of payments below the 20% maximum on request.

44 The Cigno Assessment Guidelines referred to in the Statement of Agreed Facts was also in evidence. It was also a short document (of one page) that governed the loan limit to be offered to an applicant. The loan limit assessment was based solely on the applicant's bank statement. The assessment involved two steps. The first step was to calculate the maximum loan limit based on the applicant's weekly or fortnightly income as shown on the bank statement. This was done in accordance with the following table (with the maximum loan for a first time applicant being \$350.00 and all loans above \$500.00 requiring management approval):

<b>Loan Amount</b>	<b>Weekly Income Requirement</b>	<b>Fortnightly Income Requirement</b>
\$50.00	\$75.00	\$150.00
\$75.00	\$75.00	\$150.00
\$100.00	\$75.00	\$150.00
\$120.00	\$75.00	\$150.00
\$150.00	\$75.00	\$150.00
\$175.00	\$200.00	\$400.00
\$200.00	\$250.00	\$500.00
\$250.00	\$350.00	\$700.00
\$300.00	\$500.00	\$1,000.00
\$350.00	\$600.00	\$1,200.00
<b>Existing Client Loan Income Assessment</b>		
\$400.00	\$655.00	\$1,310.00
\$450.00	\$730.00	\$1,460.00
\$500.00	\$805.00	\$1,610.00

45 The second step required the loan amount to be reduced by one row in the above table if the applicant’s bank statement showed that the applicant had two or more short-term loans to other loan companies, or the applicant’s account was overdrawn, or there were dishonours to short-term loan repayments.

46 As noted above, Cigno owned and operated the website with domain name www.cignoloans.com.au. Screenshots of the website were in evidence. While the webpages altered to some extent over time, the main messages remained constant. In contrast to the BHFS website, the Cigno website only offered loans. One of the webpages displays the questions: “In need of Cash? How much can I borrow?” followed by a link with the words “Apply Now”. Under the heading “Why Choose Cigno?”, the following text appears:

**High Approval Rate!**

At Cigno we believe in a fair go! Everyone can face financial challenges from time to time and we’re here to help.

**All Applications Considered! No ridiculous questions!**

If you’re Working or on Centerlink (sic) we consider all applications. We believe in treating each person with trust and respect and only ask what we need to in order to assess suitability.

**EMERGENCY cash when you need it**

Don't wait Days or Weeks! Have cash within hours! Cigno offers a 24/7 online platform, so apply anywhere, anytime! Even on weekends! (Applications received after 5.00pm AEST will receive funds by the next morning).

**Short application process**

Our quick and easy application means you can get back to what really matters

47 On a webpage titled "How it Works", the following text appears:

**Easy Online Application**

Complete our quick and easy 24/7 online application and send us a bank statement

**Fast Approval**

Once approved we will email you your loan agreement and service agreement. You can review and accept your agreements all online.

**Same Day Cash**

Once your application has been approved you will receive funds with in (sic) hours. (Applications received after 5.00pm AEST will receive funds by the next morning).

48 On the webpage headed "FAQs" (which is a standard abbreviation for frequently asked questions), the following question and answer appeared:

**Who are Cigno and what do they do?**

Cigno are specialists in facilitating and managing short term Cash advances up to \$1000. Unexpected Bills? Short on cash this month or in need of a short term financial boost? We're here to help! Our focus is to provide a quick, easy and quality service of loan management and enable every Australian access to a short term financial service. We believe in giving everyone a fair go and will do our best to assist our customers in every situation by considering all applications. Our quick, easy and non-invasive application process provides customers with a user experience second to none.

We always encourage our customers to only borrow when they need to, and to always borrow what they need and can afford to repay

49 Before the online application webpage, there was a webpage titled "Welcome to Cigno Loans!", followed by the words "please choose an option". Below those words was a large green box with the words "Continue with Cigno Premium Service". Below that large green box, in much smaller type was the following paragraph and link:

Please note that Cigno is not a lender, but rather, a service provider that enables its customers access to a seamless application and management process where by (sic) a loan is able to be obtained from a third party lender.

If you would prefer to deal directly with the lender, please click here.

50 If the consumer chose the option of dealing directly with the lender by clicking on the hyperlink "here", the consumer was taken to a further Cigno webpage with the following text:

## **Deal with the Lender Directly**

**You have chosen to deal directly with the lender.**

**We can direct you to proceed with: BHF Solutions Pty Ltd**

Note, this is still optional for you. You can continue to their website in which you will be subject to their normal loan application process. We do wish you all the success in your findings (sic) for a cash solution!

BHF Solutions can be contacted via [www.bhfsolutions.com.au](http://www.bhfsolutions.com.au)

If you would prefer to use the Cigno Premium Services, please click here: [New Cigno Loan](#)

51 The consumer could click on the hyperlinked address for the BHFS website and would presumably be taken to the BHFS website. As discussed above, there is nothing on the BHFS website that indicated that BHFS provided consumer loans.

52 If the consumer chose to continue with the “Cigno Premium Service”, either by clicking on the original large green box or by clicking on the hyperlink “New Cigno Loans”, the consumer was taken to an online application form headed “Cigno Loans – New Application”. The webpage contained online boxes for the applicant to provide relevant personal information and the amount of the loan being requested. The application process also required the consumer to upload the consumer’s bank statements.

53 The webpages from the Cigno website emphasise the speed of the loan approval process and receipt of funds (within hours). That is consistent with the evidence concerning the loans made to Ms Morrow, where the loans were approved and funds advanced within a single day, and reflects the limited loan approval procedures adopted by Cigno.

54 It was an agreed fact that Cigno did not receive from BHFS any referral fees for recommending qualified Cigno customers to BHFS and nor did Cigno receive from BHFS any commissions relating to BHFS’s provision of credit to Cigno customers. Rather, Cigno earned revenue from the fees and charges levied on its customers under the terms of an agreement titled Services Agreement.

55 A copy of the Services Agreement entered into between Cigno and Ms Morrow on 18 October 2019 was in evidence. In the agreement, Cigno is described as the “Service Provider” and Ms Morrow is described as the “Client”. The agreement recited that “The Client has chosen to engage the Service Provider to assist, rather than dealing directly with a lender or provider”. This appears to be a reference to the option offered through the Cigno website to “Continue with the Cigno Premium Service” or to deal directly with the lender, as described above. The

Statement of Agreed Facts included a statement that, when Ms Morrow applied through the Cigno website for her first loan on 18 October 2019 and her second loan on 2 December 2019, she was provided with the option of continuing with the “Cigno Premium Service” or dealing directly with “the lender” and she chose the former.

56 The Services Agreement stipulated as follows:

The Service Provider will facilitate in all enquiries, management, payments and all other services related to the loan or financial product.

In return for the Service Provider providing these services, the Client agrees to remunerate the Service Provider in the following manner:

**Services and Fees**

Financial Supply Fee:	\$133.00
Total Account Keeping Fees (\$5.95 charged weekly):	\$29.75

**Additional Costs**

Change of Payment Schedule Fee:	\$22.00
Drawdown Fee:	To be advised prior to processing the drawdown

In the event, and only on request, you wish to change your payment obligations under the loan arranged for you, a Change of Payment fee will be added. Note, you may incur additional weekly Account Keeping Fees if the duration of your agreement is extended.

Each time that you request a drawdown, we will calculate and communicate the Drawdown Fee to you for your acceptance prior to processing the drawdown. We will determine the amount of the Drawdown Fee based on our reasonable estimate of the cost of arranging and managing the additional credit obtained through the drawdown of funds. This Drawdown Fee will be added to the total amount owing to the Service Provider.

**Payment Schedule**

The Service Provider will facilitate all payments due to the lender as well as the Service Provider in accordance with both agreements. The Service Provider will collect payments from you by direct debit (see below). Upon collection and on your behalf, repayments will be allocated proportionately 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 contract with the lender. If there is a shortfall in amounts owing, payments will be applied between the respective obligations at the discretion of the Service Provider.

All payments will be collected in intervals and amounts as set out in the loan contract that you enter into with the lender. The Service Provider will retain a copy of that loan contract to enable it to calculate and collect repayments from you to forward to the lender. The amount of each repayment will depend on transactions that you make on the loan account. We will make reasonable attempts to notify you any time there is a change to the amount of each periodic payment that we collect from you.

The table below sets out your repayments under this agreement and your agreement with the lender, as at the commencement date of both agreements, assuming no further advances of credit in the period covered by the table. Your payment obligations will

change if you receive any further advance of credit from the lender.

Repayment 1 28/10/2019	\$126.00
Repayment 2 11/11/2019	\$126.00
Repayment 3 25/11/2019	\$125.75

In the event your repayments are at a deficit to the lender, you agree to make payments to the Service Provider until the deficit and your obligations under this agreement are discharged.

57 The Services Agreement also contained provisions addressing events of default and fees payable upon default. Those provisions are not directly relevant to the issues to be determined on this appeal.

58 It was an agreed fact that the Services Agreement specified the fees and charges for the “Cigno Services” (which were defined by reference to para 11 of the Statement of Agreed Facts reproduced above). The Statement of Agreed Facts did not otherwise specify the services for which the individual Cigno fees were charged. In respect of most of the fees, that was answered expressly or by implication by the terms of the Services Agreement. In particular:

- (a) the Account Keeping Fees were charged on a weekly basis and, on the terms of the Services Agreement, would be applied if the duration of the agreement was extended – implicitly the fee was for keeping an account for the Client once a loan was advanced;
- (b) the Change of Payment Schedule Fee was payable if the Client requested a change to the payment obligations under the loan that had been arranged – implicitly the fee was for administering that change and, again, was a fee that might arise after a loan had been advanced; and
- (c) the Default Fee was payable upon a “Default Event” which was defined as “being unable to meet your obligations under your agreement (which, for the avoidance of doubt, includes a direct debit request being dishonoured by your bank)”.

59 The Services Agreement also referred to a Drawdown Fee, but there was no evidence concerning the imposition of that fee.

60 The Services Agreement was otherwise silent about the Financial Supply Fee; it did not include any terms governing the imposition of that fee or explaining the circumstances in which it would be charged or the services for which it was charged (other than being part of the remuneration of Cigno for facilitating all enquiries, management, payments and all other services related to the loan). Nevertheless, it was an agreed fact that the Financial Supply Fee was calculated by Cigno as the sum of a base fee of \$13.00 and 60% of the loan amount. Thus,

the quantum of the fee was directly referable to the amount of credit being sought by the client. It was also an agreed fact that Cigno only charged its customers for its services if the customer obtained a loan from BHFS. Thus, the Financial Supply Fee would only be charged by Cigno if there was a financial supply (in the form of credit provided by BHFS). It is reasonable to infer from the above facts that the Financial Supply Fee was charged upon the provision of credit and for the services of Cigno that resulted in the provision of credit. Having regard to the agreed fact concerning the range of “Cigno Services”, that would include Cigno:

- (a) assisting its customers with the completion of loan applications for financing with BHFS;
- (b) verifying the information provided by its customers;
- (c) assessing its customers’ eligibility for personal loans against lending criteria that were satisfactory to BHFS and Cigno;
- (d) recommending qualified customers to BHFS for financing;
- (e) facilitating customers’ acceptance of BHFS’s offer to advance the loan amount; and
- (f) obtaining approved loan amounts from BHFS on the same day or soon after BHFS approved the loan amounts.

61 As stated on Cigno’s website and supported by the evidence concerning Ms Morrow set out below, the above services were provided over a short period of time as the time between credit application and the provision of credit was a matter of hours only.

