DRN-4818969

Financial Ombudsman Service

The complaint

Mrs V complains Assetz SME Capital Limited ("Assetz") has treated her unfairly in the way it has used its terms and conditions to introduce a fee on her peer-to-peer (P2P) lending account. She says she is being forced to accept the changes without being given the opportunity to fully consider and understand the impact of them.

What happened

Mrs V has held a P2P lending account with Assetz since 2017, she began investing shortly after opening the account.

In December 2022, Assetz announced that it had decided to close its retail platform and conduct a solvent run-off of its retail loan book. Assetz says this was due to the substantial rises in bank interest rates which led to lenders withdrawing from the platform. As part of the run-off process, Assetz announced that it was necessary to introduce a Lender Fee.

Assetz wrote to lenders on 15 December 2022 to explain the following:

"The ceasing of new retail lending means a significant drop in our income for the retail part of the business. We are in the process of reducing overheads to match this new permanent state and in the meantime, have calculated the following Lender Fees to be applied to cover the anticipated costs of adjusting the business to a run-off footing then managing the loan book through run off and returning capital to investors.

- *Through to end of June 2023 - 2.9% pa of performing loans*
- *July to December 2023 - 1.4% pa of performing loans*
- *January 2024 onward - 0.9% pa of performing loans*

(This equates to an average fee level of 2.15% for the first 12 months and a 5-year effective fee of 1.15% pa)

These are estimated fees and subject to review over time. They would be applied to interest received by investors (i.e.: on performing loans only), commencing once software updates are implemented."

Assetz also explained in this notice that it was closing its secondary market, a tool which allowed lenders to sell their loans to other lenders on the platform. As such, lenders like Mrs V were unable to exit from the loans they were invested in and had to wait for the pro-rata return of capital from loans that repay in the future.

Assetz then wrote to lenders on 17 May 2023 explaining the following Lender Fee amendments:

- Through to the end of December 2023 – 2.9% pa of performing loans
- January 2024 onward – 0.9% pa of performing loans
- This equates to an average fee level of 2.90% for the first twelve months and a five-year effective fee of 1.3% pa

Assetz wrote to lenders again on 16 June 2023 to make them aware of further amendments to the Lender Fee:

- For the period of June-September 2023 – 6.25% pa of performing loans
- October 2023 to December 2024 - 0.9% pa of performing loans
- Post December 2024 no fee expected
- This equates to an average fee level of 3.52% for the first twelve months and lower five-year average fee of 0.88% pa

Mrs V raised a complaint with Assetz about the Lender Fee. In summary she said she believes Assetz's actions were in violation of the platform terms and conditions. And it was unfair to Lending Members who were not given sufficient time to consider the changes, to allow them to make any necessary adjustments to their investments or close their account.

Assetz responded, but didn't uphold the complaint in summary it said:
Its terms and conditions made lenders aware that it could introduce a Lender Fee.

- When deciding to introduce the Lender Fee, it considered that any variation to its terms should strike a fair balance between Assetz's and lender's interests.
- The Lender Fee benefits lenders as it allows Assetz continue to provide its service and provide better outcomes for them.
- Alternatives to the solvent run-off were considered but were assessed to be potentially of much greater detriment to lenders.

Mrs V didn't accept Assetz's response and referred her complaint to this service for an independent review.

One of our investigators considered Mrs V's complaint but didn't uphold it. In summary, they said they were satisfied that Assetz had considered alternatives to a solvent run-off and that its decision was ultimately fair and reasonable in all the circumstances.

Mrs V didn't accept the investigator's assessment – in summary she said:

- Assetz said it wouldn't be able to wind-down without a lender fee without significant operational deficit, which would in turn lead inevitably to administration. This is in contrast with its published wind-down arrangements which said it had sufficient income to cover the expected costs of winding down the loan book. Its published wind-down model was no longer fit for purpose and misleading to lenders.
- Assetz's decision to wind-down its retail element seems a well-considered, carefully thought through business decision. This wasn't a black-swan event that threw up a number of unforeseeable issues, forcing Assetz to activate its wind-down plan.
- The Institutional element of Assetz's business should be supporting the retail wind-down, given it was built on the back of it.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Fairness of Assetz's term changes

The crux of Mrs V's complaint is that Assetz has unfairly introduced a Lender Fee on her P2P lending account. I can see Assetz notified Mrs V of this in its mailout dated 15 December 2022 and on its website.

Assetz says that it made lenders aware that it could introduce the Lender Fee in the terms and condition which lenders had to agree to in order to continue investing on its platform.

