IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M219 of 2015

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN

HIGH COURT OF AUSTRALIA
FILED
20 NOV 2015
THE REGISTRY SYDNEY

LUCIO ROBERT PACIOCCO
First Appellant

10 **SPEEDY DEVELOPMENT GROUP PTY LTD**
(ACN 006 835 383)
Second Appellant

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED
(ACN 005 357 522)
Respondent

APPELLANTS' REPLY

PART I : Certification re Internet Publication

20 1. These submissions are in a form suitable for publication on the internet.

PART II: Argument on Reply

Facts and Pleadings

2. **Re RS [12]-[17]**. The appellants accept that they relied upon a common set of factual allegations in support of their claims under the three different statutory regimes. They also accept that at trial they did not succeed in proving all of the facts alleged, and that they made no 'catching bargain' allegations of the kind referred to in RS [17]. The point, however, is that the statutory regimes under consideration do not condition relief upon the presence of such features.

3. **Re RS [18]-[19]**. Comparisons between the pleadings in the *Andrews* proceeding and
30 the present proceeding are of no relevance. The fact that allegations were withdrawn *in a different proceeding* does not affect what is open on the pleadings in the present proceeding. More importantly, it does not affect what the Court trying the matter is permitted to consider (or, indeed, in the case of s 12CB(4) of the ASIC Act required not

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to consider) when assessing whether pleaded conduct contravened the statutory norms. If the evidence tendered enables the Court to form a view as to whether the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier, the Court can make findings accordingly. It may be noted, of course, that the respondent had opportunity in responding to the penalty claim to adduce evidence of what its "legitimate interests" were (that is, relating to the purpose of the late payment fees) in the same way as was done in the *Dunlop* case; it chose not to do so.

The Full Court's approach

4. **Re RS [22]-[27]**. The respondent does not address the appellants' complaint that the Full Court failed to appreciate the important distinction between late payment fees and the other exception fees – namely that the late payment fees were payable upon breach of contract. RS [26] is a somewhat surprising submission, given that in the Full Court the respondent urged the proposition that the primary judge's error was in finding the late payment fee was penal when her reasoning (so it was said) only amounted to a finding that it was prima facie penal, which according to the respondent was a different inquiry.

5. The reliance in RS [25] on various paragraphs of the Full Court's reasoning is curious when:

   (a) FC [308], [312]-[315], [319]-[321], [330]-[334] and [336] are dealing with fees other than late payment fees. This is apparent from the conclusion at FC [337] which refers to the Judge's views on unconscionability, when she had dealt with that issue in relation to fees *other than* late payment fees.

   (b) The statements at FC [338] and [339] in relation to late payment fees suggest that those fees should be regarded as penal in nature.

   (c) The statements at FC [343]-[346] have to be read with the introductory words of FC [340] which make it clear that FC [343]-[346] are *not* concerned with late payment fees.

   (d) The only part of FC [357] and [360]-[363] which *possibly* refers to late payment fees is FC [362]. That is simply a conclusion. There is no relevant reasoning.

ASIC Act, s 12CB

6. **Re RS [33]-[34]**. Section 12CB(4) was expressed in mandatory terms. The Full Court was obliged to consider it. As to the matters referred to in RS [34]:

   (a) The first and second are contradictory and do not undermine the appellants' argument. If, as the respondent concedes in RS [34], the nature of its interests and foreseeable losses did not differ between the date of contract and the date of a particular late payment, its complaint that the pleading did not refer to circumstances as at the date of the late payments is of little significance. It also illustrates that the distinction sought to be drawn between *ex ante* and *ex post facto* analysis has little substance. In any event, the appellants' pleading was not so limited.

   (b) The third appears to proceed on the basis that the evidence of Mr Inglis could (notwithstanding the matters identified in AS [24]-[28]) be received for the purpose of the respondents' defence that it acted fairly or reasonably. This reading down of s 12CB(4) is unwarranted. Moreover, a rule which prohibits evidence of events which actually happened which were not reasonably foreseeable but admits evidence of hypothetical events which are not reasonably foreseeable would tend to circumvent the statutory prohibition entirely.

7. **Re RS [36]**. A complete reading of the reasons of the Chief Justice demonstrates that his consideration of the question was infected by taking into account the "maximum conceivable loss" proposition advocated by Mr Inglis (which evidence was, for the reasons set out in AS [29] prohibited by s 12CB(4)). If, as the respondent contends, the Chief Justice made alternative findings on the basis that Mr Regan's evidence represented the only appropriate assessment of the respondent's legitimate interest in the late payment fee provision, it is difficult to discern the reasons his Honour held that the respondent's conduct was not unconscionable in contravention of s 12CB. See paragraph 5 above.

8. **Re RS [37]**. Mr Regan's evidence assayed the actual damage sustained by the respondent by reason of all the first appellants' late payments. In no case did it exceed $5.50; in most cases it did not exceed $0.50. The fact that a late payment fee of $35 (or $20 after December 2009) was indiscriminately charged in all such circumstances (without any genuine endeavour to seek to tether it to compensation for breach of

contract) provides ample justification for finding that in charging it, there was the necessary quality of unconscionability.

9. **Re RS [38]-[40]**. It is not the appellants' case that the fact that consumers "*dislike*" late payment fees or would prefer lower fees renders them unconscionable. Rather, it is submitted that community expectations were at odds with arbitrarily charging exception fees that were disproportionate to the cost to the bank in providing services. In the case of late payment fees, of course, there was no service provided; they were payable upon breach of contract. The degree of disproportion was, therefore, to be measured by comparing the late payment fee with the reasonably foreseeable loss which the respondent would probably suffer upon late payment. For the reasons set out in the appellants' submissions in proceeding M220 of 2015, these did not include the provisioning losses and increases in regulatory capital sought to be relied upon by the respondent.

10. **Re RS [43]**. The respondent oversimplifies the issue. The appellants do not contend that the late payment fee is unconscionable merely because it exceeds the loss in fact suffered by the respondent. It is unconscionable for all the reasons set out in AS [32]-[35], which includes that it exceeds that loss by a disproportionate amount.

Unjust transactions

11. **Re RS [44]-[48]**. The respondent's attempt to reconstruct the reasoning of the Full Court on the premise which ignores all of the Full Court's (irrelevant) references to the fee being a "price" does not answer the appellants' submission that the Full Court failed properly to deal with the appellants' claims under s 76 of the National Credit Code in respect of the late payment fees. The appellants have a legitimate cause to believe that their case in respect of late payment fees was not dealt with.

Unfair contractual terms

12. **Re RS [49]-[53]**. The point made in the preceding paragraph equally applies to the respondent's contentions in answer to the appellants' claim as to the way in which the Full Court dealt with Part 2B of the FTA. In addition, the respondent's criticism (in RS [53]) that the appellants have accused it of "profiteering" is inaccurate and has no basis in the AS. No submission in those terms has been made. The appellants simply contend that there was no meaningful relationship between the amount of the late payment fee and reasonably foreseeable loss arising from late payments – leading to an

imbalance between rights and obligations (in terms of s 32W of the FTA). That imbalance is significant (to use the words of the section).

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