62 There appears to be an implicit assumption in the Statement of Agreed Facts that Cigno was contractually entitled to charge the Financial Supply Fee on each occasion that a customer, such as Ms Morrow, applied for a further advance of funds under a Loan Agreement, notwithstanding that the Loan Agreement was a continuing credit contract. That contractual entitlement is not made express in the Services Agreement, but the Statement of Agreed Facts records that, in respect of the second and third advances of monies obtained by Ms Morrow under the Loan Agreement, Ms Morrow was charged a further Financial Supply Fee calculated by reference to the amount of the further advances. One available interpretation of the Services Agreement is that the Financial Supply Fee was a fee for Cigno procuring the Loan Agreement for Ms Morrow which entitled Ms Morrow to a continuing credit facility of (at the outset) \$200.00. On that interpretation, Cigno was not contractually entitled to charge the Financial Supply Fee on each occasion that Ms Morrow made a further drawing of funds under the Loan Agreement. However, as set out below, Cigno did impose that charge on each such occasion,



issuing a document titled “Drawdown Summary Request” which showed those charges. The Drawdown Summary Request was styled in a similar manner to the Services Agreement, but with less detail. In particular, the Drawdown Summary Request did not specify the services being supplied by Cigno other than that Cigno would use the document for the purpose of requesting an advance of funds from BHFS. Given the manner in which the Statement of Agreed Facts was framed by the parties, the trial judge proceeded on the basis that Cigno was entitled to charge the Financial Supply Fee in respect of each advance of funds under BHFS’s Loan Agreement.

63 As is apparent from the foregoing, under the Loan Management Facilitation Agreement and as implemented through the Cigno website and pursuant to the Services Agreement, Cigno carried out all functions associated with the provision of credit to consumers including receiving and assessing applications (in the limited manner recorded in the Credit Procedure Document and the Cigno Assessment Guidelines), facilitating the advance of funds to the borrower, keeping the relevant loan account, collecting payments from the borrower and conducting all communications with the borrower. In the event the borrower was in deficit to BHFS, the Services Agreement imposed a contractual obligation on the borrower to make payments to Cigno until all obligations were discharged. As noted earlier, if the borrower had not repaid the loan plus fee to BHFS within eight weeks, Cigno was obligated to do so.

64 It is important to note that ASIC did not allege that the foregoing arrangements rendered Cigno a credit provider within the meaning of the Code. In that regard, ASIC placed no particular reliance on the provisions of the Services Agreement, reproduced above, which obligated the debtor to make repayments to Cigno and, in the event of default, to continue to pay Cigno until the default was cured. ASIC did not allege that, by virtue of those provisions, the debtor incurred a deferred debt to Cigno, an allegation that may have been open to it. ASIC’s allegation was that BHFS was the credit provider and the proceeding was conducted on that basis.

### **The loans advanced to Ms Morrow**

65 The balance of the Statement of Agreed Facts concerned the loans advanced to Ms Morrow. Those loans occurred in accordance with the lending arrangements described above. For that reason, it is unnecessary to refer to all details of those loans. The following are the key facts.

66 On or about 18 October 2019, Ms Morrow visited the Cigno website and completed an online loan application for \$200.00. The application was processed by Cigno. 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. She was then provided with the option of continuing with the “Cigno Premium Service” or dealing directly with “the lender”. Ms Morrow continued with the “Cigno Premium Service”. It was an agreed fact that Cigno then recommended the application to BHFS because Cigno was satisfied that Ms Morrow met the criteria in the Credit Procedure Document and the Cigno Assessment Guidelines and BHFS then approved the application and communicated this to Cigno using an API (Application Programming Interface) that communicated between the software systems used by BHFS and Cigno. I infer from the agreed fact that the recommendation to BHFS and the approval by BHFS were automated processes. Cigno then sent Ms Morrow a text message and an email that confirmed that the application had been approved and provided a link for Ms Morrow to finalise the loan. Ms Morrow then clicked on the link and selected a repayment schedule of three instalments (for repayment of the advance of \$200.00, and the payment of the BHFS fee and Cigno’s fees under the Services Agreement). She was presented with the Services Agreement with Cigno and the Loan Agreement with BHFS and asked to confirm whether she agreed with these contracts to finalise the loan. After Ms Morrow accepted the Services Agreement and the Loan Agreement, Cigno sent a text message and an email to Ms Morrow, which communicated that her loan had been finalised. BHFS then credited \$200.00 to Ms Morrow’s nominated bank account (with the Commonwealth Bank of Australia). All of those steps occurred on 18 October 2019.

67 From 28 October 2019 to 25 November 2019, three payments totalling \$377.75 were automatically debited from Ms Morrow’s nominated account and paid to Cigno in accordance with the terms of the Services Agreement as follows:

- (a) \$126.00 on 28 October 2019;
- (b) \$126.00 on 11 November 2019; and
- (c) \$125.75 on 25 November 2019.

68 The aggregate payment of \$377.75 comprised the loan amount of \$200.00, the BHFS fee of \$15.00, the Cigno Financial Supply Fee of \$133.00 and the Cigno Account Keeping Fees of \$29.75. Within eight weeks of 18 October 2019, Cigno transferred \$215.00 (being the loan amount of \$200.00 and the BHFS fee of \$15.00) to BHFS.

69 Throughout the above process, Ms Morrow did not have any direct contact with BHFS.

70 On 2 December 2019, Ms Morrow made a further request for funds under the Loan Agreement for \$300.00 through the Cigno website. It was an agreed fact that the credit limit made available to Ms Morrow for the December 2019 application was increased to \$300.00 by BHFS as BHFS was satisfied further credit could be extended based on Ms Morrow's positive payment history on the first borrowing. There was no other evidence about the processes involved in that approval.

71 The process involved in Ms Morrow obtaining the second loan was essentially identical to the first loan, as set out above. Cigno sent a text message and email to Ms Morrow confirming that the application had been approved, and advised Ms Morrow that she would receive the funds by 3pm that day. Cigno also sent Ms Morrow a Drawdown Summary on BHFS letterhead specifying the amounts payable to BHFS in three instalments (which document was generated by Cigno from within its system), and a Drawdown Request Summary on Cigno letterhead specifying repayment amounts and a repayment schedule that combined the amounts due to BHFS and Cigno. BHFS then credited \$300.00 to Ms Morrow's nominated bank account. All of those steps occurred on 2 December 2019.

72 From 9 December 2019 to 6 January 2020, three payments totalling \$531.80 were automatically debited from Ms Morrow's nominated bank account and paid to Cigno in accordance with the Drawdown Request Summary as follows:

- (a) \$180.00 on 9 December 2019;
- (b) \$180.00 on 23 December 2019; and
- (c) \$171.80 on 6 January 2020.

73 The aggregate payment of \$531.80 comprised the loan amount of \$300.00, the BHFS fee of \$15.00, the Cigno Financial Supply Fee of \$193.00 and the Cigno Account Keeping Fees of \$23.80. Within eight weeks of 2 December 2019, Cigno transferred \$315.00 (being the loan amount of \$300.00 and the BHFS fee of \$15.00) to BHFS.

74 Throughout the above process, Ms Morrow did not have any direct contact with BHFS.

75 On 11 January 2020, Ms Morrow made a further request for funds under the Loan Agreement for \$300.00 using the Cigno website. The process involved in Ms Morrow obtaining the third loan was essentially identical to the first and second loans, as set out above. Cigno sent a text message and email to Ms Morrow confirming that the application had been approved, and advised Ms Morrow that she would receive the funds by 2pm that day. Cigno also sent Ms

Morrow a Drawdown Summary on BHFS letterhead specifying the amounts payable to BHFS in three instalments (again, generated by Cigno), and a Drawdown Request Summary on Cigno letterhead specifying repayment amounts and a repayment schedule that combined the amounts due to BHFS and Cigno. BHFS then credited \$300.00 to Ms Morrow's nominated bank account. All of those steps occurred on 11 January 2020.

76 The repayment schedule in the Drawdown Request Summary was as follows:

- (a) \$180.00 on 20 January 2020;
- (b) \$180.00 on 3 February 2020; and
- (c) \$177.75 on 17 February 2020.

77 On 20 January 2020, \$180.00 was automatically debited from Ms Morrow's nominated account and paid to Cigno.

78 On 3 February 2020, Ms Morrow received an email and a text message from Cigno, reminding her that a payment was due that day. However, the direct debit in favour of Cigno was unable to be processed that day and was dishonoured. On 5 February 2020 at 1:20pm, Cigno sent Ms Morrow a notice of default by text message and by email because the payment due on 3 February 2020 was not made. Attached to the email was a document called a "Default Notice" on the letterhead of both Cigno and BHFS. The notice advised that a default fee of \$79.00 would be charged. The notice also stated that the amount of \$180.00 would be debited on 17 February 2020.

79 On 17 February 2020, \$180.00 was automatically debited from Ms Morrow's nominated account and paid to Cigno.

80 On 2 March 2020, Ms Morrow received an email and a text message from Cigno reminding her that a payment was due that day. However, the direct debit in favour of Cigno was unable to be processed that day and was dishonoured. On 4 March 2020, Cigno sent Ms Morrow a notice of default by text message and by email because the payment due on 2 March 2020 was not made. Attached to the email was a further "Default Notice" on the letterhead of both Cigno and BHFS. The notice advised that a further default fee of \$79.00 would be charged. The notice also stated that the amount of \$180.00 would be debited on 16 March 2020.

81 On 16 March 2020, \$180.00 was automatically debited from Ms Morrow's account and paid to Cigno.

- 82 On 26 March 2020, Ms Morrow received two emails from Cigno, advising that her payment had been changed as requested and that her next payment would be \$207.50 on 13 April 2020. The emails attached a document titled “Detailed Account Statement” for the period 11 January 2020 to 26 March 2020. The document listed all transactions in respect of the loan obtained on 11 January 2020, including all fees charged and all repayments made.
- 83 On 13 April 2020, Ms Morrow received an email from Cigno advising that her payment was pending and that her next payment of \$14.50 was due on 27 April 2020. The email attached a further Detailed Account Statement for the period from 11 January 2020 to 13 April 2020.
- 84 On 14 April 2020, \$210.85 was automatically debited from Ms Morrow’s nominated account and paid to Cigno. On the same day, Ms Morrow also manually transferred \$157.74 from her nominated account to Cigno.
- 85 On 15 April 2020, Ms Morrow sent an email to Cigno in relation to her payments of 14 April 2020 requesting a refund of \$210.85. There was further correspondence between Ms Morrow and Cigno about the refund request between 15 and 29 April 2020. On 30 April 2020, Cigno refunded \$137.29 to Ms Morrow.
- 86 The net payments made by Ms Morrow in relation to the third loan totalled \$771.30 which comprised the loan amount of \$300.00, the BHFS fee of \$15.00, the Cigno Financial Supply Fee of \$193.00, the Cigno Account Keeping Fees of \$83.80, Cigno Change of Payment Schedule Fees of \$22.00 and Cigno Default Fees of \$158.00. Within eight weeks of 11 January 2020, Cigno transferred \$315.00 (being the loan amount of \$300.00 and the BHFS fee of \$15.00) to BHFS.
- 87 Throughout the above process, Ms Morrow did not have any direct contact with BHFS.

## **LEGISLATIVE FRAMEWORK**

### **Relevant prohibition – unlicensed credit activity**

- 88 Section 29 (1) of the NCCP Act provides that:

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.

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

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***Meaning of credit activity***

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Item	Topic	A person engages in a <i>credit activity</i> 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 ...

90 As noted earlier, ASIC alleged that BHFS was engaged in a credit activity by reason of being a credit provider under the credit contract with Ms Morrow (as per item 1(a) above) and by carrying on a business of providing credit, being credit the provision of which the Code applies to (as per item 1(b) above). ASIC alleged that Cigno was engaged in a credit activity by reason of exercising the rights of BHFS (being a credit provider) in relation to the credit contract with Ms Morrow and in the course of its business generally (as per item 1(c) above) and by providing a credit service to Ms Morrow and in the course of its business generally (as per item 2 above).

91 The terms *credit*, *credit provider*, *credit contract* and *credit service* as used in the above definition of the term *credit activity* are also defined in the NCCP Act, often by reference to definitions that appear in the Code.

### Definitions of *credit* and *credit provider*

92 The term *credit* is defined in s 5(1) of the NCCP Act by reference to s 3(1) of the Code, which provides as follows:

- (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*).

93 The term *credit provider* is (relevantly) defined in s 5(1) of the NCCP Act by reference to s 204(1) of the Code to mean a person “that provides credit, and includes a prospective credit provider”.

