CITATION: LEXFUND v. FERRO et al, 2016 ONSC 4113
COURT FILE NO.: C-261-12; 12-4045-SR; 12-4358-SR;13-4060-SR;13-4088-SR;13-4121-SR
DATE: 2016-06-22

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

LEXFUND INC. Court File C-261-12

Plaintiff

– **and** –

LUCIO ANTHONY FERRO (AKA LOU FERRO) AND FERRO & COMPANY and THE ESTATE OF LUSCIO ANTHONY FERRO, DECEASED, BY ITS LITIGATION ADMISITRATOR, ANGELA POLLARD OF POLLARD & ASSOCIATES INC.

Defendants

Louis-Pierre Gregoire, for the Plaintiff

William G. Scott and Jillian Van Allen, for the Defendants Lucio Anthony Ferro aka Lou Ferro and Ferro & Company

LEXFUND INC. Court File 12-4045-SR

Plaintiff

– **and** –

BERNARD SERIEUX, LUCIO ANTHONY FERRO (AKA LOU FERRO) AND FERRO & COMPANY and THE ESTATE OF LUSCIO ANTHONY FERRO, DECEASED, BY ITS LITIGATION ADMISITRATOR, ANGELA POLLARD OF POLLARD & ASSOCIATES INC.

Defendants

Louis-Pierre Gregoire, for the Plaintiff

William G. Scott and Jillian Van Allen, for the Defendants Lucio Anthony Ferro aka Lou Ferro and Ferro & Company

Mary Grosso, for the defendants Bernard Serieux, David Tucker, Cindy Daly, Sherryl Chrysler and Matthew Cuffy

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LEXFUND INC. Court File 12-4358-SR

Plaintiff

– and –

DAVID TUCKER, LUCIO ANTHONY FERRO (AKA LOU FERRO) AND FERRO & COMPANY and THE ESTATE OF LUSCIO ANTHONY FERRO, DECEASED, BY ITS LITIGATION ADMISITRATOR, ANGELA POLLARD OF POLLARD & ASSOCIATES INC.

Defendants

Louis-Pierre Gregoire, for the Plaintiff

William G. Scott and Jillian Van Allen, for the Defendants Lucio Anthony Ferro aka Lou Ferro and Ferro & Company

Mary Grosso, for the defendants Bernard Serieux, David Tucker, Cindy Daly, Sherryl Chrysler and Matthew Cuffy

LEXFUND INC. Court File 13-4060-SR

Plaintiff

– and –

CINDY DALY, LUCIO ANTHONY FERRO (AKA LOU FERRO) AND FERRO & COMPANY and THE ESTATE OF LUSCIO ANTHONY FERRO, DECEASED, BY ITS LITIGATION ADMISITRATOR, ANGELA POLLARD OF POLLARD & ASSOCIATES INC.

Defendants

Louis-Pierre Gregoire, for the Plaintiff

LEXFUND INC. Court File 13-4088-SR

Plaintiff

– and –

LUCIO ANTHONY FERRO (AKA LOU FERRO) AND FERRO & COMPANY and THE ESTATE OF LUSCIO ANTHONY FERRO, DECEASED, BY ITS LITIGATION ADMISITRATOR, ANGELA POLLARD OF POLLARD &

Louis-Pierre Gregoire, for the Plaintiff

William G. Scott and Jillian Van Allen, for the Defendants Lucio Anthony Ferro aka Lou Ferro and Ferro & Company

Mary Grosso, for the defendants Bernard Serieux, David Tucker, Cindy Daly, Sherryl Chrysler and Matthew Cuffy

