

Date: *22 March 2021*

Settlement Agreement

Commerce Commission

UDC Finance Limited

Agreement dated *22 March 2021*

Parties

Commerce Commission a statutory body established under s 8 of the Commerce Act 1986 (**Commission**)

UDC Finance Limited an incorporated company under the Companies Act 1993 (**UDC**)

(collectively, the **Parties**)

1 Introduction

- 1.1 On 29 August 2019, the Commission commenced civil proceedings against UDC (CIV-2019-404-001760) (the **Proceeding**) in which it alleged that between 6 June 2015 and 28 August 2019 (**Claim Period**) UDC breached section 41 of the Credit Contract and Consumer Finance Act 2003 (**CCCFA**).
- 1.2 The Parties have agreed to resolve the Proceeding on the basis of this Agreement and the admissions set out at clause 4.2. In accordance with the terms of this Agreement, the Commission will file the Amended Statement of Claim attached as **Appendix One**, and UDC will file the Amended Statement of Defence attached as **Appendix Two**, admitting that it breached s 41 of the CCCFA to the extent pleaded in the Amended Statement of Claim.
- 1.3 This Agreement will be made public by the Commission (including on the Commission's website).

2 Interpretation

- 2.1 For the purposes of this Agreement, in addition to those terms defined in the body of this Agreement:

Agreement means this Settlement Agreement.

Borrower means a person with whom UDC entered into a Contract on or after 6 June 2015, and whom UDC charged one or more Default Fees during the applicable Compensation Period.

Compensation Period:

- (a) in relation to the Dishonour Fee, means the period between 6 June 2015 and 4 September 2016; and
- (b) in relation to the Late Payment Fee, means the period between 6 June 2015 and 2 February 2021.

Compensation means the payment to be made to Borrowers who are eligible under clauses 4.15 and 4.17 below, calculated in accordance with clause 4.16 below and **Appendix Six** to this Agreement.

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Contract means a consumer credit contract entered into between UDC and any person.

Current Loan means a loan provided under a Contract between UDC and a Borrower, under which any amount remains owed to UDC prior to UDC paying Compensation and Interest to that Borrower in accordance with clauses 4.15 to 4.25 below (and, for the avoidance of doubt, includes a loan where a Borrower is in default, but where UDC has not written off the amount owing).

Day means working day as defined in High Court Rule 1.3.

Default Fees means the Dishonour Fee and the Late Payment Fee.

Dishonour Fee means the fee charged by UDC on each occasion when the Borrower failed to make a scheduled loan repayment under their Contract, and as further defined in paragraph 10 of the First Amended Statement of Claim set out in Appendix One to this agreement.

Interest means interest at a rate of 5% per annum on the Compensation payable to an individual Borrower, compounded annually, from the date on which the relevant Fees were charged until 2 February 2021.

Late Payment Fee means the Fee charged by UDC to Borrowers who failed to make a scheduled loan repayment under their Contract and remained in default on the seventh day after failing to make that repayment, and as further defined in paragraph 10 of the First Amended Statement of Claim set out in Appendix One to this agreement.

Related Parties of UDC include:

- (a) its past and present directors, officers, employees and agents; and
- (b) its related companies and each related company's past and present directors, officers, employees and agents, where "related company" has the same meaning as in the Companies Act 1993.

3 Breach of CCCFA

Investigation and initial pleadings

- 3.1 UDC was one of 36 lenders whose lending practices were investigated during the Commission's review of motor vehicle fees in 2016.
- 3.2 Following the review, the Commission commenced an investigation to determine whether UDC had breached any provisions of the CCCFA regarding its Default Fees.
- 3.3 On 29 August 2019, the Commission commenced the Proceeding alleging that UDC breached s 41 of the CCCFA. In its statement of defence dated 4 October 2019, UDC denied breaching the CCCFA.

Admitted breaches and basis of resolution

- 3.4 Following discussions between the Parties, the Commission has concluded, based on its Enforcement Criteria, and guided by the principles in the Solicitor-General's Prosecution Guidelines that it would be in the public interest for it to resolve the Proceeding on the basis that:
- (a) UDC agrees to admit the breaches of section 41 of the CCCFA as pleaded in the First Amended Statement of Claim attached to this Agreement as **Appendix One**.
 - (b) UDC agrees to pay Compensation and Interest to Borrowers in the manner set out in clause 4.16 below.
 - (c) UDC agrees to make the Costs Payment to the Commission as set out in clause 4.14 below.
 - (d) UDC will give enforceable undertakings to the Commission under sections 74A to 74C of the Commerce Act 1986 via section 113 of the CCCFA, in the form set out at **Appendix Five** to this Agreement, as set out in clause 4.4 below.
 - (e) The rights of Borrowers are not compromised by this Agreement, as set out in clause 5.2 below.

4 Terms of settlement

- 4.1 The Parties have agreed to resolve the issues arising out of the Proceeding on the terms set out below.