94 There is no dispute that, by borrowing funds from BHFS under the Loan Agreement, Ms Morrow incurred a deferred debt to BHFS and that BHFS was a credit provider within the meaning of s 204(1). ASIC did not allege that Ms Morrow also incurred a deferred debt to Cigno, notwithstanding the stipulation in the Services Agreement that, if Ms Morrow’s

repayments fell into deficit with BHFS, Ms Morrow promised to make payments to Cigno until the deficit was discharged.

### **Definition of *credit contract***

95 The term *credit contract* is defined in s 5(1) of the NCCP Act by reference to s 4 of the Code, which provides as follows:

For the purposes of this Code, a ***credit contract*** is a contract under which credit is or may be provided, being the provision of credit to which this Code applies.

96 Section 204(1) of the Code defines *contract* to include a series or combination of contracts, or contracts and arrangements. At first instance and on appeal, ASIC referred to this definition as the **extended definition** of contract. As an alternative formulation of its case, ASIC alleges that the Loan Management Facilitation Agreement between BHFS and Cigno, the Loan Agreements entered into between BHFS and consumers and the Services Agreement entered into between Cigno and consumers were a series or combination of contracts, or contracts and arrangements, under which credit was provided by BHFS to consumers.

97 It can be seen that the definition of *credit contract* contains the phrase “being the provision of credit to which this Code applies”. A materially identical phrase (although grammatically less elegant) appears in item 1(b) of the definition of *credit activity*: “being credit the provision of which the National Credit Code applies to”. Thus, each of the definitions of *credit activity* in item 1 of the table in s 6(1) require, as an element:

- (a) the contract under which credit is or may be provided; or
- (b) the carrying on of a business of providing credit,

in both cases being the provision of credit to which the Code applies. That latter phrase is defined in ss 5 and 6 of the Code, which are set out below.

### **Definition of *credit service***

98 The definition of *credit activity* in item 2 of the table in s 6(1) is that the person provides a credit service. Section 7 of the NCCP Act provides that a person provides a *credit service* if the person provides credit assistance to a consumer or acts as an intermediary. In its case against Cigno, ASIC relies on both limbs of that definition.

99 Section 8 of the NCCP Act defines *credit assistance* (relevantly) as follows:

A person provides ***credit assistance*** to a consumer if, by dealing directly with the consumer or the consumer’s agent in the course of, as part of, or incidentally to, a

business carried on in this jurisdiction by the person or another person, the person:

(a) suggests that the consumer apply for a particular credit contract with a particular credit provider; or

...

(d) assists the consumer to apply for a particular credit contract with a particular credit provider; or

100 Section 9 of the NCCP Act defines *acts as an intermediary* (relevantly) as follows:

A person *acts as an intermediary* if, in the course of, as part of, or incidentally to, a business carried on in this jurisdiction by the person or another person, the person:

(a) acts as an intermediary (whether directly or indirectly) between a credit provider and a consumer wholly or partly for the purposes of securing a provision of credit for the consumer under a credit contract for the consumer with the credit provider; or

...

It does not matter whether the person does so on the person's own behalf or on behalf of another person.

101 It can be seen that the above definitions require, as an element, conduct that involves a consumer applying for a credit contract or securing the provision of credit under a credit contract. Thus, the definition of *credit activity* in item 2 of the table in s 6(1) also focusses upon a contract under which credit is or may be provided, being the provision of credit to which the Code applies.

### **The provision of credit to which the National Credit Code applies**

102 As already noted, ss 5 and 6 of the Code define the circumstances in which the Code applies to the provision of credit. Section 5 is titled "Provision of credit to which this Code applies" and (relevantly) subs (1) provides as follows:

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.

103 On this appeal, there is no dispute that the loans provided to consumers by BHFS as part of its lending arrangements with Cigno satisfied the elements of s 5(1). The loans were provided to natural persons, the loans were for personal, domestic or household purposes, BHFS charged a fee for providing the loan and BHFS provided the loans in the course of a business of doing so.

104 Section 6 is titled “Provision of credit to which this Code does not apply” and, in many subsections, describes different types of credit arrangements which are excluded from regulation under the Code. This case concerns subs (5), but it is contextually relevant also to have regard to subss (1), (2) and (3). Those subsections are as follows:

*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.

...

105 Regulation 51 of the Regulations stipulates that the maximum charge for the purpose of s 6(5) is:

- (a) for the period of 12 months commencing when the debtor enters into the continuing credit contract – \$200; and
- (b) for any subsequent period of 12 months during which the continuing credit contract is in effect – \$125.

106 Relevantly to s 6(5), the term *continuing credit contract* is defined in s 204(1) of the Code to mean 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.

107 The central dispute between the parties concerns the meaning of s 6(5) and whether it is applicable to the provision of credit under the BHFS Loan Agreements. The respondents contend that s 6(5) is applicable because the only charge that is or may be made for providing the credit under the Loan Agreements is the BHFS fee of \$15.00. ASIC contends that s 6(5) is inapplicable because the Cigno fees are also charges that are made for providing the credit under the Loan Agreements. Thus, the dispute concerns the meaning of the words “charge that is or may be made for providing the credit” under the continuing credit contract.

108 It can be observed that the expression “charge that is or may be made for providing the credit” appears in both s 6(5) and in s 5(1)(c) (with a minor syntactical difference). However, the words serve a different purpose in each provision. For the purposes of s 5(1)(c), the Code applies to the provision of credit if *a* charge is or may be made for providing the credit. For the Code to apply, it is only necessary to identify a single charge that satisfies that description. In this case, there was no dispute that the BHFS charge was a charge for providing the credit. For the purposes of s 6(5), the Code is excluded from the provision of credit 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 and is not a charge of a nature prescribed by the Regulations and does not exceed the maximum prescribed by the Regulations. Section 6(5)

requires the identification of *all* charges that are or may be made for providing the credit to determine whether all meet the requirements of s 6(5).

### **Evidentiary burdens**

109 I note for completeness that the NCCP Act and Code specify two evidentiary burdens. 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.

110 Second, s 175D of the NCCP 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.

111 However, in circumstances where the lending arrangements the subject of the proceeding are the subject of reasonably comprehensive evidence, the respondents have discharged their burden under s 175D and s 13(1) is of limited practical application. The evidentiary burdens were not relied upon in the appeal.

### **FINDINGS OF THE TRIAL JUDGE**

112 It is convenient to state the findings of the trial judge by reference to ASIC's pleaded allegations. The findings can be stated relatively briefly.

#### **ASIC's principal case against BHFS**

113 ASIC's principal allegation against BHFS was that the loans provided by BHFS, both to Ms Morrow and as part of its lending business conducted with Cigno, constituted the provision of credit under a contract, being credit to which the provisions of the Code applied. In that regard, ASIC alleged that the elements of s 5(1) of the Code were satisfied and that the elements of s 6(5) were not satisfied because the Cigno fees were each a charge that is or may be made for providing the credit.

114 An aspect of ASIC's pleaded allegations requires a short comment. ASIC alleged that each of the Cigno fees were a charge that is or may be made for providing credit within the meaning

of s 5(1)(c) of the Code. For the reasons explained above, that is an unnecessary allegation. There was no dispute that, in relation to the credit provided by BHFS under the Loan Agreements, BHFS made a charge for providing the credit by charging the \$15.00 fee. That charge satisfied the requirements of s 5(1)(c). Therefore, on the facts of this case, it is strictly irrelevant to the application of s 5(1) whether the Cigno fees were also charges for providing the credit. The relevant issue was whether one or more of the Cigno fees was a charge that is or may be made for providing credit within the meaning of s 6(5) and, depending on the fee, whether the requirements of s 6(5) were satisfied in respect of the fee.

115 As noted earlier, it was only necessary for ASIC to succeed on its allegation that the Financial Supply Fee was a charge that is or may be made for providing the credit, as that charge could not satisfy s 6(5) because it varied according to the amount of credit provided and also exceeded the amount prescribed by reg 51.

116 The trial judge found that the only charge made in exchange for the provision of the credit to Ms Morrow was the charge payable under the Loan Agreement, namely the \$15.00 fee and that, in contrast, the Cigno fees were paid in exchange for the provision by Cigno of application, management and collection services (at J [160]). In reaching that conclusion, his Honour construed the word “for” as meaning “in exchange for” or its Latin equivalent “*quid pro quo*” in a contractual sense (at J [143]-[144]). His Honour also rejected a submission by ASIC that the Cigno fees could be characterised as both a charge for services relating to the provision of credit and a charge for the provision of credit. In that respect, his Honour concluded as follows (at J [153] – [162]):

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 It 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).

117 The trial judge’s findings with respect to ASIC’s primary case against BHFS are the subject of appeal grounds 1 and 4.

### **ASIC's principal case against Cigno**

118 In its amended statement of claim, ASIC framed its allegations that Cigno engaged in credit activities in a number of alternative ways. It is unnecessary to descend to the details of the alternative formulations. Broadly, the allegations relied on three categories of credit activities.

119 In the first category, ASIC alleged that Cigno engaged in a credit activity by exercising the rights of BHFS in relation to the Loan Agreements within the meaning of item 1(c) of s 6(1) of the NCCP Act. ASIC alleged that the rights of BHFS exercised by Cigno were assessing applications for loans and managing and collecting payments from the borrower.

120 In the second category, ASIC alleged that Cigno engaged in a credit activity by providing credit assistance to consumers within the meaning of s 8 of the NCCP Act, being a credit service within the meaning of item 2 of s 6(1) and s 7(a) of the NCCP Act. ASIC alleged that Cigno provided credit assistance by suggesting that consumers apply for a credit contract with BHFS and assisting consumers to apply for a credit contract with BHFS.

121 In the third category, ASIC alleged that Cigno engaged in a credit activity by acting as an intermediary within the meaning of s 9 of the NCCP Act, being a credit service within the meaning of item 2 of s 6(1) and s 7(b) of the NCCP Act. ASIC alleged that Cigno acted as an intermediary by, in the course of Cigno's business, acting as an intermediary between BHFS and consumers for the purpose of securing the provision of credit for the consumer under a credit contract with BHFS.

122 The trial judge considered that it was necessary to answer the question whether Cigno was acting as the agent of BHFS or was acting as the agent of Ms Morrow (at J [80(d)]). His Honour concluded that, at all relevant times, Cigno was acting as the agent of Ms Morrow or on its own behalf (at [127]). In doing so, his Honour relied on three factual matters:

- (a) first, the Loan Management Facilitation Agreement contained an express acknowledgement that there was no agency arrangement between BHFS and Cigno (J at [128]);
- (b) second, the Services Agreement supported the existence of an agency relationship between Cigno and Ms Morrow as it refers to Cigno making repayments on behalf of Ms Morrow (J at [129] and [131]); and

(c) third, there was an agreed fact that 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 (J at [134]).

123 On the appeal, it was common ground that ASIC's case against Cigno did not depend upon a finding that Cigno was acting as an agent of BHFS. Neither item 1(c) nor item 2 of s 6(1) of the NCCP Act refers to agency or requires the relevant person referred to in those items to be acting in the capacity of an agent of the credit provider. Nor does ASIC's pleading allege that Cigno was acting as the agent of BHFS. While ASIC raised the trial judge's finding on agency as a ground of appeal, neither ASIC nor Cigno submitted that the resolution of that issue was determinative of ASIC's case against Cigno based on items 1(c) and 2 of s 6(1) of the NCCP Act. Indeed, in oral submissions on the appeal, Cigno conceded that the issue was of peripheral relevance only.

124 It is not clear from the record on the appeal why and how the question of agency arose at trial, given the absence of an allegation of agency. It is also not entirely clear why the trial judge did not make findings with respect to the totality of ASIC's allegations in respect of Cigno's conduct; however, as ASIC submitted, presumably his Honour considered it unnecessary in circumstances where he had found that the credit provided by BHFS was not credit to which the Code applied.

125 The trial judge's findings with respect to the issue of agency are the subject of appeal ground 5. The failure of the trial judge to otherwise make findings in relation to ASIC's case against Cigno is covered by appeal ground 6.

### **ASIC's alternative case against BHFS and Cigno**

126 ASIC's alternative case against BHFS and Cigno was founded on the contention that the Loan Management Facilitation Agreement, the Loan Agreements and the Services Agreements (or various combinations of those agreements) constituted the relevant credit contract (which ASIC described as the "Composite Contract"), relying on the extended definition of contract in s 204 of the Code. ASIC alleged that the Cigno fees were charges made for the provision of credit by BHFS under the so-called Composite Contract.