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ASSOCIATES INC. and SHERRYL CHRYSLER Defendants	
LEXFUND INC. Court File 13-4121-SR Plaintiff	Louis-Pierre Gregoire, for the Plaintiff
– and –	
LUCIO ANTHONY FERRO (AKA LOU FERRO) AND FERRO & COMPANY and THE ESTATE OF LUSCIO ANTHONY FERRO, DECEASED, BY ITS LITIGATION ADMISITRATOR, ANGELA POLLARD OF POLLARD & ASSOCIATES INC. and MATTHEW CUFFY Defendants	William G. Scott and Jillian Van Allen, for the Defendants Lucio Anthony Ferro aka Lou Ferro and Ferro & Company Mary Grosso, for the defendants Bernard Serieux, David Tucker, Cindy Daly, Sherryl Chrysler and Matthew Cuffy
	HEARD: June 13, 14 and 15, 2016

THE HONOURABLE MR. JUSTICE J. W. SLOAN

[1] I am the Case Management Judge for a group of court actions, which I refer to as the Lexfund actions.

[2] All parties agree that the counterclaims should be dismissed without costs, on the basis that Mr. Ferro never received instructions from his then clients, to commence the counterclaims and no one has filed any material with respect to them nor appeared at this hearing.

[3] Lexfund is a company which loans money for the purpose of assisting plaintiffs to finance their litigation, particularly their disbursements, medical expenses and living expenses in personal injury cases.

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[4] This hearing is brought by the plaintiff seeking summary judgment in its favour in all five actions.

[5] For the main part, the facts that form the underpinnings of the above actions are not in dispute.

[6] All of the defendants were at one time or another involved in a motor vehicle accident and they all retained the law firm of Ferro & Company to represent them.

[7] Mr. Ferro arranged for loans for each of his five clients. The loans were to cover living & medical expenses to allow the now defendants to prosecute their court actions.

[8] With the exception of the dates, amounts borrowed and interest rates, all of the loan documentation is virtually identical.

[9] Also, the procedure involved in signing the loan documentation, advancing the loans to Mr. Ferro and communications with Mr. Ferro with regards to all the loans is virtually identical.

[10] All the loans have a unique feature, that is, if the borrower's civil action is unsuccessful then no repayment of the loan is required and there was no fixed term for the loans, which were to be repaid upon settlement of the borrowers' court actions.

[11] In all of the cases, the borrowers provided Mr. Ferro with an irrevocable direction directing and authorizing him to pay the loans upon settlement of their court actions.

[12] Unfortunately this step in the procedure did not take place and Mr. Ferro made an assignment in bankruptcy on March 12, 2015 and passed away on June 12, 2015.

Loan Procedure

[13] The borrowers relied on Ferro's office with respect to obtaining each loan.

[14] Ferro or his staff gave blank forms to the borrowers for their signature.

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[15] Once a loan application was approved the borrower signed a copy of the MVA loan agreement and assignment of litigation proceeds agreement. These two agreements must be witnessed by his/her lawyer.

[16] Part one of the loan application is completed by the borrower and sets out the amount being borrowed, the underwriting fee and the interest rate. In addition, the borrower acknowledges receipt of "Explanatory Notes Regarding Lexund's MVA Loans" and authorizes his or her lawyer to complete part two of the application.

[17] Once completed and approved, the money requested was then transferred into Mr. Ferro's trust account.

[18] Mr. Ferro then paid himself an administration fee out of the funds which the borrowers had not agreed to.

[19] All of the defendants acknowledge that Mr. Ferro, on their behalf, received the loans.

[20] None of the borrowers got a loan statement from Mr. Ferro.

[21] It is their position that they were under the impression that Mr. Ferro had taken care of paying off the loans.

[22] Unfortunately it appears that Mr. Ferro, in relation to the subject loans, breached every obligation he could breach, both with respect to the plaintiff and with respect to his clients as the borrowers.

[23] All of the borrower's MVA court actions were settled and there was at the time of settlement in four actions sufficient money to pay off the outstanding balance of the plaintiff's loans, but, they were either not paid at all or not paid in full. In the fifth action there was a settlement of part of the action (which is still ongoing) which would have been sufficient to pay off almost all of the loan.