Admissions

- 4.2 By its Amended Statement of Defence, UDC will admit a number of paragraphs of the First Amended Statement of Claim, including the allegations of breach at paragraphs 21 and 25.
- 4.3 The admissions in this Agreement are limited to those admissions expressly made. Nothing in this Agreement constitutes any wider admission of liability by UDC or its Related Parties.

Enforceable Undertakings

- 4.4 At the same time as the execution of this Agreement, UDC will give enforceable undertakings to the Commission under sections 74A to 74C of the Commerce Act 1986 via s 113 of the CCCFA, in the form set out at **Appendix Five** to this Agreement.

Court procedure for declaratory order

- 4.5 Within five Days of execution of this Agreement, the Commission will file the First Amended Statement of Claim as set out in **Appendix One** to this Agreement.

- 4.6 Within five Days of the Commission filing the First Amended Statement of Claim in accordance with clause 4.5 above, UDC will file the Statement of Defence as set out in **Appendix Two** to this Agreement.
- 4.7 Within five Days of UDC filing and serving its Statement of Defence in accordance with clause 4.6 above, the Commission will file an interlocutory application seeking a declaratory order on admission of facts in the form attached at **Appendix Three**, and a joint memorandum of counsel in the form attached at **Appendix Four**, seeking that the declaratory order is made without a hearing.
- 4.8 UDC will consent to the Court making the declaration sought by the Commission in accordance with clause 4.7 above. UDC also agrees to take any steps that may be required of it in the course of the Court determining the Commission's application (including by filing submissions in support (or adopting a joint submission) should further submissions be requested by the Court).
- 4.9 The Parties agree to provide to each other, before filing, any Court documents that either intends to file, and to provide a reasonable opportunity for the recipient to comment on the contents.
- 4.10 The Commission agrees that it will not seek any relief in the Proceeding other than the declaration sought in accordance with clause 4.7 above.
- 4.11 If the Court requires a hearing, the Parties will cooperate to arrange for the Commission's application to be heard by the Court as soon as reasonably possible.
- 4.12 The other provisions of this Agreement remain in force irrespective of the outcome of the Commission's application under clause 4.7 above.
- 4.13 The Parties agree to take whatever steps are required to bring the Proceeding to a conclusion after there is a judgment on the Commission's interlocutory application under clause 4.7 above. Subject to clause 4.14, the parties agree that the costs of all steps taken in the Proceeding will lie where they fall.

Payment of costs

- 4.14 Within five Days of the execution of this Agreement, UDC will pay the Commission NZ\$50,000 (including GST, if any) towards the Commission's costs in relation to the investigation and Proceeding (**Costs Payment**).

Settlement Amount

- 4.15 UDC agrees to pay to each Borrower:
- (a) Compensation; and
 - (b) Interest.
- 4.16 Compensation is to be calculated as follows:
- (a) For Borrowers charged the Dishonour Fee in the applicable Compensation Period, the sum of \$37 for each Dishonour Fee charged.

- (b) For Borrowers charged a Late Payment Fee in the applicable Compensation Period, the amount set out at **Appendix Six** to this Agreement, being:
 - (i) a full refund for the Borrowers who remedied their arrears within seven days of being charged the Late Payment Fee; and
 - (ii) for the remaining Borrowers, an amount reflecting the difference between the Late Payment Fee that Borrower in fact paid, and the fee they would have paid had UDC charged a fee of \$14 for every 14 days the borrower had been in arrears (charged at the midpoint of that period), with the first such period commencing from the fourteenth day the Borrower had been in arrears.

4.17 UDC will make all reasonable inquiries to enable payments to be made in accordance with clauses 4.18 to 4.25 below.

Payment to Borrowers

- 4.18 Within ten Days of executing this Agreement and for a period of three months thereafter, UDC shall put a notice on its website (with a link to this from a prominent place on its home page <www.udc.co.nz>) notifying the public that:
- (a) UDC has reached a settlement with the Commission in relation to certain Dishonour Fees charged on contracts entered into between 6 June 2015 and 4 September 2016, and Late Payment Fees charged on contracts entered into between 6 June 2015 and 2 February 2021; and
 - (b) while UDC will contact customers who were charged a Dishonour Fee or Late Payment Fee during those periods, customers may also contact UDC to see whether they are owed a refund.
- 4.19 If a Borrower has a Current Loan with UDC, as soon as reasonably practicable after executing this Agreement, and no later than three months after this Agreement has been executed, UDC shall:
- (a) credit the Compensation and Interest amounts the Borrower is entitled to against the outstanding balance of the Borrower's Current Loan with UDC;
 - (b) where the amount owing on the Borrower's loan is less than the amount UDC is to pay that Borrower in Compensation and Interest, UDC shall credit the Borrower's Current Loan by the amount required to take the balance of that loan to zero dollars, and then pay the outstanding amount to the Borrower in accordance with clauses 4.20 to 4.21 below;
 - (c) update its records – including where UDC has previously written off all or part of a Borrower's loan amount or recorded it as a bad debt – to reflect the credit paid to each Borrower (and shall further advise any applicable credit reporting agencies of that adjustment);
 - (d) contact those Borrowers using the information it holds (for example, by SMS message(s), email, post and/or telephone) advising:

- (i) that UDC has previously charged unreasonable Dishonour and Late Payment Fees to some Borrowers, in breach of section 41 of the CCCFA;
 - (ii) that UDC and the Commission have agreed that UDC should offer to pay the Borrower Compensation and Interest in relation to Default Fees charged on the Borrower's loan(s) with UDC;
 - (iii) that UDC has entered into this Agreement with the Commission;
 - (iv) the amount of Compensation and Interest which UDC has agreed to pay the Borrower in settlement of the Proceeding; and
 - (v) that UDC has credited or will credit imminently the balance of the Borrower's Current Loan with the Compensation and Interest owed to them; and
- (e) provide and maintain a UDC contact email address and phone number for Borrowers to ask any queries.

4.20 If the Borrower does not have a Current Loan with UDC, as soon as reasonably practicable after executing this Agreement, and no later than three months after this Agreement has been executed, UDC shall:

- (a) update its records to reflect the Borrower's entitlement to Compensation and Interest (and, where any amount owed on a Borrower's most recent loan has been written off, will amend its records to reduce the amount of the recorded write off by the amount of the Compensation and Interest);
- (b) if UDC still has a record of that Borrower's bank account number, UDC shall:
 - (i) notify the Borrower that UDC will pay the Compensation to the bank account UDC has on record, and invite the Borrower to contact UDC if they wish to have the Compensation paid to another account; and
 - (ii) at least forty-eight hours after providing that notification, pay the Compensation to the bank account on record (or to another account nominated by the Borrower, if applicable);
- (c) if UDC has no record of that customer's bank account number, take reasonable steps using the information it holds to contact each Borrower (for example, this may include contacting Borrowers on all known contact details for that customer, including by SMS message(s), email, post and/or telephone) advising:
 - (i) that UDC has previously charged unreasonable Dishonour and Late Payment Fees to some Borrowers, in breach of section 41 of the CCCFA;
 - (ii) these Default Fees were charged on the Borrower's loan(s) with UDC;

- (iii) that UDC and the Commission have agreed that UDC should offer to pay the Borrower Compensation and Interest;
- (iv) that UDC has entered into this Agreement with the Commission;
- (v) the amount of Compensation and Interest which UDC has agreed to pay the Borrower in settlement of the Proceeding;
- (vi) that, if the Customer provides a bank account number to UDC within 14 days, UDC will pay the Compensation and Interest to that bank account; and
- (vii) the UDC contact email address and phone number for any Borrowers who have queries, together with UDC's New Zealand Business Number and FSP number.

4.21 If, following UDC's communication with Borrowers who do not have a Current Loan with UDC (pursuant to clause 4.20(c) above):

- (a) the Borrower instructs UDC to pay their Compensation and Interest into a nominated bank account, UDC shall pay the Compensation and Interest (less any sums that UDC has written off from the Borrower's most recent loan) into that account; or
- (b) if the Borrower does not provide any such instruction, UDC shall deal with the Compensation and Interest for such Borrowers (less any sums that UDC has written off from the Borrower's most recent loan) in accordance with clauses 4.26 and 4.27 below.

4.22 To the extent that UDC cannot establish contact with a Borrower using the methods set out in clauses 4.18 and 4.20 above, UDC shall use reasonable endeavours to locate and contact those Borrowers, including but not limited to:

- (a) telephoning the Borrower and if necessary leaving a voicemail message;
- (b) sending further SMS messages and emails to the Borrower;
- (c) contacting the Borrower through any publicly available phone directories and/or the electoral roll;
- (d) using external credit reporting searches to locate the Borrower; and
- (e) taking any other steps that UDC would usually take to locate and contact a non-paying debtor.

4.23 The Parties will proceed as per clauses 4.26 and 4.27 below if, six months after the date of this Agreement:

- (a) there are any Borrowers who UDC cannot locate after using reasonable endeavours as required under clause 4.22 above; or
- (b) there are any Borrowers who have not provided payment instructions in accordance with clauses 4.18 to 4.22 above.

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Bankrupt Borrowers

- 4.24 Notwithstanding clauses 4.18 to 4.22 above, if any Borrowers who are entitled to be paid Compensation and Interest are bankrupt at the time when the Compensation and Interest is to be paid to them, the relevant Compensation and Interest shall be paid to the Official Assignee, unless otherwise agreed with the Official Assignee.

Deceased Estates

- 4.25 Notwithstanding clauses 4.18 to 4.22 above, if any Borrowers who are entitled to be paid Compensation and Interest are deceased:
- (a) UDC shall use reasonable endeavours to contact the representative(s) of the deceased Borrower and write to the representative(s) of the deceased Borrower informing them of the entitlement to the Compensation and Interest; and
 - (b) pay the Compensation and Interest at the direction (if any) of the representative(s) of the deceased Borrower; or
 - (c) if the representative(s) of the deceased Borrower has not contacted UDC within six months of UDC's last attempt to contact them, or has not provided payment instructions in accordance with clauses 4.18 to 4.22 above, the Parties will proceed as set out at clauses 4.26 and 4.27 below.