I've looked at the terms that were relevant when Mrs V opened her account and I note that these do explain the possibility of charging a fee. The terms said:

"At present there is no membership or joining fee payable for being a Lending Member. The Assetz Capital Companies reserve the right to introduce a membership or joining fee in future."

I note that Assetz updated its terms on 30 April 2020. This included the following term relevant to this complaint:

"Under normal circumstances there is no membership or joining fee payable for being a Lending Member. The Assetz Capital Companies reserve the right to introduce a membership or joining fee in future…"

Assetz has referred our service to Section 21 of its terms to support that it could make updates to its terms. The relevant term says:

"2. Where a change to these Terms does not affect existing Micro Loans and does not disadvantage existing Lending Members or where the changes are reasonably believed by the Assetz Capital Companies to be in the interests of the Lending Members, the Assetz Capital Companies may make any amendments to these Terms at any time with immediate effect. Where it is necessary or desirable to make changes to these Terms which affect existing Micro Loans or may disadvantage existing Lending Members, the Assetz Capital Companies will endeavour to provide 30 days' notice before any changes take effect. Any such notice shall be posted on the Website.

3. Any amendments will be posted on the Website as soon as reasonably practicable. By continuing to use the Website, by either logging in or leaving investments within Investment Accounts or Access Accounts on a daily basis, each Lending Member agrees to be bound by the amended Terms."

While I appreciate this is a broad term, it does support that Assetz may vary its terms, but it still needed to consider the impact of any changes it made on its customers.

It's not for me to decide whether this term is fair or not – that is something only a court can decide. But as a regulated financial business, Assetz is under an obligation to treat its customers fairly. And the obligation I am under is to consider what is fair and reasonable in all of the circumstances – which includes having consideration for the relevant law and regulations, regulators' rules, guidance and standards, codes of practice; and (where appropriate) what I consider to have been good industry practice at the relevant time.

The term is a 'variation clause' in that it allows Assetz to make changes to the terms of the contract. Assetz relied on this to introduce the Lender Fee. In December 2018, the Financial Conduct Authority ("FCA") published guidance that outlines the factors financial services firms should consider under the Consumer Rights Act 2015 ("CRA") when drafting and reviewing variation terms in consumer contracts. I consider this to be relevant guidance to help me decide whether Assetz has treated Mrs V in a fair and reasonable way when it introduced the Lender Fee.

Factors that are typically considered when determining the fairness of variation clauses include things like whether the term creates a significant imbalance in the parties' rights and obligations, to the detriment of the consumer and whether customers are free to exit the contract if they don't accept the changes.

I think there are issues with the term which do touch on things that might suggest unfairness. This includes the fact the term relied on isn't specific as to when, and for what reason, the new charge might be introduced. It also doesn't make lenders aware of how much such a change would cost them and it doesn't allow for lenders to exit without penalty if they don't accept the change.

Arguably, the nature of the platform itself made it impractical for investors to always be able to exit if they objected to changes to the terms and conditions, as selling their loans on the secondary market was never guaranteed. I'm also aware that the secondary market closed permanently shortly after the changes were introduced. All that said, even if I was to conclude that a court would likely deem this an unfair contract term, I don't think this complaint should be upheld. I will set out why below.

Assetz's reasoning for introducing the Lender Fee

In considering this complaint, I've had regard for the fact Mrs V entered into an agreement which said she wouldn't pay a membership fee on her investments. She'd been warned she might have to pay one in future – but not how much that would be, when it would be payable, and on what basis (e.g. a percentage or a flat rate). However, I've thought carefully about the reasons given by Assetz for the need to introduce the Lender Fee in the context of the financial situation of Assetz and with our service's broader remit of determining what is fair and reasonable in the circumstances. This includes whether the introduction of the Lender Fee provides a fair balance between the legitimate interest of Assetz and Mrs V's interests. Assetz has explained that it needed to introduce the Lender Fee as a result of a variety of unanticipated events, including substantial economic factors which conspired to raise interest rates in historic fashion in the autumn of 2022. Assetz says these economic shocks included but were not limited to:

- The war in Ukraine.
- The on-going impact of Covid and the knock-on effects of public economic support during the pandemic (and its subsequent withdrawal).
- The economic turmoil caused by the mini budget of 23 September 2022 and spiraling inflation.

Assetz says that, given the significant and sudden rise in interest rates, its peer-to-peer loans were no longer as attractive to new and existing lenders and new loans stopped being originated. It says that this meant its fee structure which operated under normal circumstances was no longer suitable or sustainable. It says that without new loans being written there were no origination fees to fund the platform. It says the platform still had significant ongoing costs which were necessary to support the existing loan book and to ensure maximum returns for existing lenders.