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[24] Now, unfortunately for the parties, both because of the initial annual interest rates of between 19.5 to 24% and the fact that interest has been compounded monthly, the amounts being claimed by the plaintiff are very large in comparison to the initial loans.

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[25] All amounts and dates in the chart below are approximate. The chart shows some of the major events from a time perspective and the amounts of money involved.

Borrower	~ Settlement Date	Gross Recovery	~ Net Recovery for Borrower and Spouse	Lexfund's Claim at date of settlement	Lexfund's Claim June 15/16	Money in Trust or court
Serieux	Nov 2011	$149,500	$27,445	$57,976	$92,451	$41,156
Tucker	July 2012	$445,885	$280,074	$61,838	$87,831	$0.00
Cuffy	Dec 2013	$447,765	$274,770	$73,947	$124,439	$91,199
Chrysler	Oct 2011	$205,000	$147,167	$23,398	$70,922	$0.00
Daley	Oct 2013	$37,500 to date	$0.00	$39,376	$65,955	$37,500

[26] Although not germane to the matter before me, other accounts were paid from trust by Mr. Ferro, including his own legal fees, and in some cases a separate litigation lender.

[27] Mr. Ferro, for reasons known only to himself, did not pay the plaintiff, notwithstanding there was more than sufficient money in four out of five matters at the time of settlement and there was almost enough money to pay off the fifth matter which still has an ongoing aspect of the motor vehicle accident litigation to be settled or tried.

[28] Essentially there is no documentation between Mr. Ferro and his former clients of exactly how the Lexfund loans were to be retired after the settlement of their court actions.

[29] Other than perhaps a general paragraph in a short letter from Mr. Ferro to some of his former clients that he was looking after the loans, money was disbursed from, or kept in trust without paying the loans and without Mr. Ferro seeking and receiving written instructions from his clients regarding the loans and what to do about them.

[30] To compound the problems, Mr. Ferro started acting for all his former clients when Lexfund commenced its actions against them. He did this in the face of a blatant conflict of interest between himself and his then clients.

<u>The Main Position of the Defendants</u>

[31] The main position of the defendants is that the plaintiff did not comply with various sections of the *Consumer Protection Act*, SO 200, c 30, Sch A, s. 66 (*Act*) and therefore it are not entitled to any interest.

<u>Were the Loans for "Closed Credit" or "Open Credit"?</u>

[32] A great deal of time and energy was spent on whether or not the subject loans should be defined as open or closed credit facilities because there are different disclosure requirements under the *Act* for each type of credit facility. The plaintiff submits the loans fall under the open credit category and the defendant submit that the loans fall under the closed credit category.

[33] Section 1 of the *Act* defines "open credit" as follows:

> "open credit" means credit or loan of money under a credit agreement as defined by part VII, that,

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> a) anticipates multiple advances to be made as requested by the borrower in accordance with the agreement, and
>
> b) does not define the total amount to be advanced to the borrower under the agreement Although it may impose a credit limit.

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[34] "Fixed credit" is defined to mean credit or loan of money under a credit agreement that is not for "open credit".

[35] The *Act* provides for different subsequent disclosure depending on whether the credit agreement is fixed or open. For both types of loans, the initial disclosure must be made at or before the time the borrower enters into the agreement.

[36] Whether or not the court finds that the subject credit facility was for a "fixed" or "open credit" facility, pursuant to section 79(1) of the *Act*:

> Every lender shall deliver an initial disclosure statement for a credit agreement to the borrower at or before the time that the borrower enters into the agreement…

[37] While the plaintiff has attempted to set up its documentation as an "open credit" facility similar to a line of credit facility a person may have with the bank, none of the borrowers asked for multiple advances notwithstanding they could have.

[38] It was clear from the very start of the credit facilities that only one advance was going to be made, because each of borrowers asked for the full amount of the credit at the beginning of the credit facility.

