

Mortgage Bond Arrears: Can You Challenge a Certificate of Balance?

“O, I do not like that paying back.” (Falstaff, in Shakespeare’s Henry IV Part I)

A standard clause in loan agreements, suretyships and the like is the “certificate of balance” or “COB” clause.

Typically, it will read something like this (but normally with a lot more verbiage, and bear in mind that every lender has their own version or versions): “A certificate signed by a bank manager will be prima facie proof of the amount owing in terms of the loan agreement, unless the contrary is proved.” Most homeowners will have encountered a COB clause in what we all refer to loosely as “mortgage bond agreements” (actually loan agreements where the loans are secured by bonds).

The question is, should you be intimidated by that wording into accepting whatever amount a bank or other creditor demands from you?

Definitely not, confirms a recent High Court decision: a COB is not conclusive proof of the amount that is owing. Rather, it is a tool to assist the creditor in proving the amount owing.

The couple who challenged the bank’s R2.1m calculations – and won

A couple fell into arrears with their monthly repayments on a bank loan which was secured by bonds over two of their properties.

The bank sent them a “Section 129 Notice” in terms of the National Credit Act (NCA). That’s a formal letter of demand to a consumer that must be sent by the creditor before it can go ahead with court action. It warns the debtor that they are in default and sets out alternative ways for them to sort the matter out – payment, debt counselling, alternative dispute resolution, and so on.

The bank in due course applied to the High Court to enforce the loan agreement (putting both properties at risk of sale in execution). The couple, in opposing the application, said they couldn’t accept the accuracy of the R2.1m claimed by the bank in the COB. That, they said, was because they hadn’t received any statements since 2019, so they demanded a breakdown from the bank of the total amount owing.

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The bank declined to provide statements, saying that the couple had to set out a basis for requesting them, and arguing that the COB was conclusive proof of indebtedness. It was for the debtors, said the bank, to disprove the accuracy of the claim.

Not so, held the Court: the COB is simply prima facie (“at first sight”) proof of indebtedness, and it is not up to the debtors to prove what the correct amount is.

The bank, held the Court, had failed to set out in the Section 129 Notice both the correct amount of the arrears and a breakdown of that amount, and its application accordingly failed.

Lessons for lenders and borrowers

Lenders: Ensure that the amounts you claim are accurate and supported by documentation. We can help you with that, and with checking that all your loan agreements and other documents are correctly worded and updated.

Borrowers: If you receive an NCA Section 129 Notice or any other letter of demand, don’t just ignore it! If you aren’t sure what to do, ask us for help – and if you don’t agree with the amount claimed, demand a full breakdown and check it for accuracy.