I think it's worth explaining at this point that it's not my role to determine whether Assetz could decide to close its retail platform. I consider that to be a legitimate business decision that Assetz could fairly make. Rather, it's my role to determine whether, as a result of that decision, Assetz has fairly considered the impact of the introduction of the Lender Fee on lenders. And in doing so, it fairly considered the alternatives.

Assetz says it considered triggering its stand-by plan and wind down arrangements as an alternative to introducing the Lender Fee. Assetz says this would involve taking one of the following possible actions:

- Selling the business as a whole.
- Selling the loan book and use the proceeds to repay lenders (retail and institutional).

- Closing its origination business and focus solely on managing the run-off of the loan book whilst remaining solvent (and without any additional fees being charged) – essentially winding down the loan book over the normal term of the loans.
- Appointing administrators over to undertake an insolvent wind-down.

Assetz has provided our service with a comprehensive response to why each of these actions were considered to be unsuitable. I shall summarise the points provided under each heading below.

Selling the business as a whole

Assetz says that the economic turmoil of late 2022, which had substantially triggered the decision to close the retail platform in the first place, meant that any prospect of selling the business was considered highly unlikely – at any price.

In brief, it says a sale of the business would have involved the appointment of professional advisors; marketing the business for sale; receiving offers and identifying a willing buyer; due diligence assessments on the business and loan book income; and transaction processes. All of which it says would have taken a substantial time to implement. Assetz also says that any buyer would have had to dealt with the significantly changed inflationary and high interest rate economic environment.

Whilst I can't say with any certainty what the result of a sale of Assetz's business would have been for lenders, I'm satisfied that Assetz fairly considered this as an option and, on balance, I'm persuaded by the concerns it has raised regarding the timescales and prevailing economic factors involved. As such, I think it was fair and reasonable for Assetz to conclude, on balance, that this option would have likely resulted in worse outcomes for lenders than introducing the Lender Fee.

Selling the loan book

Similarly to selling the business, Assetz says selling the loan book would have involved the appointment of professional advisors; marketing the loan book for sale; receiving offers and identifying a willing buyer; due diligence assessments on the loan book income; and transaction processes. All of which it says would have taken also taken a substantial time to implement.

Additionally, Assetz says as part of the process, lenders would have had to be willing to sell their loans and it's likely that lenders would have wanted to receive a full return of their capital. However, Assetz says any buyer would have likely wanted to pay a steep discount in order to get a return on their investment. It says the loans have fixed interest rates and so become increasingly unattractive to prospective buyers as commercial interest rates rise – which they did very quickly in late 2022 and beyond.

I'm also aware that other peer-to-peer platforms have taken the decision to sell its loan books wholesale at a similar time and lenders have received just their capital back or a slight loss on their capital.

Whilst any loss is unquantifiable at this stage, I'm persuaded by Assetz's comments that it's likely a sale of the loan book would've required its lenders to agree to receiving less than their invested capital back. As such, I'm satisfied that Assetz fairly considered the sale of the loan book as an option and, on balance, I'm persuaded the concerns it has raised regarding the timescales and prevailing economic factors involved, mean its decision to not take this action was fair and reasonable.

Closing its origination business and focus solely on managing the run-off of the loan book whilst remaining solvent

Assetz says an assessment was made of the expected income from the loan book over its remaining term and it compared this to the costs expected to be required to complete the process of collecting the loan book and returning the funds to respective lenders.

Assetz says that having done so, it anticipated that a five-year wind down period would result in an operational loss of around £720,000. However, in addition to the staff costs relating to collecting the loan book and returning funds to lenders, Assetz says it was also carrying staff costs relating to originating new business which would not be needed in the wind-down. It says that the estimated costs of notice period pay, redundancy payments and associated costs, would result in a total operation loss of closer to £2.6 million.

I can confirm that Assetz has provided evidence of financial projections to support this. So, it follows that, faced with the prospect of such a substantial expected cash deficit in a managed wind-down, I'm persuaded by Assetz's claims that it wasn't financially viable to pursue this course of action. Assetz also claims that had this action been pursued, the directors would have likely had to move immediately to appointing administrators to operate the wind-down plan in an insolvent administration. I also find this persuasive given the significant costs needed and the lack of funds to meet them.

Appointing administrators

Assetz says it considered appointing administrators to operate an insolvent wind-down but felt it would have resulted in significant additional costs. Assetz says it undertook an analysis of the expected level of administrator fees over a five-year wind-down period and estimated it to be at least £3.26 million. In addition, it found that an administrator would charge recovery fees of up to 8% on any loans where they needed to take recovery action – which could lead to significant further fees over and above the £3.26 million. It also anticipated that another £2 million of fees was likely, if for example £50 million of lending was subject to recovery fees of 4%.