[39] While there were logical submissions made by both sides on the open/fixed issue I have come to the conclusion that it does not matter whether the credit facilities were open or fixed for reasons which will be clear later in my judgment.

<u>Regulations under the *Act*</u>

[40] Section 79 of the *Act* authorizes the making of regulations to deal with, among other things, what disclosure is required to comply with the *Act.*

[41] Section 64 of the regulations sets out the disclosure requirements.

[42] For the purpose of this action the parties do not agree that the appropriate disclosure was made with respect to Sections 64(1) 1, 2, 5, 6, &12 of the Regulations.

[43] It is the plaintiff's position that the entire package of documents must be reviewed to ascertain whether or not appropriate disclosure was made.

<u>Section 64(1) 1 - initial credit limit</u>

[44] The plaintiff submits the initial credit limit is clearly shown on the Loan Application, the MVA Loan Agreement and the Loan Statement.

[45] The individual defendants submit the MVA Loan Agreement was blank at the time the borrower signed it and that the loan statement was never provided to the borrower, but was only provided to the borrower's lawyer between 5 and 37 days later.

<u>Section 64(1) 2 - annual interest rate</u>

[46] The plaintiff submits that the interest rate is found in the Loan Application, the Explanatory Notes, the MVA Loan Agreement and the Loan Statement.

[47] The individual defendants submit that this section was never complied with.

<u>Section 64(1) 5 - date interest begins to accrue</u>

[48] The plaintiff submits that the Loan Statements show when the interest begins to accrue as well as the interest calculations.

[49] The individual defendants submit that the commencement date is not plainly set out, notwithstanding that the date of the first advance is set out in the documents and as well, the document shows the first interest calculation date one month after the first advance date.

<u>Section 64(1) 6 - show each element of the cost of borrowing</u>

[50] The plaintiff submits that other than interest, the only cost of borrowing is a one time, 5% underwriting fee which is set out in the Loan Application, Explanatory Notes, MVA Loan Agreement, and the Loan Statement.

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[51] The individual defendants submit that the amount payable by the borrower is not in the loan statement until after the loan is advanced.

[52] They submit that if the application came first and then the approval, the amount of the loan would be known at the time that the MVA loan agreement was entered into.

[53] They submit that the process here was simply that all documents were signed by the borrower in blank and at the same time.

Section 64(1) 12 - default charges

[54] The plaintiff submits that there are no default charges, such as charges for an NSF payment.

[55] The defendants submit that there are two such charges, one being a full month's interest, if payment is not made by the 15th of any month and the payment of full costs if collection procedures become necessary.

Were the Disclosure Requirements of the *Act* Complied with?

[56] Section 70 of the *Act*, sets out the consequences of nondisclosure and provides as follows:

> 70. A borrower under a credit agreement is not liable to pay the lender,
>
> a) the cost of borrowing under a credit agreement if the borrower receives no statements required by this part; or
>
> b) as part of the cost of borrowing, any amount in excess of the amounts specified in the statements that this part requires to be delivered to the borrower in respect of the agreement.

[57] Section 93 of the *Act* also deals with non-compliance and a possible remedy for same:

> 93. (1) A consumer agreement is not binding on a consumer unless the agreement is made in accordance with this *Act* and regulations.

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> (2) Despite subsection 1, a court may order that a consumer is bound by all or a portion or portions of a consumer agreement, even if the agreement has not been made in accordance with this *Act* or the regulations, if the court determines that it would be an equitable in the circumstances for the consumer not to be bound.

[58] The plaintiff submits that it has complied with the disclosure requirements of the *Act*.

[59] Alternatively it submits, if the issue of noncompliance as alleged by the defendants is made out, such noncompliance is of a technical nature and the defendants/borrowers have not suffered any prejudice.

[60] No counsel was able to find case law dealing with disclosure compliance under the *Act*.

