

PART 2

THE COURSE OF THE PROCEEDINGS

- FIRST HEARING

HFC's application was made on 10 April, 1985.

The objection from CCLS was made on or about 10 August 1987. It set out the principal grounds of objection and the briefest particulars of the cases or transactions intended to be relied upon. The terms of that objection excluding the particulars are set out in Part 1 of Appendix 'A'.

The Director's objection was made on 10 August, 1987 and it contained 13 grounds of objection. With the Director's objection there were included very brief particulars of the matters to be relied upon in support of the Director's objection. The terms of the Director's objection excluding the particulars are set out in Part II of Appendix 'A'.

After receipt of the objections the Authority, constituted by the Chairman sitting alone, convened a series of Directions Hearings at which the objectors were ordered to provide further and better particulars of their objections. Successive statements of further and better particulars were provided by the objectors, principally CCLS, and the format most commonly adopted was a consolidation of the grounds of objection and particulars thereof. All parties were directed to make discovery of relevant documents. The final consolidated form of the objection by CCLS excluding the particulars is set out in Part III of Appendix 'A'.

Finally, before the proceedings proper began, HFC delivered responses to both objections.

The hearing of the application and the objections commenced on 3 May, 1988. Mr. Charles, QC, Mr. Habersberger, QC, and Mr. O'Callaghan, Mr. Robertson and later Mr. Bevan John of Counsel, all instructed by Messrs. Arthur Robinson and Hedderwicks appeared for HFC.

In the course of its opening, HFC put to the Authority amongst other things that -

- (i) it denied most of the allegations made against it;
- (ii) to the extent that individual allegations might be proved, such matters are not representative of HFC's conduct generally and, further, the allegations arose from a very small proportion of HFC's transactions;
- (iii) the Credit Act which took effect on 28 February, 1985 was a new and most complex piece of legislation and due allowance ought to be made for difficulties in achieving total compliance, particularly in the earlier stages of its operation; and
- (iv) only weeks before the Credit Act came into effect HFC had acquired BFC and the difficulties of management immediately following upon the take-over distracted

HFC to some extent from achieving immediate full compliance with the Act.

It should also be added at this stage, that in the responses to the objections delivered prior to the commencement of the hearing, very limited admissions were made by HFC.

The opening by HFC was followed first by the opening by CCLS, for whom Mr. Bingham appeared assisted by Mr. Nelthorpe and then by the opening by Mr. Lyneham, representing the Director of Consumer Affairs.

The following 16 sitting days were occupied mainly with taking evidence from witnesses called by CCLS in support of its objections.

On 20 June, 1988 the presentation of the CCLS case was interrupted with leave of the Authority by HFC which put forward a proposal which, if fully accepted by the Authority, would have altered fundamentally the further course of the proceedings.

The essence of the proposal was that notwithstanding that HFC's past conduct had involved various types of breaches of the requirements of the Credit Act and other shortcomings, HFC had already taken steps within the preceding 12 months and was proposing to take further measures by 1 September, 1988 which would ensure the cessation of practices or conduct which had been in breach of the Credit Act or were otherwise unsatisfactory and further would ensure that henceforth its regulated credit business would be conducted in a manner which was demonstrably efficient, honest and fair.

It was submitted to the Authority that in the light of those matters it would not be open to the Authority to refuse to grant a licence

provided the Authority was satisfied as to the effectiveness and comprehensiveness of the measures HFC had already taken and was proceeding to take and as to HFC's ability and willingness or determination to implement and maintain those changes to its practices.

A substantial document, Exhibit "AC2" was furnished by HFC in support of these proposals. In AC2 are set out a range of allegations or matters "admitted" by HFC for the purposes of these proceedings and the two classes of changes, namely those already made and those proposed to be effected by 1 September, 1988.

It was made plain by HFC that this proposal was not advanced in a sense of an offer to settle the proceedings. In particular, irrespective of what course the Authority might take in response to the proposal, the admissions were being made by HFC for all purposes of the proceedings and HFC would still continue to follow such changes in its practices and procedures as it had already made and to implement the changes which it proposed to have adopted by 1 September.

Finally, it was submitted that the Authority should cease hearing further evidence from the objectors other than evidence of HFC's conduct within the immediately preceding 12 months and that apart from that, evidence should be confined to the evidence which HFC would adduce in order to establish its ability and willingness to implement and maintain the changes to its practices outlined in its proposal and the adequacy of those changes.

The proceedings were adjourned for some days to allow the objectors to respond to the proposal and in turn HFC was afforded an opportunity to

reply to the objectors' submission. After consideration of the submissions, the Authority decided that it could not accept the main thrust of HFC's submission. It considered that having regard to the evidence already taken and to indications in the particulars of the nature of evidence yet to be led by the objectors, there was a possibility of a case being made out that HFC would not, if licensed, carry on its business efficiently, honestly and fairly.