Report to Commission and unpaid amounts

- 4.26 Seven months after the date of this Agreement, UDC undertakes to provide a report to the Commission confirming the progress it has made in distributing the Compensation and Interest, including a summary of the payments made to the Borrowers pursuant to this Agreement, and an update on its progress locating Borrowers (**Payment Update**).
- 4.27 Within 30 days of receiving the Payment Update, the Parties will consider the amount of money which remains unpaid to Borrowers, and will agree whether:
- (a) any further steps are required by UDC in order to discharge its obligations to use reasonable endeavours to contact Borrowers; or
 - (b) any remaining unpaid amount will be:
 - (i) treated as unclaimed money under the Unclaimed Money Act 1971; or
 - (ii) paid to a charity (or charities) to be nominated by UDC and approved by the Commission.

- 4.28 Other than the Compensation and Interest, and the Costs Payment, this Agreement does not:
- (a) require UDC to pay any further amounts to the Commission or Borrowers; or

- (b) affect UDC's obligations to any Borrower or any Borrower's obligations to UDC other than by reducing the quantum of any sum payable by the Compensation and Interest paid to that Borrower or credited to that Borrower's account.

5 Other proceedings

- 5.1 The Commission undertakes not to issue, encourage or support any civil or criminal legal proceedings against UDC and/or each of its Related Parties in respect of matters that are the subject of the Proceeding.
- 5.2 This Agreement is entered into without prejudice to the rights of Borrowers in respect of UDC's admitted breaches, whose rights the Commission is not compromising on their behalf.
- 5.3 Nothing in this Agreement will limit or affect the ability of:
 - (a) the Commission to issue proceedings against UDC in respect of matters not related to the Proceeding, or in respect of conduct UDC engages in after the date of this Agreement or for breach of this Agreement or a breach of the Enforceable Undertakings; and
 - (b) any person who has not consented to be bound by the terms of this Agreement from pursuing any rights that person considers would be available to them arising from matters contained in this Agreement.

6 Public statements

- 6.1 Subject to clause 6.2 below, the Parties may make public statements in relation to the settlement after this Agreement has been executed. The Parties agree that:
 - (a) any public statements relating to the Proceeding will be made in good faith; and
 - (b) nothing in this Agreement prevents either party from referring to the fact that UDC has admitted breaching s 41 of the CCCFA.
- 6.2 Except as required by law, UDC agrees that it will not make any public comment in relation to this Agreement or the Proceeding until after the Commission has issued any media comment notifying the public of this settlement.
- 6.3 The Parties agree to provide written copies of their draft initial press releases to the other party at least one hour in advance of their release to allow the other party the opportunity to comment. A party will be free to amend their draft initial press release after provision to the other party and will not be obliged to accept the comments of the other party.

7 Miscellaneous

- 7.1 The Commission acknowledges that some of the information provided by UDC in the course of the investigation and proceedings may be confidential and/or

commercially sensitive and/or subject to privilege. The Commission agrees that, if it receives a request pursuant to the Official Information Act 1982 that covers or might cover and/or record or reveal all or some of that information it will notify UDC of that request and will consult with UDC as to whether there are grounds for the requested material to be withheld under Part 1 of the Official Information Act 1982.

- 7.2 Each Party will meet its own expenses incurred in the course of performing its obligations under this Agreement.
- 7.3 The Parties agree to take such steps as are necessary or desirable to give full effect to the terms of this Agreement, and to demonstrate good faith in performing their obligations under this Agreement and in resolving any issues arising under this Agreement.
- 7.4 If necessary or desirable, the payment processes required to give full effect to the terms of this Agreement may be amended by agreement of the Parties.
- 7.5 The Parties by written agreement may vary any of the time periods stipulated in this Agreement, in which instance all other dependent time periods will be extended by the same amount of time.
- 7.6 This Agreement will be governed by, and construed in accordance with, the laws of New Zealand.
- 7.7 The Parties agree that the New Zealand courts will have exclusive jurisdiction to determine any proceedings arising out of or in connection with this Agreement and the matters to which it relates, including any proceedings brought by the Commission.
- 7.8 This Agreement constitutes the entire agreement between the Parties in relation to resolving the Proceeding. It supersedes all prior communications, understandings or representations whether oral or written between the Parties.
- 7.9 No amendment to this Agreement will be effective unless it is in writing and signed by both of the Parties.
- 7.10 Any failure by any party to enforce any provision of this Agreement at any time will not operate as a waiver of that provision in respect of that act or omission or any other act or omission.
- 7.11 Any person signing this Agreement on behalf of one of the Parties warrants that by signing it they have all the necessary authority from that Party to sign this Agreement on their behalf.
- 7.12 The Parties may enter into this Agreement by signing any number of counterparts, each of which will be treated as an original. All of the counterparts taken together will constitute a single document. A Party may execute this Agreement by one signatory executing one counterpart and another signatory executing a different counterpart. A Party's delivery of a signed PDF counterpart of this Agreement by email will have the same legal effect as that Party's delivery of a signed original counterpart.
- 7.13 Any notice or communication that is given or served under or in connection with this Agreement must be given in writing in the following manner:



- (a) If addressed to the Commission, by hand delivery or email to the following address:

Commerce Commission
Level 9
44 The Terrace
Wellington 6011

Attention: [REDACTED]

Email: [REDACTED]

- (b) If addressed to UDC, by hand delivery or email to the following address:

UDC Finance Limited
Ground Floor, ANZ Centre
23-29 Albert Street, Auckland 1010

Attention: [REDACTED]

Email: [REDACTED]

WP [Signature]

Execution

Signed by and on behalf of the
Commerce Commission



Chair

ANNA RAWLINGS

Commerce Commission

Signed by and on behalf of UDC Finance
Limited



Director/authorised signatory

Wayne Percival

CEO

UDC Finance Limited

Appendix One

First amended statement of claim

The Plaintiff by its solicitor says:

The parties

- 1 The plaintiff, the Commerce Commission (the **Commission**), is a body corporate established under section 8 of the Commerce Act 1986. Its functions include the enforcement of the Credit Contracts and Consumer Finance Act 2003 (the **Act**).
- 2 The defendant, UDC Finance Limited (**UDC**):
 - (a) is a duly incorporated company having its registered office at Ground Floor, ANZ Centre, 23-29 Albert Street, Auckland;
 - (b) was incorporated on 1 April 1938 (as United Dominions Corporations Finance Limited); and
 - (c) was, until 2 September 2020, a wholly owned subsidiary of ANZ Bank New Zealand Limited.

UDC's business

- 3 UDC is a finance company. Among other matters, it carries on business providing vehicle loans to consumer borrowers in New Zealand (**Borrowers**).
- 4 UDC provides loans to Borrowers:
 - (a) who apply for loans from UDC directly, either through UDC's call centre or online via its website, <www.udc.co.nz>; and
 - (b) who obtain finance from UDC pursuant to arrangements between UDC and motor vehicle traders.
- 5 UDC provides credit to Borrowers under consumer credit contracts, and is a creditor, as those terms are defined in the Act.

The credit arrangements from 6 June 2015 to 28 August 2019

- 6 The loans UDC provided to Borrowers:
 - (a) were for terms of between one to five years;
 - (b) were typically for amounts of \$10,000 or more; and
 - (c) were secured over chattels (typically the financed vehicle).
- 7 UDC provided loans to Borrowers under credit contracts, the terms of which were set out in:

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- (a) either:
 - (i) a document described as a "Term Loan Agreement"; or
 - (ii) a document described as a "Credit Sale Agreement"; and
- (b) a document described by UDC as the "General Conditions (Consumer)"; and
- (c) if applicable, a security agreement and/or a deed of guarantee.

(together, as applicable, the **Contract**)

8 Under the Contract, Borrowers were required to:

- (a) pay interest charges;
- (b) pay credit fees;
- (c) make repayments of specified amounts and in regular instalments; and
- (d) pay specified default fees, where the Borrower was in default.

UDC's default process

9 During the relevant period, UDC typically undertook the following steps when a Borrower failed to make a scheduled loan repayment and remained in default:

- (a) 1 day after the failed payment, UDC sent the Borrower an automated email and/or text message;
- (b) 7 days after the failed payment, UDC sent the Borrower an automated late payment letter;
- (c) 14 days after the failed payment, UDC sent the Borrower an automated pre-possession notice;
- (d) 30 days after the failed payment, UDC sent the Borrower late payment correspondence (including emails and text messages), and continued to do so every 30 days until it commenced repossession action;
- (e) 60 days after the failed payment, UDC sent the Borrower a manual pre-possession notice; and
- (f) from the first day after the failed payment until it commenced repossession action, UDC conducted various account maintenance and collection activities, including engaging in telephone correspondence with Borrowers, as required.

UDC's default fees

10 At all relevant times, UDC charged defaulting Borrowers:

- (a) A **Dishonour Fee** on each occasion when the Borrower failed to make a scheduled loan repayment; and



(b) A **Late Payment Fee** if the Borrower remained in default on the seventh day after failing to make a scheduled loan repayment.

11 At all relevant times UDC also charged:

- (a) repossession fees, charged if UDC commenced repossession action following the default; and
- (b) default interest charges in the event of a default in payment, for the duration of the default.

The Dishonour Fee

12 The Dishonour Fee is a "default fee", as that term is defined in s 5 of the Act.

13 By reason of paragraph [12] above, the Act required the amount of the Dishonour Fee to be not unreasonable having regard to:

- (a) the amount reasonably required to compensate UDC for:
 - (i) the costs incurred by UDC whenever a scheduled loan repayment by a Borrower was dishonoured; and
 - (ii) a reasonable estimate of any loss incurred by UDC as a result of the Borrower's acts or omissions; and to
- (b) reasonable standards of commercial practice.