[61] The plaintiff relies on Section 93(2) of the *Act*, where a court may order "a consumer bound" even if the agreement had not been made in accordance with the *Act,* "if the court determines that it would be inequitable in the circumstances for the consumer not to be bound".

[62] The plaintiff relies in part on the case of *Weller v Reliance* 2012 ONCA 360.

[63] Although this case was essentially a dispute between two companies it was styled as an individual plaintiff against a corporate defendant. The court invoked Section 93(2) of the *Act* and at paragraph 19 stated:

> 19 However, I would not interfere with the application Judge's holding that this is a proper case to invoke the proviso in s 93(2) of the *Ac*t. I agree with the application Judge that s. 93(2) applies even though the appellant was not attempting to resign from the entire agreement, only the proposed amendment. There is nothing in s. 93 to so limit the reach of the provision. To the contrary, s. 93(2) refers to the court ordering that the consumer be bound by "all or a portion or portions of the consumer agreement". The wording is broad enough to include a proposed amendment to the agreement. Similarly, there is nothing in s. 93(2) that limits its reach to technical oversights. The test for the application of the proviso is not the nature of the defective compliance but whether it would be inequitable for the consumer not to be bound. Obviously, in deciding whether it would be inequitable, the court will take into account the nature of the noncompliance, and the more substantial the deviation from the legislative scheme the more likely it will be that the court will find it would not be inequitable for the consumer not to be bound by the agreement. I therefore turn to

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whether the application Judge erred in finding that it would be inequitable for the appellant not to be bound to his agreement with the respondent.

Position of the Defendants

[64] Although there were some differences between the individual and Ferro defendants, for the most part they adopt each other's submissions.

[65] The defendants submit that the court does not have to consider Mr. Ferro's involvement to determine whether or not the plaintiff breached the *Act.*

[66] They submit the plaintiff's breaches were threefold:

a) It did not give disclosure required by the *Act* and within the time parameters set out in the *Act*,

b) When it did give disclosure it did not give disclosure to the right person, that being the individual borrowers/defendants and

c) The disclosure that was provided did not comply with what is required under the *Act*

[67] They submit that the *Act* is there to protect consumers who are always at a disadvantage with respect to merchants because they do not have the knowledge, resources or bargaining power of the merchants.

[68] They rely in part on the case of *Richard v. Time Inc.*, 2010 SCC 8. This case dealt with similar consumer legislation from the Province of Québec.

[69] Although the *Richard* case is about misleading mailings and not a credit agreement, the individual defendants draw the court's attention to the following paragraphs in the case.

> [112] … The Court of Appeal has correctly confirmed that the recourse provided for in s. 272 C.P.A. is based on the premise that any failure to fulfil an obligation imposed by the *Act* gives rise to an absolute presumption of prejudice to the consumer…."
>
> [160] The C.P.A.'s first objective is to restore the balance in the contractual relationship between merchants and consumers… This rebalancing is necessary because the bargaining power of consumers is weaker than that of merchants both

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> when they enter into contracts and when problems arise in the course of their contractual relationships. It is also necessary because of the risk of informational vulnerability consumers face at every step in the relations with merchants. In sum, the obligations imposed on merchants and the formal requirements for contracts to which the Act applies are intended to restore the balance between their respective contractual powers of merchants and consumers.
>
> [161] The C.P.A.'s second objective is to eliminate unfair and misleading practices that may distort the information available to consumers and prevent them from making informed choices... Most of the measures imposed by the legislature to achieve this objective are found in Title ll of the *C.P.A.* which we discussed above.
>
> [162] The legislature's intention in pursuing these two objectives is to secure the existence of an efficient market in which consumers can participate confidently...

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[70] The above paragraphs from the *Richards* case were quoted with approval, with respect to the *Act* we are concerned with in this case, in the case of *Ramdath v. George Brown College of Applied Arts and Technology* 2012 ONSC 6173.