However, it seemed to the Authority that as a consequence of HFC having made the admissions contained in AC2 there ought to be some changes made to the future course of the proceedings.

The approach taken by HFC prior to the introduction of the AC2 proposal had been that very few of the matters alleged by the objectors were admitted and further that to the extent that the Authority might find allegations proved, such matters represented a very small proportion of HFC's transactions and should not be viewed by the Authority as representative or typical of HFC's conduct. It was not surprising, therefore, that the first and principal objector, CCLS, had proceeded to call quite a number of witnesses in an endeavour to establish the same types of breaches by HFC and further were intending to call a considerable number of further witnesses.

It seemed to the Authority that HFC having admitted for the purposes of these proceedings that it had in the past committed a range of breaches and been guilty of a range of shortcomings, little point would be served by permitting the objectors to adduce further evidence of conduct which was of a kind already admitted by HFC. Correspondingly, the Authority did not consider it would be useful to have HFC produce

evidence by way of rebuttal or explanation of evidence led by the objectors prior to the AC2 proposal where the evidence brought by the objectors related to conduct of a kind admitted by HFC.

However, the specifying of the matters about which the Authority should not require further evidence for those reasons proved to be no easy matter, principally because of the form and limited nature of the admissions made in AC2.

In particular -

- (i) HFC did not admit any particular instance as alleged in the Particulars of Objection by either objector.

Thus, for example, it did not concede that any particular consumer had been obliged to take insurance as a condition of being granted credit; rather it admitted in general terms that HFC had made obtaining insurance from the Heritage companies a condition of granting credit.

As a further illustration, in relation to the subject of harassment the terms of the admission were "individual incidents of harassment occurred";

- (ii) the admissions did not state the number of incidents admitted nor the period over which the relevant acts or omissions occurred;

- (iii) in some areas the conduct admitted to comprised part only of a course of conduct alleged by the objectors;
and
- (iv) the terms of some admissions were such that the Authority was given little if any idea of the true nature of what was being admitted or of its importance or gravity - see for example the admission concerning harassment referred to above.

Ultimately, the Authority informed the parties that it did not wish to receive further evidence from the objectors or evidence from the applicant as to certain only of the matters admitted in the AC2 proposal documents.

Further, even though the range of matters on which the Authority decided it did not require any further evidence was much narrower than the range of matters as to which AC2 admissions were made, the Authority saw it as critical that the parties and particularly the applicant have a clear understanding of the limits of the areas as to which the Authority was indicating it did not wish to receive further evidence.

This was particularly so to the extent that the Authority was indicating to the applicant that there was no need to adduce evidence in rebuttal of evidence already brought by the objectors. Of particular concern were a number of instances where evidence had been led by the objectors on a subject which was dealt with in an admission made by HFC but where the Authority also considered that there was some

particular feature of the objectors' evidence which was potentially adverse to HFC and the Authority considered that the particular adverse matter was not entirely subsumed into the admission. In these instances the Authority brought that matter to notice in order that HFC would have knowledge of it and could if it wished introduce evidence to rebut or explain that particular aspect.

An example may assist in further explaining this point.

HFC admitted that persons were asked to be guarantors of loan contracts but were signed up in the capacity of co-borrowers. In one particular transaction involving co-borrowers/guarantors about which evidence was received before the AC2 proposal, the evidence suggested also that the co-borrowers/guarantors were led to believe by HFC staff that their potential liability under the arrangement was an amount substantially less than their actual liability. This particular matter was brought to the notice of the parties.

Because of the importance of the parties and particularly HFC having a correct understanding of what the Authority took to be being admitted in AC2 and from that what were the matters on which further evidence from either party was considered unnecessary, the Authority took what it believed were all reasonable steps to ensure that a common understanding existed on these matters and to that end invited the parties to raise with it any difficulties the parties were experiencing. Consequently a number of discussions which further clarified that understanding eventuated.

After the Authority had decided that it did not accept the main thrust of HFC's proposal as set out in AC2, CCLS resumed the bringing of

evidence in support of its objection although, of course, certain evidence which it had intended to bring was no longer proceeded with in the light of admissions in AC2 and the Authority's views as to further evidence in the light thereof.

In addition to evidence of particular transactions between consumers and HFC, CCLS called expert evidence as to print sizes on contract documents, the comprehensibility of language in such documents and evidence of an actuarial nature.

The presentation by CCLS of material in support of its objection was again interrupted on 19 July, 1988 when HFC submitted that the Authority as then comprised by R. T. Viney, Chairman, and members C. Richards and J. Trevenen, should cease hearing the application and objections by reason of apparent, as distinct from actual, bias on the part of Ms. Richards said to arise out of her former associations with CCLS.

On 29 July, 1988 the Authority determined that it should uphold the objection made by HFC to its further hearing of the matter and the proceedings before the Authority as so constituted thereupon ended. The reasons for that decision are set out in Appendix 'B' of these Reasons.