(the amount described in the Act being referred to in this statement of claim as the **Reasonable Dishonour Costs**)

14 Each Dishonour Fee:

- (a) was added to the Borrower's outstanding loan balance on the day the Borrower failed to make a scheduled loan repayment; and
- (b) was paid by the Borrowers when making repayments under their respective loans.

15 UDC charged Borrowers who entered into Contracts with it between 6 June 2015 and 4 September 2016 a Dishonour Fee of \$45 for every dishonoured payment.

The Late Payment Fee

16 The Late Payment Fee is a "default fee", as that term is defined in s 5 of the Act.

17 By reason of paragraph [16] above, the Act required the amount of the Late Payment Fee to be not unreasonable, having regard to:

- (a) the amount reasonably required to compensate UDC for:
 - (i) the costs incurred by UDC whenever a Borrower did not make a scheduled loan repayment within seven days of the due date for the payment; and

(ii) a reasonable estimate of any loss incurred by UDC as a result of the Borrower not making a scheduled loan repayment within seven days of the due date for the payment; and to

(b) reasonable standards of commercial practice.

(the amount described in the Act being referred to in this statement of claim as the **Reasonable Late Payment Costs**).

18 Each Late Payment Fee:

(a) was added to the Borrower's outstanding loan balance on the seventh day after the Borrower failed to make a scheduled loan repayment (or the next business day thereafter); and

(b) was paid by the Borrowers by making repayments under their respective loans.

19 The amounts of the Late Payment Fee were:

(a) For Borrowers who entered into Contracts with UDC between 6 June 2015 and 4 September 2016: \$45;

(b) For Borrowers who entered into Contracts with UDC between 5 September 2016 and 10 December 2018:

(i) \$73, if the fee was charged on or before 10 December 2018; and

(ii) \$60, if the fee was charged between 11 December 2018 and 28 August 2019; and

(c) For Borrowers who entered into Contracts with UDC between 11 December 2018 and 28 August 2019: \$60.

First cause of action: the Dishonour Fees were unreasonable

20 The Commission repeats paragraphs [1] to [15] above.

21 The Dishonour Fees charged to the Borrowers who had entered Contracts with UDC between 6 June 2015 and 4 September 2016:

(a) partially recovered costs which UDC would only incur after the seven day period covered by the fee; and

(b) accordingly, were unreasonable in breach of s 41 of the Act.

22 Of the defaulting Borrowers:

(a) those who have since made repayments under their loans have paid the Dishonour Fees, either in full or in part; and

(b) those who have not since made repayments under their loans have increased loan balances as a result of being charged the Dishonour Fees.

23 Borrowers have suffered loss or damage as a consequence of paying an unreasonable default fee.

Particulars of paragraph 23

The Borrowers have suffered the following losses:

- (a) the amount paid by them in excess of UDC's Reasonable Dishonour Costs (the amount in excess being the extent to which the Dishonour Fee included the costs referred to in paragraph 21(a) above); and
- (b) interest on the amount set out above.

Accordingly, the Commission seeks:

- (A) A declaration that between 6 June 2015 and 4 September 2016, UDC contravened s 41 of the Act by charging unreasonable Dishonour Fees.

Second cause of action: the Late Payment Fees were unreasonable

24 The Commission repeats paragraphs [1] to [11] and [16] to [19] above.

25 In respect of the Late Payment Fees charged between 6 June 2015 and 28 August 2019:

- (a) the amount of the Late Payment Fee reflected costs UDC would or could incur from all Borrowers who were in default for more than seven days;
- (b) in calculating the Late Payment Fee, it was permissible for UDC to average a reasonable estimate of its costs of late payment across a class of Borrowers;
- (c) approximately one in eight of UDC's Borrowers who were charged the Late Payment Fee remedied their default within 14 days, with the remainder remedying either later or not at all;
- (d) UDC incurred most of its default costs in relation to Borrowers who remained in default after day 14;
- (e) the effect of subparagraphs (a) to (d) above is that:
 - (i) the Borrowers who remedied their defaults between days seven and 14 formed one class of Borrowers;
 - (ii) the remaining Borrowers formed at least one other class of Borrowers; and
 - (iii) UDC ought to have charged one fee to Borrowers in default on day seven and another fee to those still in default on day 14; and
- (f) accordingly, for Contracts commencing between 6 June 2015 and 28 August 2019, the Late Payment Fee was unreasonable, in breach of s 41 of the Act.

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- 26 Of the defaulting Borrowers:
- (a) those who have since made repayments under their loans have paid the Late Payment Fees, either in full or in part; and
 - (b) for those who have not since made repayments under their loans their loan balances have increased as a result of being charged the Late Payment Fees.
- 27 Borrowers have suffered loss or damage as a consequence of paying an unreasonable default fee.

Particulars of paragraph [27]

- (a) The Borrowers have suffered the following losses:
 - (i) the amount paid by them in excess of UDC's Reasonable Late Payment Costs; and
 - (ii) interest on the amount set out above.

Accordingly, the Commission seeks:

- (A) A declaration that between 6 June 2015 and 28 August 2019, UDC contravened s 41 of the Act by charging unreasonable Late Payment Fees.