[71] The individual defendants like the plaintiff also rely on the *Weller* case and brought to the court's attention paragraph 15 under the heading, Interpretation of the Regulation.

> 15 The main objective of consumer protection legislation such as the *Consumer Protection Act* is to protect consumers: see *Richard v. Time Inc.,* 2012 SCC 8 (S,C.C.), at para 50. Thus, while this particular litigation in reality pits two suppliers against each other, the Act and Regulation must be interpreted in a manner that furthers the consumer protection objective. The *Act* and Regulation contain special protections for consumers who are bound by remote agreements. Among those protections is the protection against unfair unilateral amendments of the agreement set out in s. 42 of the Regulation. Central to this protection is s. 42(2)2, which requires the supplier to give the consumer the option to either terminate the agreement or retain the existing agreement unchanged as alternatives to accepting the proposed amendment. As indicated, this agreement does not give the consumer the right to retain the existing agreement unchanged. The issue is therefore whether the agreement allows the consumer to terminate the agreement.

Disclosure Not on Time

[72] The individual defendants submit that the plaintiff did not comply with section 79 of the *Act* which reads:

> 79(1) Every lender shall deliver an initial disclosure statement for a credit agreement to the borrower at or before the time that the borrower enters into the agreement, unless the lender has adopted the loan is an initial disclosure statement as his, her or its own.

[73] They submit that the assignment, loan agreement and application were all signed at the same time. Therefore the individual defendants did not have access to the loan/disclosure statement at or before the time they entered into the agreement because the loan/disclosure statement came in an email after the funds had been advanced.

[74] To put it another way, they state, the loan/disclosure statement was not provided, even to their lawyer, until after the horse had left the barn.

[75] In addition, the individual defendants submit that the plaintiff never communicated with them as the borrower, but only communicated with their lawyer. Section 66 of the *Act* clearly defines borrower as the party to a credit agreement and does not include an agent or representative.

[76] Section 7(1) of the *Act* states "The substantive and procedural rights given under this *Act* apply despite any agreement or waiver to the contrary."

[77] The individual defendants therefore submit that even though the forms drafted by the plaintiff appear to allow the plaintiff to send all documentation to the borrower's lawyer, the plaintiff must still comply with the *Act* and send all necessary documents and disclosure directly to the borrower.

[78] They further submit that the plaintiff cannot rely on its own documentation that says borrowers' individual lawyers will supply a copy of the documents to them, because there is no legal obligation, in this case on Ferro to do so, and in any event such method of delivery of important documents is not contemplated by the *Act*.

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[79] To put it succinctly, they submit the plaintiff cannot craft an agreement so that they do not have to communicate with the borrower.

[80] The defendants submit that with respect to the initial disclosure and to whom it is to be sent, it does not matter whether the credit is defined as open or closed.

[81] They therefore submit that since the loan/disclosure statement was not there at the time it was required to be, that is, before or at the time the borrower entered into the credit agreement the subject agreements do not comply with the *Act.*

[82] The individual defendants submit, with respect to the MVA loan agreement, that it was signed in blank and therefore disclosed nothing.

Was the Disclosure Adequate?

[83] Part of the disclosure with respect to the Cuffy loan is set out at Tab 20 page 434 of the Further Supplementary Motion Record.

[84] Although Mr. Cuffy borrowed $20,000 all at one time, the example disclosure shows a line of credit of $10,000 being borrowed in increments over a 30 month period.

[85] Therefore the loan balance in the far right column which would include the loan, the lender's charges and the compound interest does not bear any relationship to what Mr. Cuffy owed the plaintiff at any particular time.

[86] The individual defendants using Mr. Coffy as a generic example submit that after reviewing the amounts owing after 36 months as shown in the calculations at Tabs 20 and 21 of the Further Supplementary Motion Record, what Mr. Coffy would really owe after 36 months was $38,918 and not the $16,720 shown in the initial disclosure statement.

