

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

BETWEEN: **LUCIO ROBERT PACIOCCO and another**
Appellants
and

10 **AUSTRALIA AND NEW ZEALAND BANKING GROUP LTD (ACN 005 357 522)**
Respondent

RESPONDENT'S SUBMISSIONS



Part I: Publication

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

Part II: Issues

20 2. The Respondent (ANZ) agrees that the Appellants' appeal presents issues (a) and (b) identified by the Appellants. The Appellants' appeal does not present issue (c) as the Full Court did not make the asserted finding.

Part III: Judiciary Act 1903 (Cth), s 78B

3. ANZ considers that notice is not required to be given pursuant to s 78B of the *Judiciary Act* 1903 (Cth).

Part IV: Facts

4. ANZ adopts Part IV of its submissions in M220 of 2015.

Part V: Statutes and regulations

5. The Appellants' statement of applicable constitutional provisions, statutes and regulations is accepted save that:

- (a) section 8 and Part 2B of the *Fair Trading Act 1999* (Vic) (**FTA**) are no longer in force, having been repealed on 1 July 2012 by the *Australian Consumer Law and Fair Trading Act 2012* (Vic) s 233;
- (b) the Uniform Consumer Credit Code is not applicable to any of the Appellants' claims; and
- (c) the Appellants made no allegation under the Australian Consumer Law and, accordingly, Parts 2-2 and 2-3 of the Australian Consumer Law are not applicable.

Part VI: Argument

10 *Introduction*

- 6. The Appellants' statutory claims were based on three statutory regimes. They are each different. They merited separate consideration¹, and they received separate consideration².
- 7. As the trial judge observed, there was no dispute between the parties concerning the field of operation of the various statutory provisions³. The trial judge identified the relevant provisions⁴ and the principles applicable to each of the provisions⁵. The Appellants did not challenge the trial judge's articulation of the principles in the appeal to the Full Court⁶.
- 8. Having found that the late payment fee was a penalty, the trial judge did not
20 consider the application of the statutory causes of action to that fee⁷. Accordingly, her Honour's analysis of the statutory causes of action was confined to the other fees (honour, dishonour, non-payment and overlimit)⁸.

¹ cf Appellants' submissions [11].

² Full Court Reasons [352].

³ Trial Reasons [279].

⁴ The trial judge set out the applicable principles relating to each of the statutory provisions: in relation to unconscionability at [279]-[285], unjust terms at [314]-[321] and unfair contract terms at [328]-[341]. The Appellants did not contend on appeal that the trial judge had misdirected herself by reference to the wrong provisions: Full Court Reasons [249], [254]. The Full Court held that the trial judge had "dealt meticulously with the not uncomplex web of provisions that has been placed in various statutes at various times": Full Court Reasons [250].

⁵ Trial Reasons at Parts 7 ([275]-[310]), 8 ([311]-[325]) and 9 ([326]-[353]).

⁶ Full Court Reasons [249], [254], [257], [259], [348] and [350].

⁷ Trial Reasons [278].

⁸ Trial Reasons [279] – [353].

9. In the Full Court, the Appellants' "real submission" was that the size and extravagance of the fees necessitated their characterisation as unconscionable, unjust and unfair⁹. The Full Court found that the late payment fee did not give rise to liability under any of the statutory causes of action¹⁰.
10. The trial judge and the Full Court dealt with each of the statutory regimes in accordance with the way in which the parties had approached the matter¹¹.
11. The table presented in the Appellants' submissions at [9] does not accurately summarise the applicable statutory regimes and the fees to which the regimes applied as found by the trial judge. The inaccuracies are addressed in Schedule A to this submission.

The Appellants' pleaded case and relevant findings

12. The facts alleged by the Appellants in support of liability under the statutory regimes were the same for all fees, including late payment fees. The facts were alleged to be common to all class members, not facts specific to individual class members, as required in a representative proceeding. The facts alleged were also common to each statutory claim. Relevantly, each statutory claim relied on:
 - (a) the facts alleged at paragraph 24 of the Amended Statement of Claim (which repeated the facts alleged in paragraph 16); and
 - (b) the conclusory facts alleged at paragraphs 25, 43 and 60¹².
13. It is important to note what facts were alleged and found at trial in support of the statutory claims, and what facts were not alleged and were not found.
14. It was alleged and found that the exception fees were contained in standard form contracts and that ANZ did not negotiate the fee provisions with the Appellants¹³.