127 Although a considerable portion of the trial judge's reasons addressed ASIC's alternative allegation (J at [50]-[72] and [86]-[123]), his Honour observed, and the parties agreed on the appeal, that the issue is not determinative because neither s 5(1)(c) nor s 6(5) is confined to

payments made under a credit contract (J at [86] and [135]). The statutory provisions refer only to the existence of a charge that is or may be made for providing the credit. In that regard, a contrast can be drawn with s 6(1) which refers to certain obligations that exist “under the contract”.

128 The trial judge concluded that ASIC had not established the existence of the Composite Contract (J at [123]). In reaching that conclusion, his Honour considered that the facts in this case were relevantly indistinguishable from the facts in *Australian Securities and Investments Commission v Teleloans Pty Ltd* (2015) 234 FCR 261, where Logan J concluded that the contract under which the charges were made was not a contract for the provision of credit but a contract for the provision of services (J at [60]). Conversely, his Honour distinguished *Bahadori v Permanent Mortgages Pty Ltd* (2008) 72 NSWLR 44, *Australian Securities and Investments Commission v Fast Access Finance Pty Ltd* [2015] FCA 1055 (**Fast Access Finance**) and *Walker v Consumer, Trader and Tenancy Tribunal of New South Wales* [2013] NSWSC 1432 (**Walker**) on the basis that, in those cases, it was the combination of discrete contracts that gave rise to the relevant provision of credit and that none of the constituent contracts in and of themselves provided for the provision of credit (J at [92]). In that respect, the trial judge adopted the conclusion of Doyle J in *Bendigo and Adelaide Bank Limited v Brackenridge* [2020] SASC 114 at [379] that the operation of s 204 of the Code is confined to the amalgamation of those contracts or arrangements constituting a particular provision of credit and the section does not operate to require the amalgamation of all related contractual arrangements as though they involve one overall credit contract (at J [93]). In reaching that conclusion, Doyle J relied on the reasoning of Fraser JA (with whom Philippides and McMurdo JJA agreed) in *Appleyard v Westpac Banking Corporation* [2017] QCA 316 at [21]. The trial judge observed that, in the present case, it was not disputed that the Loan Agreement is a credit contract that created the deferral of a debt owed by Ms Morrow to BHFS (J at [96]).

129 The trial judge’s findings with respect to ASIC’s alternative case against BHFS and Cigno are the subject of appeal grounds 2 and 3.

#### **GROUND 1 AND 4**

130 The focus of the appeal was on grounds 1 and 4. By those grounds, ASIC contends that the trial judge erred in his interpretation of the expression “a charge that is or may be made for providing the credit” in ss 5(1)(c) and 6(5) of the Code, and by failing to find that one or more of the Cigno fees came within that expression. As noted earlier, it is not strictly relevant



whether the Cigno fees came within the expression as used in s 5(1)(c) because the BHFS fee satisfied that element of s 5(1). The relevant legal issue concerns the applicability of s 6(5). Nevertheless, the use of the same phrase in both ss 5(1) and 6(5) has contextual relevance to the interpretation of the phrase in s 6(5).

### **ASIC's submissions**

131 In respect of ground 1, ASIC submitted that the phrase “charge that is or may be made for providing the credit” refers to what the consumer pays or promises to pay in order to obtain a provision of credit. ASIC argued that the trial judge read limitations into the phrase that are unsupported by the text of ss 5(1)(c) and 6(5), construed in context and in light of the Code’s consumer protection objectives.

132 ASIC submitted that the key to unlocking the meaning of “charge ... for providing the credit” in ss 5(1)(c) and 6(5) of the Code is the relational term “for”. It argued that this is an “ambulatory word” that “may be designed to cover a variety of subjects and a variety of relationships between those subjects” – the “nature and breadth” of which relationships will “depend upon ... statutory context and purpose”: *R v Khazaal* (2012) 246 CLR 601 (*Khazaal*) at [31]. ASIC argued that while all parties accept that “for” in this context contemplates the notion of “exchange”; it still begs the question of the nature and scope of the connection required. Thus, the plain language of ss 5(1)(c) and 6(5) admits of:

- (a) a broader meaning: a charge attributable to, inter alia, the architecture that creates and effectuates the legal obligations governing the deferral of debt under a continuing credit contract, including by accommodating the possibility that charges may be “for” multiple things (as ASIC argued); or
- (b) a narrower meaning: a charge solely attributable to the credit provider’s deferral of a debt under a contract with the debtor (as the respondents argued).

133 In these circumstances, the availability of multiple constructions means that the interpretation that best achieves the NCCP Act’s object or purpose must be preferred: s 15AA of the *Acts Interpretation Act 1901* (Cth) (**Acts Interpretation Act**). ASIC argued that the consumer protection objectives of the Code infuse all of its provisions, including ss 5 and 6, and the Court should therefore prefer an interpretation that gives effect to those objectives, over a construction that creates large holes in the regulatory scheme for no useful purpose that the respondents can identify. ASIC submitted that the trial judge’s construction of “charge ... for

providing the credit” does not promote the Code’s beneficial and protective purpose. The purpose of the Code is promoted by an interpretation that looks to the substance of the manner in which a provision of credit is effected. Conversely, on the trial judge’s interpretation, the Code’s protections may be defeated by parties structuring their arrangements such that a charge may partly be attributable to an activity other than the advance of funds.

134 ASIC submitted that the trial judge erred in concluding that “charge ... for providing the credit” means a charge imposed solely for the purpose of, or solely in exchange for, the deferment of an existing debt or the creation of a new deferred debt (referring to his Honour’s reasoning at J [151], [153]-[157], [159]-[160]). ASIC argued that the word “for” is a broad term that does not connote exclusivity. It argued that the trial judge was wrong to contrast the use of the phrase “wholly or predominantly” in s 5(1)(b) because those words are used in a different context, being concerned with the purpose to which the credit is to be applied, not the purpose for which fees or charges are imposed. ASIC noted that the *expressio unius* principle of construction should be approached with caution: *Doyles Farm Produce Pty Ltd v Murray Darling Basin Authority (No 2)* [2021] NSWCA 246 (*Doyles Farm*) at [70].

135 Third, ASIC submitted that the trial judge erred in concluding that if a charge could be characterised as “for any service related to the provision of credit” or “payable in connection with a credit contract”, it could not be a “charge ... for providing the credit” (referring to his Honour’s reasoning at J [155]-[156] and [162]). ASIC argued that this analysis does not find support in the statutory text, and that the nexus contemplated by the word “for” is readily satisfied by fees attaching to services that establish the very mechanism for bringing into existence, and performing the terms of, a supply of a deferred debt to a consumer. ASIC argued that his Honour erred in contrasting the use of the phrase “for any service related to the provision of credit” in s 6(2) of the Code as the phrase is used in a different context, and to describe a different commercial arrangement, compared with s 6(5). ASIC also argued that the phrase as used in s 6(2) cannot control the meaning of the different phrase “a charge ... for providing the credit” in s 5(1)(c), given that s 5(1)(c) is a “gateway” criteria and s 6(2) is part of a definition of a statutory exclusion. The words in s 5(1)(c) are general and accommodate different charging arrangements, some of which are the subject of specific carve outs (in s 6) or targeted regulation (for example, ss 31A, 32). ASIC argued that ss 6(1) and (2) contain an exception for short term credit contracts with particular terms, or terms having certain effects. Having regard to the interconnected operation of ss 5 and 6, these types of fees are capable of being classified as “charge[s] ... for providing the credit”.

136 Fourth, ASIC submitted that in construing the phrase “charge ... for providing the credit”, the trial judge did not fully grapple with what the provision of credit entails. ASIC argued that the provision of credit occurs if, under a contract, payment of a debt owed by one person to another is deferred or one person incurs a deferred debt to another. The deferral of debt involves postponing repayment of an amount owed to another person. For repayment of a debt to be postponed, arrangements need to be made for the collection of money, for timetabling repayments and for changes to the timetable. They are particularly evident, and important, in a “continuing credit contract” under which “multiple advances of credit are contemplated” and “the amount of available credit ordinarily increases as the amount of credit reduces” (as per s 204(1)). There must be a mechanism in place for bringing about the further advances and reducing the amount of credit. For these reasons, any charge for the provision of the components of the deferral of debt is for the provision of credit. Relatedly, the provision of credit may be structured in various ways. The bargain struck between the credit provider and the debtor may be such that the credit provider takes the risk of the deferral only in exchange for a particular scheme (and its associated fees) for managing those components of the deferral. Alternatively, all risk and cost may remain with the credit provider. It would be a triumph of form over substance if only fees levied in the latter arrangement, and not the former arrangement, qualified as “charge[s] ... for providing the credit”. ASIC argued that s 5(1)(c) should be construed in a way that recognises the price for the provision of credit, viewed in the full factual setting of the arrangements relating to the provision of credit. This approach furthers the Code’s purpose of protecting credit consumers and leads to the conclusion that the concept of “charge ... for providing the credit” means a charge that, in all the relevant circumstances (including any arrangements between the consumer and a service provider), forms part of the *quid pro quo* for which a consumer obtains a credit provider’s agreement to defer payment of a debt.

137 In respect of ground 4, ASIC submitted that the trial judge erred in finding that the Cigno fees were not charges for providing the credit to Ms Morrow because they were in exchange for providing the services pursuant to the Services Agreement, and that the only charge for the provision of credit to Ms Morrow was the BHFS fee (referring to his Honour’s reasoning at J [159]-[160]). ASIC submitted that the trial judge’s characterisation of the Cigno fees did not reflect the substance of the arrangements pursuant to which BHFS provided credit to Ms Morrow – particularly:

- (a) the role of the Cigno Services in the creation of a new deferred debt for Ms Morrow, including that, as Ms Morrow had chosen to use the Cigno Premium Service, the Cigno services were an essential *quid pro quo* for the provision of credit by BHFS to Ms Morrow;
- (b) the interconnected arrangements between Ms Morrow, BHFS and Cigno, whereby Ms Morrow repaid Cigno for the amounts advanced by BHFS and the BHFS fee, and within eight weeks of each advance, Cigno repaid the advance plus the BHFS fee under the Loan Management Facilitation Agreement; and
- (c) the description of the BHFS fee in the Loan Agreement as, in effect, a fee for the advance of funds, rather than for the deferral of debt.

### **BHFS's submissions**

138 BHFS submitted that s 6(5) requires a characterisation of the charge in issue – whether it is “for providing credit”. It argued that the word “providing” must take its meaning from the cognate term in s 3(1) which defines when credit is provided. Section 3(1) is directed solely to a legal question: whether “under a contract” a debt owed is deferred (s 3(1)(a)), or a person incurs a deferred debt (s 3(1)(b)). BHFS submitted that the concept of providing credit under s 3(1) is fundamentally about the legal operation of contracts. It was wholly and only under her contract with BHFS that Ms Morrow incurred a deferred debt. By contrast, no debt was created or deferred under her contract with Cigno. BHFS argued that ASIC diverts attention from the statutory meaning of when credit is “provided” as defined in s 3(1) of the Code. While ASIC refers to services provided by Cigno which (it submits) constitute a “mechanism” for bringing about the existence of a deferred debt, s 3(1) is not concerned with practical arrangements nor even with the advance of money.

139 BHFS argued that the focus of the relevant provisions of the Code is thus sharply on the legal effect of the contractual relations with respect to the deferral of the existing or created debt. The Cigno services are distinct from the legal bargain by which deferred debt is created; those services do not themselves constitute the creation of deferred debt.