[87] In essence, while the initial loan amount has doubled the interest accumulation from the monthly compounding interest has approximately tripled.

[88] These numbers appear to be true for the Cuffy, Tucker and Serieux Loans while the discrepancy for the other two borrowers is less because they borrowed $10,000.

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[89] The individual defendants submit that all of the loan/disclosure statements are very misleading because all of them took the full amount at the start as opposed to periodic advances.

Non est Factum

[90] On the evidence before me, the borrowers knew they were entering into a loan, that there would be charged interest and at some time in the future, they would have to repay the loan with interest.

[91] I therefore find this is not a case of *non est factum*.

Unconscionable Transactions Act

[92] I do not find that this case fits within this legislation. Although the interest is high, on the evidence before me it does not appear to be out of line with interest that is charged by other litigation lenders. The other issues raised by the individual defendants under this heading are better dealt with under the *Consumer Protection Act.*

Consumer Protection Legislation - Findings

[93] It is trite to say that consumer legislation is enacted for the benefit of the consumer and has been enacted in an effort to level the playing field where consumers have to negotiate with merchants.

[94] The plaintiff breached the *Consumer Protection Act* in several ways, however the main breach is that it did not forward any disclosure whatsoever to the individual borrowers as legislated by the *Act*.

[95] That is why I earlier concluded that it did not matter whether the loans were fixed or open.

[96] The loan documents were signed in blank so no disclosure could have been given at the time of signing.

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[97] The completed loan documents were never sent to the borrowers and on the evidence before me were never forwarded to the borrowers by their lawyer, Mr. Ferro.

[98] Even if the loan statements which the plaintiff produced had found their way to the borrowers they were very misleading. For some reason which was never explained, all of the loan statements show periodic advances rather than a one-time advance of the entire credit facility.

[99] This of course as set out earlier, significantly understated the loan balance for any particular month.

[100] In some loan statements where the borrower borrowed $20,000 the loan statement shows an example for $10,000 and again shows an example for periodic advances which only exacerbates the understatement of the loan balance for any particular month.

[101] It is extremely unlikely that most consumers, including these borrowers, would have the mathematical abilities to calculate interest compounding on a monthly basis. If the borrowers had been given an appropriate loan statement before or near the time of entering into the loan agreement, even borrowers with limited education would be able to see how quickly the amount they would have to repay was escalating.

[102] To compound the problem for the borrowers, or at least in some of them, when the money was transferred into Mr. Ferro's account he kept it there and after deducting an administrative fee for himself he periodically released money to the borrowers.

[103] This meant that the borrowers were paying significant compounding interest on the full amount of their loan without having access to the whole loan and they were likely getting no interest on the money stagnating in Mr. Ferro's trust account.

[104] They certainly would have had a better chance of realizing what was happening if they had received a copy of an appropriate loan statement.

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[105] To put it another way, to be able to look at a statement showing how the amount owing was changing month by month would drive home to the borrower what was happening and how much of their future settlement they would have to pay to the plaintiff at the end of their case.

[106] The amount owing would also likely influence the instructions they would give their lawyer with respect to a settlement figure. I acknowledge this information should have been told to them by their lawyer, however they were entitled to be able to approximate the amount owing on their own from the plaintiff's disclosure.

[107] Although the plaintiff argues that there was no prejudice to the individual defendants, there is no doubt in the courts mind that the defendants were prejudiced by the severe lack of disclosure which prohibited them from making the best decisions they could make with respect to the subject credit facility.

[108] In this case the plaintiff, with full knowledge of the *Consumer Protection Act,* made an informed decision not to comply with the *Act's* disclosure provisions by sending that disclosure directly to Mr. Ferro and not the borrower as mandated by the *Act*.

[109] The plaintiff has not given any reason why it failed to comply with the *Act* and its only response is that any breach it may be guilty of was a technical breach and easily remedied by section 93(2) of the *Act.*

[110] For the reasons given above this is not a case where pursuant to section 93(2) of the *Act* "it would be inequitable for the consumer not to be bound."