⁹ Full Court Reasons [326], [330], [334], [353].

¹⁰ Full Court Reasons [347], [365].

¹¹ Full Court Reasons [257], [325]-[330], [349]-[353]. The Appellants elected (at trial) to use "the nomenclature of statutory unconscionability" in their written submissions as to the application of each of the statutory provisions (without distinguishing between them) to the facts in this case. The Appellants adopted the same approach on appeal. In 73 pages of closing trial submissions, the appellants devoted less than 8 pages to the statutory claims. The Appellants' oral address on appeal occupied less than 5 pages of transcript.

¹² Amended Statement of Claim paragraphs 79, 91, 94 and 98. In fact, those paragraphs cross-referred to paragraphs 23 and 25, and failed to cross-refer to paragraph 24. However, the trial proceeded on the basis that paragraph 24 was included in the allegations.

15. The trial judge observed that the following matters were not alleged and were not present¹⁴:
- (a) there was no allegation of dishonesty, oppression or abuse of a commercially powerful position, and none of those circumstances existed;
 - (b) there was no allegation that ANZ failed to disclose the fee provisions to Mr Paciocco at the time he entered into the relevant contracts or when the fees were altered, and the fees were disclosed;
 - (c) there was no allegation that Mr Paciocco was unable to understand the relevant provisions of the contracts;
 - 10 (d) there was no allegation that Mr Paciocco was compelled to enter into the contracts or that ANZ placed financial or other pressure on him to enter into the contracts; and
 - (e) there was no allegation that Mr Paciocco could not terminate the accounts at any time, and the accounts were terminable at will.
16. The trial judge rejected the allegations that ANZ had all or most of the bargaining power and that the Appellants did not have a real choice to take their business elsewhere. The trial judge found that the exception fees charged by ANZ and other banks varied and that Mr Paciocco acquired banking services from other financial institutions and had held, and continued to hold, accounts with several of ANZ's
20 competitors¹⁵.
17. Nor was it alleged that¹⁶:
- (a) Mr Paciocco had an inability reasonably to protect his own interests or lacked the capacity to decide whether to enter into the credit card accounts;

¹³ Trial Reasons [292] and [294]. Full Court Reasons [312] and [313].

¹⁴ Trial Reasons [290]. These matters were not the subject of appeal in respect of the late payment fee: Full Court Reasons [308], [345], [336], [357].

¹⁵ Trial Reasons [293]. These matters were not the subject of appeal in respect of the late payment fee: Full Court Reasons [312]ff.

¹⁶ Trial Reasons [324]. These matters were not the subject of appeal in respect of the late payment fee: Full Court Reasons [350].

- (b) Mr Paciocco did not understand the terms of the credit card accounts or that ANZ did not take adequate measures to ensure that he understood the nature and implications of his accounts and their terms;
- (c) Mr Paciocco was unaware of the purpose and nature of the credit card accounts or his potential financial exposure or that he had an inability to meet the obligations under them;
- (d) ANZ exerted or used unfair pressure, undue influence or unfair tactics on Mr Paciocco to enter into the credit card accounts or that he did not have a real or informed choice to enter into the accounts. In fact, Mr Paciocco was under no obligation to enter into the accounts;
- (e) there was anything unusual or exceptional in the manner in which the credit card accounts were entered into or in their terms. On the contrary, it was common ground that similar terms were offered by ANZ's competitors.

10

18. In the earlier Andrews proceeding¹⁷ (to which this proceeding is related¹⁸), the following additional factual allegations had been made but were withdrawn by amendment prior to the initial trial in that proceeding:

- (a) that the applicants were required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of ANZ;
- (b) that the risk assumed by ANZ in entering into the customer contracts, and the rewards and protections otherwise available to ANZ under those contracts, did not justify the imposition and / or rate of the fee imposed; and
- (c) that ANZ imposed the fee to achieve a revenue which substantially exceeded any reasonable return upon capital employed by ANZ¹⁹.