This statement of claim is filed by [REDACTED], solicitor for the Commerce Commission.

The address for service of the Commerce Commission is at the offices of Meredith Connell, Level 5, 4 Graham Street, Auckland.

Documents for service on the Commerce Commission may be:

- (a) emailed to [REDACTED] and [REDACTED]; or
- (b) if email is not practical:
 - (i) posted to Meredith Connell (attn. [REDACTED]) at PO Box 90750, Victoria Street West, Auckland 1142; or
 - (ii) left at the solicitor's address as noted above (attn. [REDACTED]).

Appendix Two

In response to the plaintiff's amended statement of claim, dated [to insert], the defendant by its solicitor says:

The Parties

1. It admits paragraph 1.
2. It admits paragraph 2.

UDC's business

3. It admits paragraph 3.
4. It admits paragraph 4.
5. It admits paragraph 5.

The credit arrangements from 6 June 2015 to 28 August 2019

6. It admits paragraph 6.
7. It admits paragraph 7.
8. It admits paragraph 8.

UDC's default process

9. In relation to paragraph 9:
 - a. In relation to paragraph 9(f), it says that it conducted account maintenance and collection activities from the day after the failed payment until the date on which the overdue amount was recovered, as required.
 - b. It otherwise admits the paragraph and says further that the process of dealing with borrowers' defaults differed depending on the circumstances of each default.

UDC's default fees

10. It admits paragraph 10 and says further that in certain circumstances it also reversed Dishonour Fees and Late Payment Fees, meaning that those fees were not charged.

Particulars

UDC may decide to reverse a fee on a case-by-case basis taking into account such factors as the customer's history with UDC and the customer's financial situation.

11. It admits paragraph 11.

The Dishonour Fee

12. It is not required to plead to paragraph 12.
13. It is not required to plead to paragraph 13.

WP 

14. It admits paragraph 14 but refers to the further statement in paragraph 10 above.

15. It admits paragraph 15 but refers to the further statement in paragraph 10 above.

The Late Payment Fee

16. It is not required to plead to paragraph 16.

17. It is not required to plead to paragraph 17.

18. It admits paragraph 18 but refers to the further statement in paragraph 10 above.

19. It admits paragraph 19.

First cause of action: the Dishonour Fees were unreasonable

20. It repeats paragraphs 1-15.

21. It admits paragraph 21.

22. It admits paragraph 22 but refers to the further statement in paragraph 10 above.

23. It admits paragraph 23.

Second cause of action: the Late Payment Fees were unreasonable.

24. It is not required to plead to paragraph 24.

25. It admits paragraph 25.

26. It admits paragraph 26 but refers to the further statement in paragraph 10 above.

27. It admits paragraph 27.

Appendix Three

Interlocutory application for declaratory order

To: The Registrar of the High Court at Auckland

And to: The Defendant

This document notifies you that:

- 1 The applicant, the Commission, applies to the court for declaratory orders as sought at paragraphs 20-23 and 24-27 of the First Amended Statement of Claim (**Claim**), in the following terms:
 - (a) A declaration that between 6 June 2015 and 4 September 2016, UDC contravened s 41 of the Credit Contracts and Consumer Finance Act 2003 by charging unreasonable Dishonour Fees.
 - (b) A declaration that between 6 June 2015 and 28 August 2019, UDC contravened s 41 of the Credit Contracts and Consumer Finance Act 2003 by charging unreasonable Late Payment Fees.

- 2 The grounds on which the order is sought are as follows:
 - (a) The Defendant has admitted at paragraphs 21 and 25 of its Amended Statement of Defence that it breached s 41 of the CCCFA;
 - (b) Declaratory relief is available for breaches of the CCCFA, even when there has been a settlement between the parties;
 - (c) It is in the interests of justice to grant the declaratory order sought and to give effect to the negotiated settlement;
 - (d) There is a strong public interest in the making of the declaratory order in this case;
 - (e) Upon the grounds set out in the affidavit of [REDACTED] affirmed on [to insert] and filed with this application; and
 - (f) The application for a declaratory order is not opposed by UDC, as set out in the joint memorandum of counsel filed with this application.

- 3 This application is made in reliance on:
 - (a) Rule 15.15 High Court Rules;
 - (b) *Commerce Commission v ANZ Bank New Zealand Limited* [2015] NZHC 1168;
 - (c) *Commerce Commission v Ferratum New Zealand Limited* [2020] NZHC 1607.

