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# LITIGATION & REGULATORY UPDATE:
## NO KNOCKOUT BLOW IN BANK FEES CLASS ACTIONS (*PACIOCCO V ANZ*)

### OVERVIEW

Both sides claimed victory when Justice Gordon of the Federal Court of Australia delivered her decision in the bank fees litigation, *Paciocco v Australia and New Zealand Banking Group Limited* [2014] FC 35 *(Paciocco v ANZ)* and both sides are contemplating their respective positions in terms of an appeal. Therefore, the much anticipated clarity around the doctrine of penalties may be shortlived.

Justice Gordon found that ANZ's credit card late payment fees are 'penalties' and are unenforceable. A necessary element of this finding was that her honour considered the late payment fees were extravagant and unconscionable. However, it is important to note that Her Honour commented that *'...there was no allegation of dishonesty, oppression or abuse of a commercially powerful position and none existed.'*

Her Honour found that ANZ's other fees such as dishonour fees, overdrawn and over limit fees are not penalties and are therefore enforceable. The decision, in practical terms, is the same as her Honour's decision in *Andrews v Australia and New Zealand Banking Group Ltd* (2011) 211 FCR 53 *(Andrews v ANZ)*. In that case her Honour found that only the late payment fees were penalties and that the other fees were not. However, her decision in the Paciocco case is informed by the High Court's subsequent judgment in *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30 (Andrews HC).

### HISTORY OF THE BANK FEES CLASS ACTIONS

**22 September 2010:** First bank fees class action filed against ANZ.

**5 December 2011:** Justice Gordon in the Federal Court finds that late payment fees are capable of being penalties, but finds for ANZ on other fees.

**16 December 2011:** Maurice Blackburn appeals adverse findings in Justice Gordon's December judgment.

**18 April 2012:** Class action filed against Bankwest.

**11 May 2012:** High Court grant leave to appeal Justice Gordon's judgment of 5 December 2011.

**14 August 2012:** High Court hears appeal from Justice Gordon's judgment of 5 December 2011.

**6 September 2012:** High Court rules that bank fees can be considered penalties.

**5 February 2014:** Justice Gordon in the Federal Court hands down judgment finding that late payment fees on credit cards are penalties and should be repaid, with no retrospective time limitation on claims. Justice Gordon finds for the ANZ on the other fees.

*(Source: Maurice Blackburn Press Release 5 February 2014)*

In Andrews HC, the High Court expanded the Australian doctrine of penalties, putting the Australian position out of step with other common law jurisdictions, in particular English law upon which the law of penalties is based.

The law on penalties in England is narrow and the penalty doctrine is not engaged unless the agreed sum is payable on breach of contract. This position was relatively recently confirmed by the Commercial Court in *Office of Fair Trading v Abbey National Plc and 7 Others* [2008] EWHC 875 (Comm) affirmed on appeal in *Office of Fair Trading v Abbey National Plc and Others* [2009] UKSC 6, a case where the fairness of bank charges were challenged on a number of grounds, including that of penalty.

## BACKGROUND

*Paciocco v ANZ is* a class action, or representative proceeding, under *Pt IVA of the Federal Court of Australia Act 1976* (Cth), as is *Andrews v ANZ*. Mr Paciocco and Mr Andrews are 'lead applicants' in actions brought on behalf of approximately 43,500 group members. They claim that a range of fees charged by the ANZ Bank are penalties and therefore unenforceable .

Mr Paciocco's claim comprised 72 fees. Of those 72, he was successful on 26, totalling a relatively trifling $640, less an amount representing a reasonable fee, plus interest. Given the history of the proceedings, legal costs may also be the subject of dispute.

However, the quantum could run into the tens of millions when losses of all group members are quantified. The applicants are funded by litigation funder, Bentham IMF Limited, Australia's largest litigation funder and the first to be listed on the Australian Securities Exchange

It goes without saying that without the class action provisions and third party litigation funding, claims for such low amounts could not be sustained in terms of legal costs, time and effort. To that extent, the class action regime in Australia can be considered a success in terms of access to justice for ordinary people.