20

19. Those withdrawn allegations were not relevantly repeated in this proceeding. The allegations were withdrawn, and not repeated in this proceeding, to obviate the need for ANZ to adduce evidence in answer, and enable the case to go to trial more quickly. A short chronology of this procedural history is contained in Schedule B to these submissions. It is not open to the Appellants now to advance arguments in

¹⁷ Proceeding VID 811 of 2010.

¹⁸ As observed by the Appellants in their submissions in M220 of 2015 at [12], this proceeding is related to the Andrews proceeding and concerns the same issues.

¹⁹ Amended Fast Track Statement, deleted paragraphs 19(f), (k) and (m).

this appeal to the effect of those withdrawn allegations; viz, that the fees were not reasonably necessary for the protection of ANZ's legitimate interests²⁰ and to make assertions of windfall gains²¹ and profiteering²².

- 10 20. The argument that was pressed was that what was said to be the size and extravagance of the fees necessitated their characterisation as unconscionable, unjust and unfair²³. The pleaded allegations in relation to penalties were forward looking from the date of contract²⁴. No different case was advanced in respect of the statutory causes of action. The pleaded case adopted an approach that was necessary for the purposes of the class action, requiring a common factual foundation²⁵.
21. The trial judge rejected the allegation that the quantum of the honour, dishonour, non-payment and overlimit fees was so large as to render them contrary to the statutory regimes²⁶. The Full Court agreed²⁷. There is no appeal from that decision. The Full Court reached the same conclusion in respect of the late payment fee.

The Full Court's consideration of the late payment fees

- 20 22. The Appellants contend that Allsop CJ's reasoning on the statutory claims was substantively directed to fees other than late payment fees²⁸. The contention is incorrect. Allsop CJ said:
- What follows in this and later sections, as to the lack of demonstrated unconscionability, unjustness or unfairness applies (except where otherwise expressed) to all the fees, including the late payment fees²⁹.
23. In support of their contention, the Appellants refer to three matters.

²⁰ Appellants' submissions [22] – [32], [37].

²¹ Appellants' submissions [35(d)].

²² Appellants' submissions [44].

²³ Full Court Reasons [326], [330], [334] and [353].

²⁴ Amended Statement of Claim paragraphs 16(j) (cross-referenced by paragraph 24), 25, 43 and 60.

²⁵ A class action could not be maintained where liability depended on an assessment of loss incurred in individual instances of late payments by different customers in different circumstances.

²⁶ Trial Reasons [301], [322]-[323], [352]-[353].

²⁷ Full Court Reasons [330]-[334], [361].

²⁸ Appellants' submissions [16].

²⁹ Full Court Reasons [325].

24. First, the Appellants argue that the Full Court incorrectly proceeded on the basis that the late payment fee statutory claims were raised only by notice of contention³⁰. The contention is wrong and the Full Court was procedurally correct³¹. In any event, this procedural complaint does not undermine the Full Court's reasoning.
25. Next, the Appellants select a handful of paragraphs in the Full Court Reasons where reference is made to "limits" or where fees are referred to as a price³². There is no error in those references, as the Full Court was addressing the range of fees (including fees other than late payment fees) that were the subject of the Appellants' claims. The Appellants ignore all other paragraphs of the Full Court Reasons that explain why the late payment fee did not offend the statutory provisions, including [308], [312] – [315], [319] – [321], [330] – [334], [336] – [337], [343] – [346], [357] and [360] – [363].
26. Third, the Appellants argue that the Full Court's reasoning on late payment fees involved inconsistency, treating the fee as "prima facie" penal in the context of the penalty cause of action but no different to other fees in the context of the statutory causes of action³³. The premise is inaccurate (the Full Court did not find the late payment fee to be "prima facie" penal³⁴) and the contention is wrong (the Full Court did not treat the late payment fee as no different to the other fees). Having found that the late payment fee was not penal, there was no inconsistency in the

³⁰ Appellants' submissions [15].

³¹ The Appellants raised the application of the statutory causes of action to the late payment fee in the Full Court by their Notice of Contention in VID 149 of 2014 (paragraph 2) and not by their Notice of Appeal in VID 141 of 2014. This is apparent from the grounds of appeal in VID 141 which were directed to paragraphs of the Trial Reasons which did not concern the late payment fee (Trial Reasons [278], [300]).

³² Appellants' submissions [16].

³³ Appellants' submissions [17].