Date: [to insert]

.....
[REDACTED]
Counsel for the Plaintiff

Appendix Four

Joint memorandum of counsel regarding hearing for interlocutory application for declaratory order

May it please the Court:

- 1 The Commerce Commission has filed an interlocutory application for declaratory order on admission of facts, pursuant to r 15.15 High Court Rules. That application relies on the admissions made by UDC in paragraphs 21 and 25 of its Amended Statement of Defence dated [to insert], filed as part of a negotiated settlement between the parties. The basis for the application is further set out in the affidavit of [REDACTED].
- 2 The application for a declaratory order is not opposed by UDC. In light of that fact, pursuant to r 7.37 High Court Rules, the Court may grant the order sought with or without a hearing.
- 3 The parties seek that the order sought be made without a hearing. However, in the event the Court considers it would be assisted by written and oral submissions, then the parties agree that a one hour hearing would be sufficient, with timetabling directions for the exchange of synopses of submissions.
- 4 Accordingly, the parties seek:
 - (a) In the event the Court is prepared to make the order sought on the papers:
 - (i) the declaratory orders set out in the first and second causes of action of the First Amended Statement of Claim; and
 - (ii) that there be no order for costs.
 - (b) Or, in the event the Court wishes to convene a hearing to consider the application, the parties seek the following orders:
 - (i) The Registry to consult with the parties to set a one hour hearing on the first available date;
 - (ii) Commission to file its synopsis of submissions ten working days before the hearing, in accordance with r 7.39(2)(a);
 - (iii) UDC to file any synopsis of submissions five working days before the hearing, in accordance with r 7.39(5).

Date:

.....
[REDACTED]
Counsel for the Plaintiff

.....
[REDACTED]
Counsel for the Defendant

Appendix Five

Undertakings to the Commerce Commission under s 113 of the Credit Contracts and Consumer Finance Act 2003

1 Persons giving undertakings

- 1.1 These Undertakings are given to the Commerce Commission (**Commission**) for the purposes of s 113(aa) of the Credit Contracts and Consumer Finance Act 2003 (**CCCFA**) by UDC Finance Limited (**UDC**), a company having its registered office at the Ground Floor, ANZ Centre, 23 – 29 Albert Street, Auckland.

2 Background

- 2.1 The background to this matter is set out within a Settlement Agreement between the Commission and UDC dated [to insert] (**Settlement Agreement**).

3 Undertakings

- 3.1 UDC undertakes to the Commission that it will, within the time periods set out in the Settlement Agreement, make payments to Borrowers in accordance with clauses 4.15 to 4.25 of the Settlement Agreement.

4 Effect of the Undertakings

- 4.1 The Undertakings are Court enforceable undertakings in terms of s 113(aa) of the CCCFA.

5 Commencement of the Undertakings

- 5.1 The Undertakings come into effect when:
- (a) executed by UDC; and
 - (b) the Commission confirms its acceptance of the Undertakings.

6 Duration of the Undertakings

- 6.1 These Undertakings will continue to have effect until either:
- (a) the Compensation and Interest (as those terms are defined in the Settlement Agreement) are paid in full; or
 - (b) UDC is discharged from making further payments of Compensation and Interest in accordance with clause 4.27 of the Settlement Agreement.

7 Compliance with the Undertakings

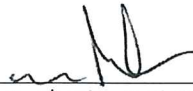
- 7.1 If UDC becomes aware of a breach of these Undertakings, whether advertent or inadvertent, it will notify the Commission within seven days of becoming aware, giving full particulars of the breach.
- 7.2 For the avoidance of doubt, nothing in paragraph 7.1 above prevents the Commission from seeking any information from UDC at any time during the course of any criminal and/or civil proceedings for the purpose of checking compliance with the Undertakings.

8 Miscellaneous

- 8.1 No amendment to the Undertakings will be effective unless it is in writing, executed by the Undertaking Parties, and signed as accepted by the Commission.
- 8.2 These Undertakings are properly executed if each Undertaking Party signs the same copy, or separate identical copies of the execution page. Where separate copies are signed by UDC or by the Commission, the signed copy can be the original document, or a faxed or emailed copy.
- 8.3 UDC acknowledges that:
- (a) The Commission will make the Undertakings publicly available including by publishing them on the Commission's enforcement response register on its website.
 - (b) The Commission may, from time to time, make public reference to the Undertakings including in media statements and in the Commission's publications.
 - (c) Nothing in the Undertakings is intended to restrict the right of the Commission, or the right of any other person, to take action under the CCCFA or any other statute or law.

Execution

Signed by and on behalf of UDC Finance Limited



Director/authorised signatory

Name **Wayne Percival**
CEO

In the presence of:

Signature of witness

Name of witness

Solicitor

Occupation

Auckland

City/town of residence

11 March 2021

Date



Acceptance

Signed by and on behalf of the Commerce
Commission by:


Chair

ANNA RAWLINGS
Commerce Commission

In the presence of:


Signature of witness


Name of witness

Executive Assistant
Occupation

Auckland
City/town of residence

22.03.2021
Date

Appendix Six

Day in arrears	Compensation for Late Payment Fees		
	\$45 Contract entered into from 06/06/15 to 04/09/16	\$73 Contract entered into from 05/09/16 to 10/12/18	\$60 Contract entered into from 11/12/18 to 02/02/21
7-14	\$45 <i>Full refund</i>	\$73 <i>Full refund</i>	\$60 <i>Full refund</i>
14-28	\$31	\$59	\$46
28-42	\$17	\$45	\$32
42-56	\$3	\$31	\$18
56-70	No refund	\$17	\$4
70-84	No refund	\$3	No refund