[111] The plaintiff in this case flagrantly and with a sense of entitlement crafted documents in an effort to allow it to process its loans without full compliance of the *Act*. These breaches of the *Act* by the Plaintiff were not technical, they went to the very heart of the reason for the *Act* coming into force.

[112] Based on the foregoing, I find that there was not only a presumed prejudice to the borrowers but actual prejudice.

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[113] Based on the forgoing reasons the plaintiff's claim for compound interest in accordance with the subject contracts is dismissed.

[114] On the facts of this case however, I find it would be inequitable for the individual defendants not to pay any interest for loans that in conjunction with their lawyer, they deemed necessary to prosecute their motor vehicle accident cases, all of which resulted in recoveries for the borrowers.

[115] In addition all of the individual defendants, if they did not know what the interest was, would have known that they weren't getting the use of the money interest free.

[116] I therefore set the interest rate at 5% per annum simple interest commencing from the date that each individual defendant obtained their loan.

[117] This means the annual interest for a $10,000 loan would be $500 per year and for a $20,000 loan $1,000 per year.

[118] From the chart at Tab C of Ms. Grosso's factum it appears the Serieux loan was advanced on August 15, 2006, the Daley and Tucker loans or advanced December 15, 2006, the Cuffy loan was advanced November 27, 2007 and the Chrysler loan was advanced May 30, 2008.

[119] If the parties have any difficulty in calculating the individual amounts owing I may be spoken to.

[120] All counterclaims against the Plaintiff are dismissed.

[121] The court is aware that there are actions it believes in the form of cross claims by the five individual defendants against the Ferro defendants.

[122] It is obvious that the loans should have been paid off at or shortly after the settlement dates of the five individual's actions as set forth in the same chart at Tab C of Ms. Grosso's factum.

[123] The plaintiff shall therefore have judgment against the individual defendants for any remaining portion of the initial loan that has not been repaid plus the accumulated interest at 5%.

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[124] The plaintiff shall have judgment against the Ferro defendants for the cumulative amount owing by all of the individual defendants while at the same time receiving credit for any monies paid by the individual defendants to the plaintiff, or to be paid from monies currently held in trust accounts or paid into Court.

[125] I recognize there is still an issue between the individual defendants and the Ferro defendants, at least with respect to who should be responsible for interest accumulated after the date that the individual defendants settled their MVA accidents.

[126] The Court understands that there is approximately $91,000 in court to the credit of the Cuffy action. Subject to the issue of costs being resolved, the appropriate amount of that money in court should be released in part of the plaintiff first with the remainder going to Cuffy.

[127] The Court also understands that there is money in trust with a former associate/partner of Mr. Ferro's, being $37,500 for Daley and 42,000 for Serieux. Again, subject to the issue of costs being resolved, the appropriate amount of that money should be released, firstly to the plaintiff and then to Serieux and Daley subject to any other claims there may be against the money of which I am not aware.

[128] Given my judgment, I am not prepared to stay execution of my judgment for the purposes of the individual defendants proceeding with their claims against Mr. Ferro in the event that it cannot now be resolved.

[129] If the parties are unable to agree on costs, Ms. Grosso and Mr. Scott shall forward their **brief** submissions on costs to me by June 30, 2016. Mr. Gregoire shall forward his **brief** response to me by July 8, 2016. Ms. Grosso and Mr. Scott shall then forward her/his reply, if any, to me by July 15, 2016. Cost submissions may be sent to my attention by email, care of Kitchener.Superior.Court@ontario.ca.

[130] I understand there may be as many as 13 similar actions pending. If they have not been resolved by August 31, 2016, I would ask Mr. Gregoire to arrange for a conference call with respect to all interested parties sometime after that date.

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J. W. Sloan J.

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