³⁴ The Full Court rejected ANZ's argument that, properly characterised, the fee was not payable upon breach by Mr Paciocco of a contractual obligation to make a minimum monthly payment by a due date (at [83] of the Full Court's Reasons). It was in that context that the Full Court agreed with the trial judge's characterisation of the fee as one payable upon breach of contract, or as a collateral or accessory stipulation as security for the primary stipulation of timely repayments (at [89]). However, the Full Court did not adopt the trial judge's description of the fee as "prima facie" penal, discussing that notion at [113] – [117] of its Reasons.

Full Court finding that the statutory regimes did not apply. The Full Court emphasised that it was necessary to consider all the circumstances and did so³⁵.

27. Contrary to the Appellants' submissions³⁶, the Full Court did not fail to start from the correct point, and its reasons displayed no inconsistency.

Statutory unconscionability

28. The Appellants' submission to the effect that the statutory unconscionability prohibition is broader than the general law³⁷ was not controversial at trial or on appeal to the Full Court.
29. The Appellants' submissions refer to two aspects of the legislative criteria that were not relied upon below: s 12CB(2)(b) and 12CB(4)(a) of the *Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act)*.
- 10 30. Section 12CB(2)(b) is a consideration to which the Court may have regard: whether the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier. As noted above, the Appellants withdrew this allegation (that the fees were not reasonably necessary for the protection of the legitimate interests of ANZ) in the *Andrews* proceeding, and had not introduced the allegation into this proceeding. In those circumstances, it is unremarkable that the Full Court did not expressly refer to the factor³⁸.
- 20 31. At [330] – [334], the Full Court addressed the “gravamen” of the Appellants' argument, which asserted a huge disparity between the level of the fees and the costs sustained by ANZ by the conduct for which the fees were charged. In that context, the Full Court observed that the question whether the conduct of ANZ was unconscionable should be looked at from the perspective of all the circumstances and that those circumstances, within reason, included an assessment of the legitimacy of the fee from the perspective of ANZ's business as well as from the customer's perspective. The Full Court's language was not framed by reference to s 12CB(2)(b) for the reasons explained, but it is nonetheless clear that the Full

³⁵ Full Court Reasons [330], [354], [365].

³⁶ Appellants' submissions [18].

³⁷ Appellants' submissions [21].

³⁸ cf Appellants' submissions [22].

Court applied the appropriate standards in its consideration of all the circumstances³⁹.

32. Thus, the Appellants' contention that the test applied by the Full Court was erroneous⁴⁰ is unfounded. The Full Court's conclusion was that the evidence could not permit a conclusion of such exorbitance as could conceivably found a conclusion of unconscionability⁴¹, and that the Appellants had not demonstrated that from any reasonable perspective the fees were exorbitant⁴². This conclusion was strengthened by consideration of all of the surrounding circumstances, as summarised by the Full Court at [336].
- 10 33. Section 12CB(4)(a) provides that, in determining whether a person has contravened subsection (1), the Court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention. The Appellants contend that this limitation made it inappropriate to be relying solely on evidence concerning the position as at the time of entry into the contract (Mr Inglis' evidence), and ignoring evidence looking at the position as at the time of each breach⁴³. The matter was not raised by any allegation or submission of the Appellants either at trial or on appeal. By "the time of each breach", it appears that the Appellants are referring to the date on which each fee was charged to Mr Paciocco.
- 20 34. The argument is wrong for at least three reasons. First, as discussed above, the Appellants' pleading did not rely on circumstances as at the date of late payments; it alleged circumstances as at the date of contract. The trial and appeal were conducted on that basis. Second, the nature of ANZ's interests and the foreseeable losses protected by the late payment fee did not differ between the date of contract and the date of a particular late payment. At the date of contract, it was not known whether Mr Paciocco, or any given customer, would default in a payment due, or the circumstances of their account at the time of any default. However, it was reasonably foreseeable that if they did default, additional costs would be imposed

³⁹ Full Court Reasons [330], [334].

⁴⁰ Appellants' submissions [23].

⁴¹ Full Court Reasons [332].

⁴² Full Court Reasons [334].