140 BHFS submitted that the trial judge did not err in consistently construing each of ss 5(1)(c) and 6(5) as identifying charges imposed in exchange for the deferral of an existing debt or the creation of a new, deferred debt. His Honour construed “the provision of credit” by correctly focussing on the legal deferral of debt as the statutory criterion. His Honour also construed the word “for” as meaning “in exchange for”. BHFS submitted that the trial judge was correct to

have regard to the immediate statutory context of related provisions in the Code and the use of broader language in provisions such as s 6(2) and the definition of “credit fees and charges” in s 204(1). It submitted that the absence from ss 5(1)(c) and 6(5) of such words of expansion emphasises the relationship required between the charge and the creation of the deferred debt: the charge must be one made in exchange for a right granted by the creditor for the deferral of a debt, or for the incurring of the debt as a deferred debt. BHFS argued that there has to be a tight connection in the nature of a direct exchange or a *quid pro quo* between the legal deferral of the existing debt or the creation of a new deferred debt on the one hand and the fee on the other.

141 BHFS further submitted that, if contrary to its submissions concerning the proper construction of s 6(5) it is permissible to have regard to charges that are not solely in exchange for the creation of the deferred debt, relevant factors that should be taken into account in characterising the charge are:

- (a) whether the charge is payable to the credit provider or to another person;
- (b) whether the person to whom the charge is payable is providing services distinct from the provision of credit; and
- (c) whether the charge is payable under a separate contract to the contract creating the deferred debt.

142 BHFS submitted that, in the present case, the Cigno fees are paid to a person other than the credit provider, they are payable under the Services Agreement which does not create the deferred debt and they are payable in return for the services of “facilitat[ing] in all enquiries, management, payments and all other services related to the loan or financial product”, not the incurring of the deferred debt.

### **Cigno’s submissions**

143 Cigno submitted that ASIC’s challenge to the trial judge’s conclusion focusses on the procedural “mechanism” of Cigno’s assistance, which ASIC says was necessary to the creation of the deferred debt between Ms Morrow and BHFS. Cigno submitted that ASIC’s approach suffers from a number of problems. First, the approach overlooks the fact that the legal mechanism by which the deferred debt was brought into existence was the entry into the Loan Agreement under which the credit was provided by BHFS. Second, ASIC’s approach finds no support in the cases that have considered whether a charge is “for” the provision of credit.

Third, the approach would “obscure rather than illuminate” the key question by raising collateral factual inquiries about events in a causative chain involving potentially numerous third parties (referring to his Honour’s reasoning at J [148]). Fourth, and in any case, ASIC did not allege, and there was no evidence at trial showing, that Ms Morrow would not have been provided credit by BHFS but for her choice to engage Cigno, rather than directly approaching BHFS for credit.

144 In respect of ASIC’s argument that s 5 of the Code is a “gateway” and that the exceptions found at s 6 must therefore address only a narrower subset of cases that would otherwise be caught by s 5, Cigno submitted that this argument should be rejected for the following reasons.

145 First, it proceeds from an incorrect premise that the “gateway” in s 5 will be narrow unless the term “for” is given a very broad meaning. Cigno argued that this is not correct, as s 5(1)(c) does not specify any minimum amount or other threshold characteristic of the charge which must be satisfied in order for the charge to be one “for providing the credit”. The quantum and characteristics of the charge only become relevant when one comes to consider exceptions such as that in s 6(5). Accordingly, on proper analysis, s 5(1)(c) imposes a very undemanding threshold for the application of the Code when one gives the term “for” its natural and ordinary meaning. One will pass through the gateway unless there is no charge at all for providing the credit.

146 Second, ASIC’s criticism of the trial judge’s reasoning as to the absence of a phrase such as “wholly or predominantly” in ss 5(1)(c) and 6(5) is misplaced. Such language was expressly used, including in the “gateway” provision at ss 5(1)(b) and 5(1)(b)(iii), when Parliament contemplated picking up one of multiple purposes. This accords with the proposition that where different words are used a different meaning is intended: *Taheri v Vitek* (2014) 87 NSWLR 403 at [124] (Leeming JA, with whom Bathurst CJ and Emmett JA agreed). Even if this proposition may be relatively weak (as Leeming JA acknowledged), there must be something to displace it. There is nothing here.

147 Third, ASIC’s submission with respect to the exception in ss 6(1) and (2) misses two key points. The first is that the fees and charges referred to in those sections are not necessarily the “only” fees charged under the credit contract. The second is that Parliament had an interest in including the fees set out in s 6(2) within the exemption’s maximum permissible fees because those fees arise from services that would be caught by ss 6 to 9 of the NCCP Act if the Code

applies. Cigno submitted that Parliament framed the relevant fees and charges in the ss 6(1) and (2) exception in terms that are clearly broader than the s 5 gateway.

148 Fourth, Cigno reiterated that Parliament could have extended s 6(5) to any charge “for any service related to the provision of credit” (as it did in s 6(2)) or to charges “payable in connection with a credit contract” (as per the definition of credit fees and charges in s 204(1)) but elected not to do so.

149 Fifth, s 6(5) is not concerned with charges “under a credit contract”, even though such a phrase might have caught charges for services that were related to the provision of credit but not necessarily “for” the provision of credit.

### **Consideration**

150 It is common ground that BHFS provided credit to Ms Morrow, and more generally as part of its lending arrangements with Cigno, pursuant to the terms of the Loan Agreement. It is also common ground that the provision of that credit satisfies the requirements of s 5(1) of the Code. The question for determination, raised by appeal grounds 1 and 4, is whether one or more of the Cigno fees is a “charge that is or may be made for providing the credit”, being the credit provided by BHFS under the Loan Agreement, within the meaning of s 6(5) of the Code. It is sufficient to focus on the Financial Supply Fee because, if that fee satisfies the statutory language, s 6(5) will not apply.

151 The answer to the question for determination depends upon the meaning of the phrase “charge that is or may be made for providing the credit”. It is a relatively short phrase of ordinary language, albeit that the word “credit” is defined in s 3(1) of the Code. Despite being a short phrase, elaborate and extensive arguments have been advanced as to its construction. In a nutshell, ASIC contends that a charge may be made (or imposed) in return for multiple things; in this case, the Financial Supply Fee was imposed both for the credit application services supplied by Cigno and for the provision of credit. The respondents contend that, under the Cigno Services Agreement, it is clear that the Financial Supply Fee was only imposed for the credit application services.

152 The proper approach to statutory construction is well understood and not disputed by the parties. The task begins with the text of the provision in question which, as for all writing, is to be understood in its context (including legislative history and extrinsic materials) and with regard to its purpose: *SZTAL v Minister for Immigration and Border Protection* (2017) 262

CLR 362 (*SZTAL*) at [14]; *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39]; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]-[71]. As the majority of the High Court observed in *SZTAL* (Kiefel CJ, Nettle and Gordon JJ at [14], citations omitted):

The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

153 Where multiple interpretations of a provision are available, s 15AA of the Acts Interpretation Act requires that “the interpretation that would best achieve the purpose or object of the Act ... is to be preferred to each other interpretation”.

154 It is convenient to consider the arguments concerning the statutory text, context and purpose in turn, before considering the previous cases that have considered the phrase in question.

#### *The statutory text*

155 Section 6(5) requires the identification of each charge that is or may be made for providing the credit, being credit provided under a continuing credit contract. It is necessary to identify each such charge in order to answer the statutory question whether the only charge is a periodic or other fixed charge that does not vary according to the amount of credit provided and is not of a nature prescribed by the Regulations or in excess of the maximum so prescribed. It is important to observe that the section does not refer to the person imposing the charge; in particular, it is not a requirement that the charge is imposed by the person providing the credit.

156 The word “for” is a common preposition. Like all prepositions, it expresses a relationship between two things. It is a protean word in that its meaning, being the nature of the relationship expressed, is governed by the nouns or verbs it connects. This is well illustrated by the myriad definitions of the preposition and accompanying examples given in the Macquarie Dictionary. To quote a few:

1. with the object or purpose of: to go for a walk.
2. intended to belong to, suit the purposes or needs of, or be used in connection with: a book for children; a box for gloves.



3. in order to obtain: a suit for damages.
- ...
6. in consideration of, or in return for: three for a dollar; to be thanked for one's efforts.
- ...
8. with regard or respect to: pressed for time; too warm for April.
9. during the continuance of: for a long time.
- ...
12. in the interest of: to act for a client.
15. in punishment of: fined for stealing.
- ...
24. in proportion or with reference to: tall for his age.
- ...
26. by reason of, or because of: to shout for joy; famed for its beauty.

157 In s 6(5) of the Code, the relationship expressed by the preposition “for” is between a charge that is or may be made on the one hand and providing credit on the other. The expression “charge that is or may be made” focusses upon the making of the charge. In that context, the word “made” connotes brought about or imposed. Thus, the beginning of the phrase invokes an enquiry as to what the imposition of the charge is for. In respect of the expression “providing credit”, the respondents are correct that the word “provide”, and cognate terms, must take their meaning from s 3(1) of the Code. Section 3(1) defines the phrase “credit is provided” by reference to the deferral of a debt or the incurring of a deferred debt under a contract.

158 In the context of s 6(5), there are at least two available meanings of the preposition “for”. One available meaning is “in consideration of” or “in return for” – that the charge is made in consideration of or in return for the provision of credit. This may be conceived in a strict contractual sense, asking whether the charge in question is the contractual consideration for the provision of credit, or may be conceived in a practical commercial sense, asking whether the provision of credit is the benefit received in return for the charge in question. A second available meaning is “by reason of” or “because of” – that the charge is made by reason of the provision of credit in the sense that the charge is imposed if credit is provided. The second meaning is similar to the first, but conveys a different shade of the meaning of “for”. It asks whether the charge in question is imposed by reason of the provision of credit or whether the provision of credit is the condition for the charge being imposed.

159 There is no particular textual reason for choosing one of the available meanings over the other, or for excluding one of the available meanings. Each may be appropriate in particular factual contexts. It is therefore necessary to consider whether considerations of statutory context or purpose would lead to the exclusion of one of the meanings.

*Contextual considerations*

160 An important matter of statutory context is that each of ss 5(1)(c) and 6(5) use the same statutory phrase. Given the close relationship between ss 5 and 6 (defining what is and what is not the provision of credit to which the Code applies), the phrase must be given the same meaning in each provision. It will therefore be relevant, when considering matters of statutory purpose, to consider also the purpose of s 5(1).

161 In the construction of s 6(5), the respondents advanced elaborate contextual arguments seeking to contrast the language used in s 6(5) with the language used in other provisions, particularly ss 5(1)(b) and 6(2) and the definition of “credit fees and charges” in s 204(1). The burden of the arguments was that, in those other provisions, the legislature expressly contemplated and addressed circumstances that have parallels with the present case, viz:

- (a) that a thing may have multiple purposes or objects, as seen in the use of the language “wholly or predominantly” (see s 5(1)(b));
- (b) that a fee or charge may be payable by the debtor to a person for introducing the debtor to the credit provider (see s 6(2)(a));
- (c) that a fee or charge may be payable by the debtor for services related to the provision of credit (see s 6(2)(c)); and
- (d) that a fee or charge may be payable by the debtor in connection with a credit contract (see the definition of “credit fees and charges” in s 204(1)).

162 The respondents argued that the absence of similar language from ss 5(1)(c) and 6(5) indicates that the legislature intended that those provisions should only apply where the charge is made solely in exchange for the provision of credit, and not where the charge is made for the provision of other services, even if those other services are connected to the provision of credit.

163 The respondents’ arguments draw on the *expressio unius* maxim that where legislation includes provisions relating to similar matters in different terms, there is a deliberate intention to deal with them differently. Caution with respect to the application of the *expressio unius* maxim has been repeated by the courts on many occasions: see eg, *Houssein v Under Secretary*,

*Department of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88 at 94; *O’Sullivan v Farrer* (1989) 168 CLR 210 at 215; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 575; *Wentworth v New South Wales Bar Association* (1992) 176 CLR 239 at 250. In *Doyles Farm*, Leeming JA observed at [70]:

... I see no reason to depart from the caution which ordinarily accompanies *expressio unius* arguments; cf *George v Federal Commissioner of Taxation* (1952) 86 CLR 183 at 206; [1952] HCA 21. It is much better to start with the language which Parliament has enacted, rather than draw inferences based on words which it has not employed.

164 The strength of the maxim depends upon many factors including the similarity of the subject matter being addressed in the relevant provisions (*Lyford v Commonwealth Bank of Australia* (1995) 130 ALR 267 at 270) and the time at which different provisions were enacted (*Construction, Forestry, Mining and Energy Union v Hadgkiss* (2007) 169 FCR 151 at [15]).