### *Andrews v ANZ* – first instance

Mr Andrews' case was decided by Justice Gordon in December 2011. The basis of her finding that the fees (other than the late payment fees) could not be penalties was that the fees were not payable on breach of contract. At that point in time, breach of contract was an essential element for a finding that a fee or a payment was a penalty. A further and essential element for there to be a penalty at common law and in equity is if the fee is extravagant (or exorbitant) *and* unconscionable in amount.

### Andrews HC

The High Court was then asked to consider the first essential element – was breach of contract an essential element in determining whether a fee is a penalty? (A proposition once described by Lord Denning as an "*absurd paradox*"). The High Court found that breach was not an essential element. If the purpose of the fee is to secure performance of a primary obligation, it *may* be a penalty even if there has been no breach of contract. In other words, if the liability to pay the fee was collateral (or accessory) to a primary stipulation, it *may* be a penalty. The High Court was not asked whether any particular fee was a penalty and made no such findings - that remained a question for the trial judge.

### *Paciocco v ANZ*

Mr Paciocco's case was then brought to test the position, that is, whether the dishonour fees were charged to scare (*in terrorem*) a customer into behaving in a particular way. If they were (and if they were extravagant (or exorbitant) and unconscionable in amount), then they would be deemed to be penalties and unenforceable. If they were not, they would be enforceable even if the charges were high.

In the meantime, 6 other class actions have been brought against other banks and financial institutions (see box insert) with an additional 140,000 – 170,000 group members.

## THE FEES IN QUESTION

Like most, if not all, banks and financial institutions, 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. Post December 2009, the late payment fee was reduced to $20.

The other fees included honour fees, over limit fees, dishonour fees, outward dishonour fees and overdraft fees (collectively Other Fees**)**. The honour fee would be charged if a customer overdrew on their savings account and ANZ agreed to honour the overdrawn amount. If ANZ did not agree to honour the amount, a dishonour fee would be charged. Likewise, if a customer exceeded their credit card limit, and ANZ agreed to allow the debit, an over limit fee would be charged. The other fees are of a similar nature, and all attracted fees of between $20.00 and $37.50.

## THE FINDINGS

There seems little doubt that Justice Gordon would again find that the late payment fees were penalties and unenforceable, as she had in *Andrews v ANZ.* The contract between Mr Paciocco and ANZ provided that Mr Paciocco would make a monthly minimum payment on his credit cards. A failure to do so was a breach of contract and would attract a late payment fee. Notwithstanding the difficulties in ascertaining what an appropriate fee would be, Her Honour found that the fee charged was extravagant and unconscionable in amount in comparison to the maximum loss that might be suffered by ANZ. She found the late payment fee on Mr Paciocco's consumer credit cards constituted a penalty at both common law and in equity.

However, the Other Fees were of an entirely different character. For example, when exceeding a credit card limit, a customer is not breaching the contract. Nor can the over limit fee be construed as (to adopt the language of the High Court) a collateral stipulation to coerce compliance with a primary stipulation – in fact, there was no primary stipulation in play. The various contracts contained express wording to the effect that when a customer exceeds their credit card limit they are in fact requesting the bank to provide a service - that is, to provide additional credit. The bank is not obliged to agree to the request. The fee is payment for considering the request, regardless of the outcome. In that sense, there is no limit, apart from market forces, as to what fee is charged for that service. The same considerations apply to the Other Fees.

It is widely reported that the credit card late payment fees comprised only about one quarter of the total claim by ANZ's customers.

## IMPLICATIONS

The future of the litigation remains unknown. ANZ may well appeal Justice Gordon's decision – if so, it will be likely to be on the grounds that the fees were not extravagant or unconscionable. Mr Paciocco may well appeal – presumably on the grounds that the Other Fees come within the High Court's expansion of the penalty doctrine and, of course, were extravagant and unconscionable.

Solicitors for the other banks defending similar class actions by their customer will be carefully scrutinising Justice Gordon's decision, and keenly watching for any appeal from that decision.

However, the High Court decision in Andrews HC goes well beyond the bank fees saga. It has implications for contract law in general and for performance-based contracts such as construction contracts. For further reading on Andrews HC, **click here** to view DLA Piper Partner, David Harley's 'Contractual penalties: clarification form the Australian High Court in *Andrews v ANZ*' publication.

## MORE INFORMATION

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