Assetz says that any shortfall between the income expected to be received from the loan book, in addition to the costs to operate the wind-down, would be deducted by an administrator from lenders' returns. It says that taking the expected operational deficit of £720,000 and adding administration fees of at least £3.26 million and also factoring in the prospect of some redundancy costs and a reduction to expected income due to the insolvency process, the expected level of deductions from lender income over the insolvent wind-down was calculated to be in excess of £5 million.

Considering Assetz's assessment of the impact on lender returns through an insolvent wind-down was significant, I'm persuaded that Assetz's reasoning to not take this action was also fair and reasonable.

Was Assetz's decision to introduce the Lender fee fair and reasonable?

Taking all the above into account, I'm persuaded it was fair and reasonable for Assetz to conclude that there were significant risks of poor outcomes for lenders by taking any of the actions considered above. And bearing in mind Assetz's obligation to have regard for lenders best interests and to treat them fairly, I'll now go onto explain why I consider Assetz's decision to introduce the Lender Fee was fair and reasonable in these particular circumstances.

Assetz says that having considered its historic recovery rates, it estimated a return of close to 100% of capital, plus some interest. It says the front loading of the Lender Fee was necessary to protect the capital position, but the tiered approach would still result in a five-year effective fee of just 1.15% per annum. And so, introducing the Lender Fee was considered to be the most viable option to maintain the platform and provide better outcomes for its lenders.

Assetz says the introduction of the Lender Fee has been successful. To support this, Assetz says that as of 15 December 2022 (date of introduction of the Lender Fee), there were 337 loans with a principal amount of £194.9 million – this included 63 loans marked as default with a principal value of £33.3 million with expected losses of £25 million and provision funds of £9 million. In the first ten months of the run-off to 31 October 2023, the total number of loans has reduced from 337 to 280 – equating to a repayment of 57 loans or 17% of the portfolio. It also says the total principal amount of loans has reduced from £194.9 million to £159.7 million – equating to a reduction of £35.2 million or 18% of the portfolio.

I think for the reasons I've given, it was fair and reasonable for Assetz to conclude that this alternative was better, overall, for its lenders than the options it considered and the facts above show that, with hindsight, it had a positive effect on returning capital to investors.

In reaching its decision, it's clear from the evidence I've outlined above that Assets gave due and careful consideration to the potential outcomes for lenders and I'm satisfied it examined the data it had available, as well as the forecasts it was able to produce, in order to conclude that of all the options, introducing the fee would likely provide the best overall outcome for its lenders. In other words, I'm satisfied that Assetz has had regard for its lenders' interests as it is obliged to under the FCA's principles, and that looking at the circumstances as a whole, it has treated its lenders fairly.

I've considered the points Mrs V makes about Assetz not following the published wind-down arrangements. This suggested there was enough income to cover the expected costs of winding-down the loan book, but as a fee was required, she says this suggests the published plan wasn't fit for purpose.

Assetz does have regulatory responsibilities to ensure arrangements are in place in the event of wind-up. Prior to the Lender Fee announcement, it did have a published plan on its website. But I accept this didn't include the potential for a Lender Fee. The website did detail there were risks to carrying out the published plan. Assetz said it felt there was sufficient funding to cover the cost of implementing the plan. But I note it did warn there was a risk that assumptions made during the planning process may prove to be incorrect as they haven't been tested in practice and/or the operating environment subsequently changes. In my view, the fact Assetz didn't follow the plan set out, doesn't mean there has been a failing here or that the published plan wasn't fit for purpose. I appreciate lenders weren't expecting a fee to be part of any future wind-up, but this isn't sufficient for me to find Assetz has acted unfairly.

Mrs V also says she thinks the institutional element of Assetz's business should be supporting the retail wind-down, and questions whether the closed retail section was loaded with costs. I haven't seen evidence that the retail section (where Mrs V held her investments) has been loaded with costs not associated with its operation. I appreciate Mrs V thinks the institutional lending side of Assetz's business should support the wind-up of the retail section. But Assetz is entitled to make commercial decisions about how it operates its business. I'm not able to comment on the institutional lending operation as this is not something that can be considered in relation to the complaint brought by Mrs V in her position as a customer of the retail part of the business. I haven't seen evidence to say Assetz has acted against the interests of retail investors in this respect.

So, on balance, I'm persuaded Assetz's decision to introduce the Lender Fee was fair, as it was consistent with the objective of maintaining the solvent run-off of the platform, whilst allowing lenders to continue to benefit from capital repayments and some interest (albeit less than expected).

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs V to accept or reject my decision before 17 December 2024.

Daniel Little
Ombudsman