165 For the following reasons, I consider that the respondents’ contextual arguments do not afford a sound basis on which to construe the phrase “charge ... made for providing the credit” in ss 5(1)(c) and 6(5).

166 Section 5(1)(b) addresses a different subject matter to s 5(1)(c), being the purpose (in the sense of use) to which the provided credit is to be put. The statutory requirement is that the identified purposes of the credit be the sole or predominant purposes. No necessary implication arises as to the manner in which the different criterion in s 5(1)(c) should be construed. In any event, none of the available meanings of the preposition “for” in ss 5(1)(c) and 6(5) depend upon reading in the words “wholly or predominantly”.

167 Section 6(2) expands upon the meaning of s 6(1)(b), which is an element of the exemption afforded by s 6(1). The exemption in s 6(1) is entirely distinct from the exemption in s 6(5) and operates in a different manner. Section 6(1) is headed “short term credit” and applies to the provision of credit that is limited to a term of 62 days and for which the fees, charges and interest applied under the credit contract are below stated thresholds. The important limitation in s 6(1) is that it is expressed to apply to the provisions of the credit contract. The effect of s 6(2) is to deem certain fees and charges to be imposed under the credit contract when, contractually, they are not. As stated in the Explanatory Memorandum (at [8.22]), ss 6(2) and (3) were inserted to address fee structures aimed at avoiding the fees and charges limit for exempt short-term credit by capturing fees and charges paid to parties other than the credit provider. In contrast, s 6(5) is not, on its terms, confined to charges imposed under the credit contract or charges imposed by the credit provider. For that reason, no implication as to the

proper construction of s 6(5) can arise from the different circumstances addressed by ss 6(1) and (2). Further, s 6(2) was not enacted concurrently with s 6(5) but was enacted at a later time, rendering any argument based on the *expressio unius* maxim even more problematic. The legislative history can be briefly summarised as follows:

- (a) The predecessors of s 6(1) (s 7(1) of the Uniform Consumer Credit Code) and s 6(5) (s 7(3) of the Uniform Consumer Credit Code) were both enacted on 14 September 1994 with the passing of the *Consumer Credit (Queensland) Act 1994* (Qld). When enacted, s 7(1) of the Uniform Consumer Credit Code was confined to what is now s 6(1)(a), whereas s 7(3) was in the same form as s 6(5).
- (b) Section 7(1) of the Uniform Consumer Credit Code was amended by the *Consumer Credit (Queensland) Amendment Act 2001* (Qld), which introduced the two additional conditions that are now ss 6(1)(b) and (c).
- (c) Sections 6(2) and (3) (which both relate to s 6(1)) were introduced at the time of the enactment of the National Credit Code in 2009.

168 The respondents’ argument based on the definition of “credit fees and charges” in s 204 ultimately goes nowhere. The phrase is not used in ss 5(1)(c) and 6(5): Parliament has chosen different statutory language to define the circumstances in which the Code will and will not apply to credit and the task is to construe those words. The available meanings of the statutory language do not seek to read in the expression “in connection with”. Further, the words used in a legislative definition provide an unsound foundation for any argument based on the *expressio unius* maxim: cf *Kelly v The Queen* (2004) 218 CLR 216 at [84] per McHugh J.

#### *The statutory purpose*

169 It is appropriate to characterise the National Credit Code as remedial legislation. The overarching purpose of the Code is to protect consumers from unscrupulous and unfair lending practices. As observed by McHugh J in *Webb Distributors (Aust) Pty Ltd v Victoria* (1993) 179 CLR 15 at 41 in reference to the *Trade Practices Act 1974* (Cth), such remedial legislation should be construed broadly so as “to give the fullest relief which the fair meaning of its language will allow”, citing Isaacs J in *Bull v AG for New South Wales* (1913) 17 CLR 370 at 384. As Isaacs J made clear in the cited passage, that does not mean that the “true signification of the provision should be strained or exceeded”. But nor should limitations be read in when they are not required by the statutory text.

170 Sections 5 and 6 largely define the reach of the Code. Section 5(1) provides that the Code applies to the “provision of credit” if four criteria are met, one of which is that a charge is or may be made for providing the credit (s 5(1)(c)). Section 6 of the Code then exempts from the Code certain categories of credit. The Explanatory Memorandum stated (at [8.37]) that the exemptions in s 6 “reflect the fact that these contracts provide benefits to the debtor (that Code credit does not) and their availability is restricted so that they do not affect competition”. This reinforces the readily available inference that the categories of credit defined in s 6 are considered to be unlikely to cause significant consumer harm requiring regulation under the Code.

171 The respondents’ proposed construction of the phrase “charge ... made for providing the credit” is narrow. It adopts an approach derived from the law of contract, asking whether the charge is the legal consideration for the provision of credit. While the respondents’ construction is an available meaning on the text, the respondents did not advance a compelling reason why the legislature would have had that narrow construction in mind. When applied in the context of s 5(1)(c), the effect of the respondents’ construction is that the operation of the Code can be readily avoided, as illustrated by the facts of this case. If the s 5(1)(c) criterion is confined in its operation to a charge that is the contractual consideration for the provision of credit, the Code can be avoided by structuring the credit arrangements such that no charge is made for the provision of credit and all charges are made for other services such as the processing of credit applications, the keeping of accounts, the variation of repayment schedules and for events of default. There is no apparent reason why the legislature would consider that credit arrangements structured in that manner should be outside the remedial framework established by the Code.

172 A broader construction of the phrase “charge ... made for providing the credit” is to be preferred. Giving the statutory language its full ordinary meaning, the Code would apply if a charge is made in exchange for, on account of or by reason of the provision of credit, applied in a commercially practical manner. There is nothing strained in construing the preposition “for” in s 5(1)(c) in that manner. The construction requires a direct relationship between the charge and the provision of credit by looking to the circumstances in which, or conditions on which, the charge is made or imposed and the reason for the charge. It looks to the substance of the credit arrangements rather than their contractual form and ensures that the remedial provisions of the Code are not easily avoided by carefully structured credit arrangements.

*Previous cases*

- 173 The meaning of the phrase “charge ... made for providing the credit” has been considered in two previous cases in the context of s 5(1)(c) of the Code (and its predecessor, s 6(1)(c) of the Uniform Consumer Credit Code). Those decisions are consistent with the broader construction of the phrase explained above.
- 174 In *Walker*, Hall J concluded that the preposition “for” denoted a causal connection in the sense that the charge was imposed as a consequence of or on account of the fact that credit was provided (at [143]-[148] and [190]). In reaching that conclusion, his Honour considered it significant that s 6(1)(c) of the Uniform Consumer Credit Code did not expressly require that the charge be made under the credit contract (contrasting the definition of credit in s 4(1) of that Code) and that the preposition “for” should not be read down by unexpressed limitations (at [190]). Leave to appeal from that decision was refused by the NSW Court of Appeal in *Kwik Finance (Sydney) Pty Ltd v Walker* [2014] NSWCA 73. Relevantly, the Court of Appeal also expressed the view that s 6(1)(c) of the Uniform Consumer Credit Code did not “in terms say or require that the charge which is or may be made must be made by the credit provider” and that it would not “be consistent with the purpose and object of that provision to read it down in that way so as to permit the operation of the Act to be avoided by an arrangement under which the credit charge was to be made by an entity other than the credit provider” (at [13]).
- 175 In *Fast Access Finance*, Dowsett J considered the reasoning of Hall J in *Walker*. While not challenging the correctness of Hall J’s approach in so far as it concerned the circumstances of that case, Dowsett J found it difficult to accept that the word “for” in s 5(1)(c) of the Code necessarily means that there must be a causal connection between the charge and the provision of credit (at [255]). After considering the dictionary definitions, his Honour expressed the view that s 5(1) involves the notion of exchange, the charge being made in exchange for the provision of credit (at [257]). However, when applying that meaning to the facts of the case, it is apparent that his Honour did not conceive of “exchange” in a narrow contractual consideration sense but rather looked to the commercial substance of the relevant transactions (at [261]).
- 176 In each of *Walker* and *Fast Access Finance*, the court concluded that a charge had been made for the provision of credit in the circumstances of each case. There is no substantive inconsistency in the approach taken in each case. Although Hall J expressed the required

relationship between the charge and the provision of credit as one of causation, his Honour explained the meaning of the relationship by the phrases “as a consequence of” or “on account of”. Those phrases are consistent with Dowsett J’s practical application of the phrase “in exchange for”.

177 It would be wrong to treat the reasoning in either *Walker* or *Fast Access Finance* as providing an exhaustive definition or explanation of the meaning of the phrase “charge ...made for providing the credit” in either ss 5(1)(c) or 6(5). In each case, the court gave meaning to the phrase for the purpose of resolving the case before the court. The reasoning in each case is expositional, not definitional. As French CJ explained in *Khazaal* in a similar context (construing the relational term “connected with”) (at [31], citations omitted):

Relational terms such as “connected with” appear in a variety of statutory settings. Other examples are: “in relation to”; “in respect of”; “in connection with”; and “in”. They may refer to a relationship between two subjects which may be the same or different and may encompass activities, events, persons or things. They may denote relationships which are causal or temporal or relationships of similarity or difference. The task of construing such terms does not involve the resolution of ambiguity. They are ambulatory words and may be designed to cover a variety of subjects and a variety of relationships between those subjects. The nature and breadth of the relationships they cover will depend upon their statutory context and purpose. Generally speaking it is not desirable, in construing relational terms, to go further than is necessary to determine their application in a particular case or class of cases. A more comprehensive approach may be confounded by subsequent cases.

178 Nevertheless, the reasoning in each of *Walker* and *Fast Access Finance* is consistent with an approach that gives the statutory language its full ordinary meaning, looking to the commercial substance of the credit arrangements and not restricted by the doctrine of consideration drawn from the law of contract.

#### *Conclusion as to proper construction*

179 For the foregoing reasons, I consider that the expression “charge ... made for providing the credit” in s 5(1)(c) should be construed as a charge that is made in exchange for, on account of or by reason of the provision of credit. The same phrase used in s 6(5) should be construed in the same manner. Ultimately, the application of the statutory criterion in both ss 5(1)(c) and 6(5) requires an assessment of all relevant facts. It is an evaluative task that requires the relevant charge to be characterised by reference to the statutory criterion.

*Application to facts*

180 The relevant question is whether the Cigno fees, and particularly the Financial Supply Fee, is a “charge ... made for providing the credit” within the meaning of s 6(5). On the facts of the case as set out earlier, the answer to the question is relatively straightforward.

181 It is an agreed fact that Cigno provided a range of services to its customers (including Ms Morrow) pursuant to the terms of the Services Agreement. It is also an agreed fact that Cigno charged its customers, and was paid by its customers, for those services under the terms of the Services Agreement. One of those charges was the Financial Supply Fee. It was calculated as the sum of a base amount of \$13 and 60% of the loan amount. The fee was only charged if the customer obtained credit from BHFS. As discussed earlier, the services supplied by Cigno in return for the fee included: assisting customers with the completion of loan applications; verifying the information provided by customers; assessing customers’ eligibility for loans; recommending qualified customers for financing; facilitating customers’ acceptance of loan offers; and obtaining approved loan amounts.

182 The respondents contend that the Financial Supply Fee was charged by Cigno for the services it supplied, none of which constituted the provision of credit. While the contention is not inaccurate as far as it goes, it does not take into account all of the relevant facts. Critically, it ignores the following facts:

- (a) First, the services supplied by Cigno in return for the Financial Supply Fee – receiving, verifying, assessing and processing loan applications – were all anterior to and directed to the provision of credit (by BHFS).
- (b) Second, from the perspective of a credit applicant, those services were not an end in themselves. The services only have value to the credit applicant if the application is approved and credit is provided.
- (c) Third, the Financial Supply Fee, as the title of the fee implies, was not charged unless credit was provided (by BHFS). It was the provision of credit that triggered the imposition of the fee.
- (d) Fourth, the Financial Supply Fee was calculated as a percentage of the loan amount and therefore varied according to the amount of credit provided (by BHFS).

