10 APRIL 2015

LITIGATION UPDATE

LATE FEES MORE FEASIBLE AFTER THE FULL FEDERAL COURT OVERTURNS DECISION ON PENALTIES

On 8 April 2015 the Full Federal Court of Australia has found that certain bank fees were not penalties or otherwise unconscionable, unjust or unfair under statute reversing the first instance decision of Gordon J (read more in our previous article). This brief update provides an overview of the Full Federal Court of Australia decision and considers its implications.

INTRODUCTION

In the latest decision in *Paciocco (ANZ v Paciocco [2015] FCAFC 50*), the Full Federal Court of Australia has upheld the appeal by the Australia and New Zealand Banking Group Limited (ANZ) from the decision of Gordon J (*Paciocco v ANZ [2014] FCA 35*) (and thereby overturned Her Honour's decision) which found that credit card late payment fees charged by ANZ were penalties and the quantum of those fees were extravagant or exorbitant and unconscionable. The Court dismissed Paciocco's appeal in relation to other bank fees.

To explain the context of those fees, ANZ imposed a variety of fees on their customers. For instance, up until December 2009, a late credit card payment attracted a late payment fee of $35, regardless of the overdue amount and regardless of how long it was overdue. From December 2009, the late payment fee was reduced to $20.

As set out in our previous article, the matter is a class action, or representative proceeding, under Part IVA of the *Federal Court of Australia Act 1976* (Cth). This means that although the quantum of Paciocco's claim is relatively small, the quantum claimed by the class could be in the tens of millions.

THE FULL COURT DECISION

The Full Federal Court (Allsop CJ, with whom Besanko J and Middleton J agreed) held there was "no basis to conclude that… the provisions were unfair or the transactions unjus notwithstanding the Court agreed that the late payments on a credit card should be characterised "as one payable upon breach of contract, or as a collateral or accessary stipulation, as security for, or *in terrorem* of, the primary stipulation: timely repayments according to the terms of credit."

The Court held that Gordon J erred by not analysing the damages suffered by Paciocco from a forward-looking enquiry. In other words, the correct approach is to ask whether the fees were extravagant or exorbitant by reference to the greatest conceivable loss, on a forward looking analysis (ie by examining what the greatest conceivable loss was at the time Paciocco entered into the contract with ANZ).

In finding that the fees were not penalties, Allsop CJ reiterated that it was not the ANZ's onus to disprove exorbitance and extravagance at the time of entering into the contract but rather Paciocco's onus to prove it. His Honour held that taking account the nature of the relationship, the legitimate interests of ANZ and the correct analytical perspective, he could not be satisfied there was sufficient evidence to consider the fees extravagant, exorbitant or unconscionable.

In finding that the late fees were not unconscionable, Allsop CJ warned against the Court becoming a "price regulator" of contracts. He stated that the moral threshold for "unconscionable" is higher than that of "unjust" or "unfair." He continued by stating that it cannot be concluded that the transactions were unjust and as such the behaviour of ANZ was clearly not unconscionable.

Middleton J in *obiter* warned against a judge's view on commercial morality, stating it was a task for evaluating the facts with reference to a statutory standard only. His Honour continued by stating that commercial law must keep up with the development of commerce and that values, norms and community expectations evolve over time.

Importantly, the judgment noted that "the customer could terminate the account at will, could (in most cases) avoid the fee by turning off shadow limits, or in all cases, by adhering to contractual arrangements." The case illustrates the high threshold required to establish a clause is a penalty. The proposition in Andrews is that there does not need to be a breach of a contract for a penalty to arise remains good law.

CONCLUSION

The class action was funded by litigation funder, Bentham IMF Limited, Australia's largest litigation funder. Bentham IMF Limited has already issued a press release which states "[i]t is likely that the representative will seek special leave to appeal to the High Court."

Similar class actions have been brought against seven other banks, who along with ANZ no doubt welcomed this week's decision. All banks will be waiting with interest to see whether a High Court appeal is lodged, whether special leave to appeal is granted, and if so whether an appeal is successful.

Businesses such as banks and telecommunications providers, might also consider reviewing their standard form agreements and other contracts to ensure that fees and charges are enforceable, especially once the dust settles on any prospective High Court challenge.

Finally, this failed consumer class action may force plaintiff law firms and litigation funders to reassess the merit in pursuing United States (US) style mass tort litigation on behalf of many thousands of plaintiffs whose individual claims are modest and the cause of action is based on potentially flimsy legal grounds. The result may also embolden boardrooms around Australia to resolutely defend these consumer class actions where they deem the prospects of the class action succeeding to be less than certain. The potential to discourage and avoid US style litigation that is largely driven by the generation of legal fees may be an opportunity too hard to pass up.

More information

For any enquiries relating to class actions and mass tort litigation, please speak to one of the following contacts:

Kieran O'Brien
Partner
T +61 3 9274 5912
kieran.o'brien@dlapiper.com

Kirk Simmons
Senior Associate
T +61 2 9286 8111
kirk.simmons@dlapiper.com

Contact your nearest DLA Piper office:

BRISBANE

Level 28, Waterfront Place
1 Eagle Street
Brisbane QLD 4000
T +61 7 3246 4000
F +61 7 3229 4077
brisbane@dlapiper.com

CANBERRA

Level 3, 55 Wentworth Avenue
Kingston ACT 2604
T +61 2 6201 8787
F +61 2 6230 7848
canberra@dlapiper.com

MELBOURNE

Level 21, 140 William Street
Melbourne VIC 3000
T +61 3 9274 5000
F +61 3 9274 5111
melbourne@dlapiper.com

PERTH

Level 31, Central Park
152–158 St Georges Terrace
Perth WA 6000
T +61 8 6467 6000
F +61 8 6467 6001
perth@dlapiper.com

SYDNEY

Level 22, No.1 Martin Place
Sydney NSW 2000
T +61 2 9286 8000
F +61 2 9286 8007
sydney@dlapiper.com

www.dlapiper.com

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