183 Those facts provide a sufficient basis on which to conclude that the Financial Supply Fee was a charge that was made for providing the BHFS credit. Having regard to the commercial



substance of the arrangements, the Financial Supply Fee was imposed on account of or by reason of the provision of BHFS credit and, in a practical commercial sense, was imposed in exchange for that credit.

184 The contractual arrangements between Cigno and BHFS, documented in the Loan Management Facilitation Agreement, provide the commercial background to the credit arrangements offered to consumers. The contractual arrangements explain why Cigno advertised the provision of credit on its website whereas BHFS did not (because, as recited in the agreement, Cigno was in the business of marketing, facilitation, management and collections in relation to loans). The contractual arrangements also explain why the majority of credit charges are imposed by Cigno and not by BHFS (because, by guaranteeing the repayment of the credit under the agreement, Cigno ultimately bears the credit risk on the loans provided). It was no part of ASIC's case that those contractual arrangements were a sham. The case was conducted on the basis that the arrangements took effect in accordance with their terms. The conclusions I have reached with respect to the application of s 6(5) to the Financial Supply Fee charged by Cigno do not depend on any finding that, in substance, Cigno was a credit provider and the Financial Supply Fee was, in substance, a charge made for the provision of credit by Cigno. In another case, such findings may be open to be made. But it was not an argument advanced by ASIC in this case and forms no part of the conclusion. Rather, s 6(5) is applicable to the Financial Supply Fee because of the circumstances in which, and the conditions on which, the fee was charged, as set out above. It is appropriate to characterise the Fee as being made for the provision of credit (by BHFS).

185 Given my findings with respect to the Financial Supply Fee, it is unnecessary to decide whether the Account Keeping Fee or the Change of Payment Schedule Fee are charges that are made for providing credit within the meaning of s 6(5). Like the Financial Supply Fee, those fees were only payable if credit was provided by BHFS. However, the Account Keeping Fee and the Change of Payment Schedule Fee were payable for administrative services following the provision of credit, being account keeping and changing payment schedules respectively. On the facts of this case, it seems more difficult to characterise those fees as charges made for providing credit.

### **Conclusion**

186 For the reasons given above, grounds 1 and 4 of the appeal should be upheld.

## **GROUND 5**

187 By ground 5 of the appeal, ASIC contends that the trial judge erred in failing to find that, in collecting repayments and the BHFS fee from Ms Morrow, Cigno was acting as the agent of BHFS.

188 As noted earlier, it was common ground that ASIC's case against Cigno did not depend upon a finding that Cigno was acting as an agent of BHFS. Neither item 1(c) nor item 2 of s 6(1) of the NCCP Act refers to agency and ASIC's pleading does not allege that Cigno was acting as the agent of BHFS. Rather, ASIC alleged that Cigno engaged in a credit activity by:

- (a) exercising the rights of BHFS in relation to the Loan Agreements within the meaning of item 1(c) of s 6(1) of the NCCP Act (by assessing applications for loans and managing and collecting payments from the borrower);
- (b) providing credit assistance to consumers within the meaning of s 8 of the NCCP Act, being a credit service within the meaning of item 2 of s 6(1) and s 7(a) of the NCCP Act (by suggesting that consumers apply for a credit contract with BHFS and assisting consumers to apply for a credit contract with BHFS); and
- (c) by acting as an intermediary within the meaning of s 9 of the NCCP Act, being a credit service within the meaning of item 2 of s 6(1) and s 7(b) of the NCCP Act (by, in the course of Cigno's business, acting as an intermediary between BHFS and consumers for the purpose of securing the provision of credit for the consumer under a credit contract with BHFS).

189 It will be necessary to return to those allegations in the context of appeal ground 6.

### **ASIC's submissions**

190 ASIC submitted that although the Loan Management Facilitation Agreement stated that there was no agency relationship between BHFS and Cigno, it did not follow that Cigno was not acting as the agent of BHFS in collecting repayments and the BHFS fee from Ms Morrow. ASIC argued that, in determining whether there is a principal-agent relationship, including the scope of that relationship, contractual labels are to be given proper weight but are not determinative. The true character of the parties' relationship is to be gathered from an examination of all surrounding circumstances. That Cigno was Ms Morrow's agent in dealing with BHFS, including in making repayments to BHFS and negotiating new arrangements, or that "dual agency" is rare, does not preclude the existence of a principal-agent relationship. In

the present case, Cigno undertook debt recovery actions against borrowers, which actions were to Cigno's own benefit given that, for all practical purposes, it took over the debts from BHFS.

### **Respondents' submissions**

191 The submissions of the respondents were materially the same. They submitted that no error is demonstrated in the analysis of the trial judge regarding agency, placing reliance on the same facts identified by the trial judge (that the Loan Management Facilitation Agreement contained an express acknowledgement that there was no agency arrangement between BHFS and Cigno; that the Services Agreement supports the existence of an agency relationship between Cigno and Ms Morrow as it refers to Cigno making repayments on behalf of Ms Morrow; and the agreed fact that 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). The respondents submitted that the trial judge's finding that Cigno was acting as the agent of Ms Morrow supports a conclusion that Cigno was not acting as the agent of BHFS, as the circumstances of dual agency are rare (referring to the observation of Conti J to that effect in *AON Risk Services Australia Ltd v Lumley General Insurance Ltd* [2005] FCA 133 at [60]).

### **Consideration**

192 At common law, the core conception of agency is "an authority or capacity in one person to create legal relations between the person occupying the position of principal and third parties": *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co* (1958) 100 CLR 644 at 652 per Dixon CJ, McTiernan, Williams, Fullagar and Taylor JJ. That core conception has also been stated in broader terms as encompassing the authority to affect legal rights as between the principal and third parties (*Petersen v Moloney* (1951) 84 CLR 91 at 94 per Dixon, Fullagar and Kitto JJ) and the authority to act on behalf of a principal either generally or in respect of some particular act or matter (*Erikson v Carr* (1945) 46 SR (NSW) 9 at 12 per Jordan CJ). As explained in G E Dal Pont, *Law of Agency* (4th Ed, LexisNexis, 2020) at [1.4]:

... agency relationships necessarily involve an agent acting in a representative capacity for the principal, whether for the purpose of creating contractual relations for the principal or to represent the principal in a more restricted ambit. Put another way, if the right by virtue of which the alleged agent acts is an independent right he or she already possessed, then he or she is not an agent; if it is, conversely, by virtue of some authority from another, then he or she is an agent.

193 In *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389 (*Tonto*), Allsop P (with whom Bathurst CJ and Campbell JA agreed) explained (at [177], references omitted):

... Not every independent contractor performing a task for, or for the benefit of, a party will be an agent, and so identified as it, or as representing it, and its interests. Agency is a consensual relationship, generally (if not always) bearing a fiduciary character, in which by its terms A acts on behalf of (and in the interests of) P and with a necessary degree of control requisite for the purpose of the role. Central is the conception of identity or representation of the principal ... Examples and contexts may be infinite, and any arrangement must be understood and characterised by reference to its legal terms in context. ...

194 Clause 5.1 of the Loan Management Facilitation Agreement states that nothing in that agreement creates an agency relationship between BHFS and Cigno. It is uncontroversial that such a term is not determinative of the relationship between the parties but will be given due weight (unless characterised as a sham); the true character of the parties' relationship is determined from an examination of all the surrounding circumstances, including relevant contractual provisions: *Tonto* at [182]. ASIC did not suggest that any of the relevant contractual arrangements were a sham.

195 The terms of the relevant contractual arrangements, and the manner in which BHFS and Cigno conducted business, have been set out earlier. There are features of the Loan Management Facilitation Agreement that are suggestive of an agency relationship. In particular, under cl 2.1, BHFS agrees to make available and lend funds to the clients of Cigno under the Loan Agreements. Under cl 2.2, BHFS may stipulate the conditions on which funds are to be lent and, under cl 2.3, Cigno must comply with the loan conditions stipulated by BHFS. Under cl 2.5, Cigno agrees to manage the Loan Agreements on behalf of its clients in accordance with the conditions of the Loan Management Facilitation Agreement. Each of those clauses is suggestive of an arrangement by which Cigno was authorised to enter into Loan Agreements on behalf of BHFS and where BHFS controlled the terms of the Loan Agreements to be entered into. Further, the evidence indicates that Cigno only marketed and facilitated loans with BHFS and not with any other lender.

196 However, there are a number of other features of the contractual arrangements, and the manner in which Cigno and BHFS conducted business, that suggest that Cigno was not an agent of BHFS but, rather, party to a joint commercial arrangement or enterprise. The following matters can be noted:

- (a) First, under the Loan Management Facilitation Agreement, BHFS does not expressly appoint Cigno as its agent to enter into Loan Agreements with consumers. Further, as noted above, cl 5.1 states that the relationship is not one of agency.

- (b) Second, it is an agreed fact that Cigno recommended loan applications to BHFS (para 11.4 of the Statement of Agreed Facts) and, in respect of each of the advances made to Ms Morrow, BHFS approved the advance (paras 25.7, 44.7 and 55.1 of the Statement of Agreed Facts). Those facts indicate that Cigno did not have authority to create legal relations on behalf of BHFS.
- (c) Third, it is an agreed fact that BHFS did not pay to Cigno any referral fees, finder's fees, commissions or any other bonuses or amounts related to the referral of customers from Cigno to BHFS (para 9.3 of the Statement of Agreed Facts).
- (d) Fourth, the Loan Management and Facilitation Agreement recites that BHFS is in the business of lending and/or advancing personal loans to consumers secured by the Loan Agreements, and that Cigno is in the business of marketing, facilitation, management services and collections in relation to the Loan Agreements. The recitals indicate that BHFS and Cigno have undertaken a joint commercial arrangement or enterprise whereby each undertakes an aspect of the enterprise – BHFS lends funds (at least in the first instance) while Cigno engages in the marketing, facilitation, management and collection of the loans.
- (e) Fifth, the nature of the joint commercial arrangement or enterprise is reflected in the terms of the Loan Agreements entered into by BHFS with consumers and the Services Agreements entered into by Cigno with consumers. Under the Loan Agreements, BHFS lends funds to consumers. Under the Services Agreements, Cigno provides a range of services to “Clients” in return for fees. As far as the evidence reveals, the fees were determined by Cigno and BHFS had no control over the level of fees.
- (f) Sixth, under cl 2.6, Cigno guaranteed repayment of the loans to BHFS and ultimately bore the financial risk of the loans.

197 Having regard to the above matters, I am not persuaded that the trial judge erred in concluding that Cigno did not act in the capacity as agent of BHFS. Accordingly, I would dismiss appeal ground 5.

198 For completeness, I note that, in determining appeal ground 5, I have not placed any weight on the respondents' argument based on the trial judge's finding that Cigno was acting as the agent of Ms Morrow. The respondents' argument overstates the trial judge's finding which was that, at all relevant times, Cigno was acting as the agent of Ms Morrow *or on its own behalf* (at J [127], emphasis added). It is not clear from the trial judge's reasons whether this finding was

in the alternative, or whether his Honour envisaged that some aspects of the services provided by Cigno involved Cigno acting as the agent of Ms Morrow and other aspects involved Cigno acting on its own behalf. The latter understanding of the finding might be supported by his Honour's further statement that the Services Agreement supported the existence of an agency relationship between Cigno and Ms Morrow (rather than between Cigno and BHFS) (at J [129]), referring to a provision by which Cigno agreed, on behalf of Ms Morrow, to disburse Ms Morrow's repayments proportionately between amounts owing to BHFS and amounts owing to Cigno (at J [131]). His Honour also referred to the agreed fact that Cigno dealt with BHFS on behalf of Ms Morrow (at J [134]). Despite those findings, there are many aspects of the Services Agreement which strongly suggest that Cigno did not undertake to act as an agent of consumers who accepted the terms of the Services Agreement, with the associated fiduciary duties, but rather as an independent contractor able to exercise contractual rights against the consumer's interests in circumstances of default. I note in particular that:

- (a) the agreement described itself as a "services agreement";
- (b) the agreement referred to the provision of services to the Client for which the Client pays fees to Cigno;
- (c) Cigno had the right to collect payments due from the Client to BHFS and due to Cigno by way of direct debit;
- (d) while Cigno undertook to allocate collected payments proportionately between the amounts owing to BHFS and Cigno, in the event of a shortfall the collected payments could be applied between BHFS and Cigno at the discretion of Cigno;
- (e) if the Client's repayments were at a deficit to BHFS, the Client agreed to make payments to Cigno until the deficit and the Clients' obligations under the agreement were discharged;
- (f) in the event of default, Cigno had the right to change the timing of direct debits to reduce the likelihood of payments being dishonoured and that, if the direct debit was dishonoured, Cigno was entitled to process the direct debit on subsequent days;
- (g) in the event of default, it was the Client's responsibility to contact Cigno and negotiate an alternative payment arrangement; and
- (h) by entering into the agreement, the Client acknowledged that he or she understood that he or she had the right to get independent legal and financial advice before entering into the agreement.

199 ASIC did not appeal the finding that, at all relevant times, Cigno was acting as the agent of Ms Morrow. Accordingly, it is unnecessary to reach any conclusions about that finding on this appeal. It is sufficient to record that that finding does not affect my conclusion that Cigno did not act as an agent of BHFS in respect of the credit arrangements.

### **GROUND 2 AND 3**

200 Grounds 2 and 3 of the appeal concern ASIC’s alternative case against BHFS and Cigno based on the alleged Composite Contract. By those grounds, ASIC contends that the trial judge erred in his interpretation of the expression “credit contract” in s 4 of the Code, read in light of the extended definition of “contract” in s 204(1), and thereby erred in holding that the “Composite Contract” did not constitute a “credit contract” within s 4 and a “continuing credit contract” within s 6(5) of the Code.

201 As observed above, ASIC advanced an alternative case against BHFS and Cigno alleging that the Loan Management Facilitation Agreement, the Loan Agreement and the Services Agreement constituted a series or combination of contracts, or contracts and arrangements, and were therefore a “contract” within the meaning of that term in s 204 of the Code (which ASIC described as the “Composite Contract”). ASIC alleged that the Cigno fees were charges made for the provision of credit under the Composite Contract.

202 The conclusions reached in respect of grounds 1 and 4 largely render moot the alternative allegations the subject of grounds 2 and 3. It is therefore strictly unnecessary to determine those grounds of appeal. Nevertheless, in case the matter goes further, I will briefly express my reasons for concluding that ASIC’s alternative allegations concerning the Composite Contract do not assist its case against either BHFS or Cigno.

203 In s 204(1), the word “contract” is defined as including “a series or combination of contracts, or contracts and arrangements”. In s 4, the expression “credit contract” is defined as “a contract under which credit is or may be provided, being the provision of credit to which this Code applies”. ASIC’s alternative allegation, as pleaded and maintained on the appeal, was that the Composite Contract was a credit contract within the meaning of s 4 of the Code because it was a series or combination of contracts, or contracts and arrangements, under which the BHFS credit is or may be provided.

204 It is important to observe that ASIC’s alternative allegation, as for its primary allegation, was that BHFS was the credit provider under the Composite Contract. No allegation was advanced

that, by reason of the combined operation of the Loan Management Facilitation Agreement, the Loan Agreement and the Services Agreement, Cigno was a credit provider. The relevant credit was the loan advanced by BHFS which, by the terms of the Loan Agreement with debtors, created a deferred debt.

205 In those circumstances, ASIC's allegation that the Cigno fees (and particularly the Financial Supply Fee) were charges made for the provision of credit within the meaning of s 6(5) is not affected by whether the credit arrangements are viewed as a combined contract, applying the extended definition in s 204, or simply as a series of commercially related contracts. Precisely the same issues arise on either approach. The application of s 6(5) requires the characterisation of the charge in question to determine whether it is made for the provision of credit being, on ASIC's case, the credit provided by BHFS. Importantly, s 6(5) does not require that the charge be made under the credit contract.

206 In characterising the Cigno fees for the purposes of s 6(5), it is of course relevant to consider the totality of the commercial arrangements governing the imposition of the fees and the provision of credit. In the present case, that included the terms of the Services Agreement under which the fees were charged by Cigno, the terms of the Loan Agreement under which the credit was provided by BHFS and the terms of the Loan Facilitation Management Agreement which governed the commercial arrangements between Cigno and BHFS. However, the factual analysis of those commercial arrangements for the purpose of characterising the Cigno fees is not affected by the statutory definition of "contract" in s 204. To put it simply, the statutory definition does not alter the facts. The definition merely enables the Loan Management Facilitation Agreement, the Loan Agreement and the Services Agreement to be treated as a single contract (when they are not) when applying other provisions of the Code that depend upon the identification of a contract.

207 While each of ss 5(1) and 6(5) require the existence of a credit contract (and, in the case of s 6(5), a continuing credit contract), neither the existence of a credit contract, nor the identity of the credit provider, is disputed in this case. It is common ground that credit was provided by BHFS and, with respect to the existence of a credit contract, the statutory requirement is satisfied either by the Loan Agreement or, if the extended definition of contract in s 204 is applied, by the Composite Contract. The disputed issue is whether the Cigno fees were made for providing the credit. In the circumstances of this case, the determination of that issue cannot be affected by the extended definition of contract in s 204. Whether the provision of credit is



treated, for the purposes of the Code, as having been effected under the Loan Agreement or the Composite Contract, the same question of characterisation of the Cigno fees arises.

208 It should be acknowledged that ASIC’s case against Cigno raised a separate issue that had the potential to be affected by the extended definition of contract in s 204. ASIC alleged that Cigno engaged in a credit activity by exercising the rights of BHFS in relation to a credit contract, which ASIC alleged was either the Loan Agreement or the Composite Contract, within the meaning of item 1(c) of s 6(1) of the NCCP Act. The rights of BHFS allegedly exercised by Cigno were the assessment of applications for loans and managing and collecting payments from the borrower. Those activities were governed by the terms of the Services Agreement. ASIC’s allegation was that, when analysed as part of the Composite Contract, those activities should be characterised as the rights of BHFS. Again, though, the factual analysis of the rights and obligations under the relevant documents is not affected by the statutory definition of “contract” in s 204. Merely because the Services Agreement can be treated as part of a combined set of arrangements constituting a credit contract does not convert a right held by Cigno into a right held by BHFS. As discussed below, the question whether Cigno engaged in a credit activity by exercising the rights of BHFS was not determined by the trial judge, and the preceding observations should not be understood as a determination of that question. My conclusion is only that the extended definition of contract in s 204 does not assist ASIC’s case on that issue.

209 In the circumstances, it is unnecessary, and therefore inappropriate, to express any view on the conclusion reached by the trial judge that the application of the extended definition of “contract” in s 204 of the Code is confined to circumstances in which none of the contracts to be combined effected a provision of credit and the provision of credit is only effected through the combination (J at [89]-[97] and [123]). On the basis of the facts and allegations made in the present case, the application of the extended definition cannot advance ASIC’s principal case against either BHFS or Cigno.

## **GROUND 6 AND RELIEF**

210 By ground 6 of its appeal, ASIC contends that the trial judge erred in failing to find that:

- (a) BHFS engaged in a credit activity within the meaning of item 1(a) and/or item 1(b) of s 6(1) of the NCCP Act (ground 6(a)); and

- (b) Cigno engaged in a credit activity within the meaning of item 1(c) and/or item 2 of s 6(1) of the NCCP Act (ground 6(b)).

211 With respect to ground 6(a), it follows from the conclusions reached in respect of grounds 1 and 4 that the Code applied to the provision of credit by BHFS. It further follows that BHFS was a credit provider under a credit contract within the meaning of item 1(a) of s 6(1). Further, there was no appeal against the trial judge's finding that BHFS was carrying on a business of providing credit (at J [82]) and it follows that BHFS carried on a business of providing credit, being credit the provision of which the Code applied to, within the meaning of item 1(b) of s 6(1). Appeal ground 6 should therefore be upheld.

212 With respect to ground 6(b), and as discussed above, the trial judge addressed the question whether Cigno acted as an agent of BHFS, but did not otherwise address or make findings as to ASIC's allegations that Cigno engaged in a credit activity within the meaning of items 1(c) and 2 of s 6(1). As ASIC submitted, his Honour most likely considered it unnecessary in circumstances where he had found that credit provided by BHFS was not credit to which the Code applied. Given my conclusion that the credit provided by BHFS was credit to which the Code applied, appeal ground 6(b) should be upheld on the basis that his Honour failed to make findings with respect to ASIC's allegations concerning Cigno.

213 As set out above, ASIC alleged that Cigno engaged in a credit activity by:

- (a) assessing applications for loans and managing and collecting payments from the borrower and thereby exercised the rights of BHFS in relation to a credit contract within the meaning of item 1(c) of s 6(1) of the NCCP Act;
- (b) suggesting that consumers apply for a credit contract with BHFS and assisting consumers to apply for a credit contract with BHFS and thereby provided a credit service within the meaning of item 2 of s 6(1) and s 7(a) of the NCCP Act; and
- (c) by, in the course of Cigno's business, acting as an intermediary between BHFS and consumers for the purpose of securing the provision of credit for the consumer under a credit contract with BHFS and thereby provided a credit service within the meaning of item 2 of s 6(1) and s 7(b) of the NCCP Act.

214 The determination of those allegations requires the Court to consider the meaning of the statutory language and apply it to the facts as found at trial. On the appeal, neither ASIC nor Cigno advanced submissions with respect to the meaning of the statutory language nor the

determination of those allegations. The language of item 1(c) of s 6(1), and its application to the facts of this case, may raise issues for determination. In particular, while rights may be exercised on behalf of another by an agent, rights may also be exercised on behalf of another by a range of powers and authorities which do not necessarily involve the creation of an agency relationship. ASIC's allegation requires the Court to determine whether Cigno exercised the rights of BHFS in relation to the Loan Agreements when Cigno assessed applications for loans and managed and collected payments from the borrower. The answer to that question requires an assessment of whether the rights exercised by Cigno were the rights of BHFS as opposed to the rights of Cigno. The language of item 2 of s 6(1), as further defined by ss 7, 8 and 9, is perhaps more straightforward in asking whether Cigno suggested that consumers apply for a credit contract with BHFS and assisted consumers to apply for a credit contract with BHFS or whether Cigno acted as an intermediary between BHFS and consumers for the purpose of securing the provision of credit.

215 In circumstances where the foregoing issues were not addressed by the trial judge and no submissions were advanced on the appeal as to the determination of those issues, the appropriate course is for the matter to be remitted to the trial judge for determination.

216 The relief sought by ASIC on the appeal included: an order setting aside the orders of the trial judge; declaratory and injunctive relief against BHFS and Cigno; and costs of the appeal. Perhaps by oversight, ASIC did not expressly seek its costs of the hearing before the trial judge.

217 Given the conclusions reached on the appeal, the appropriate orders to be made are to allow the appeal with costs; to set aside the orders of the trial judge; and to remit the proceeding to the trial judge for determination of ASIC's allegations against Cigno and the form of relief. Although it might be possible for this Court to make orders for relief in respect of ASIC's case against BHFS, it is not appropriate to do so for two reasons. First, on the hearing of the appeal it became apparent that the form of declaratory and injunctive relief sought by ASIC raised a number of issues that required further submissions from the parties which were not advanced in the course of the hearing of the appeal. Second, given the interrelationship of ASIC's case against BHFS and Cigno, it is appropriate that the trial judge consider the appropriate form of relief against BHFS after a determination has been made in respect of ASIC's case against Cigno. With respect to the costs of the trial, in the circumstances it is also appropriate that that issue be determined by the trial judge after the determination of ASIC's case against Cigno.

## CONCLUSION

218 In conclusion, I would uphold the appeal on grounds 1, 4 and 6. The appropriate orders are:

- (a) The appeal be allowed with costs.
- (b) The orders made on 23 June 2021 by the trial judge in Federal Court of Australia proceeding NSD 1088 of 2020 be set aside.
- (c) The proceeding be remitted to the trial judge for determination of ASIC's allegations against Cigno and relief.

I certify that the preceding two hundred and twelve (212) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice O'Bryan.

Associate:



Dated: 27 June 2022