⁴³ Appellants' submissions [24] – [30].

upon ANZ. Third, the Appellants misapply s 12CB(4)(a). The section prevents the Court from having regard to subsequent circumstances that were not reasonably foreseeable in determining whether a person has engaged in unconscionable conduct; the Court is not restricted in considering circumstances that show that the person has acted fairly or reasonably⁴⁴. The section thus operates in the same manner as section 76(4) of the National Credit Code, discussed below.

- 10 35. The Appellants contend that Mr Inglis' evidence was not tempered by notions of reasonable foreseeability⁴⁵. The premise for the contention is that Mr Inglis was asked to assess ANZ's maximum costs as a result of late payments. The contention does not follow from the premise. While Mr Inglis assessed, as at the date of contract, the maximum loss that ANZ may suffer from late payments, he explained the categories of costs that ANZ incurs by reason of late payments and the range of costs that are incurred. That evidence was not confined to a point estimate of the maximum. Accordingly, his evidence identified losses that were reasonably foreseeable at all relevant times. Reasonable foreseeability requires a "serious possibility⁴⁶" of damages of the *kind* sought by the claimant⁴⁷; the parties need not have in contemplation the degree or extent of the loss or damage suffered or the precise details of the events giving rise to the loss⁴⁸.
- 20 36. The Appellants criticise the Full Court's reasons at [338] – [340], suggesting that they are difficult to follow⁴⁹. The criticism relies on a partial reading of the relevant passage which extends from [338] to [347]. The Full Court made the assumption that Mr Regan's evidence reflected the only appropriate assessment of ANZ's legitimate interest in, relevantly, late payments, and the further assumption that Mr Regan's evidence was based on a forward looking assessment at the date of contract. The Full Court then discussed whether, on those assumptions, the charging of (relevantly) the late payment fee was unconscionable. The Court

⁴⁴ That this is the operation of s 12CB(4)(a) is confirmed by paragraph 86 of the Explanatory Memorandum to the *Trade Practices Revision Bill* 1986 which introduced section 52A into the then *Trade Practices Act* 1974. Section 12CB of the ASIC Act originates from section 52A and remains in substantially the same form as the original enactment.

⁴⁵ Appellants' submissions [29].

⁴⁶ *Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310 at 316.

⁴⁷ *Hughes v Lord Advocate* [1963] AC 837; *Rosenberg v Percival* (2001) 205 CLR 434 at [64].

⁴⁸ *Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310 at 365–366; *Cripps v G & M Dawson Pty Ltd* [2006] NSWCA 81 at [38]–[39].

⁴⁹ Appellants' submissions [30].

considered that whether the fees were compensatory was not determinative and their characterisation depended on the broader considerations of the statute [341] and that, even on those assumptions, ANZ's conduct would not be held to be unconscionable [343].

- 10 37. The Appellants then contend that the late payment fee was unconscionable because it was charged at an amount which was higher than the reasonably foreseeable loss from any late payment by Mr Paciocco⁵⁰. This contention should be rejected for many reasons. First, the pleading did not allege, and could not allege (given the nature of the proceeding as a class action) that the fee was higher than costs caused by specific instances of late payments. Secondly, any factual foundation for the contention in the Trial Reasons was removed by the Full Court's recognition that loss provisions and the costs of regulatory capital were relevant to any consideration of ANZ's costs. Thirdly, even if the contention was correct in respect of specific instances of late payment, it does not lead to a conclusion of unconscionability. It remains relevant to consider all the circumstances including the terms of the contract under which the fee is charged and the legitimacy of the inclusion of the fee in the contract. Parties to a contract commonly agree a fee payable upon future breaches of the contract. The parties will not know what loss may be suffered on the occurrence of any one of the future breaches, and the calculation of the loss may be difficult and uncertain, but that does not lead to the conclusion that the loss is not reasonably foreseeable for the purposes of s 12CB(4)(a) and that it is impermissible to agree an amount payable in advance. The fact that one possible future breach may generate a loss that is lower than the contract fee does not render the charging of the contract fee unconscionable. If it were otherwise, the purpose of agreeing the fee in the contract would be redundant; on the Appellants' argument, the party charging the fee would be required to assess its losses from each breach to determine whether it is unconscionable to charge the contract fee.
- 20
- 30 38. The Appellants' contentions⁵¹ based upon "values, norms and community expectations" as discussed in *ACCC v Lux Distributors*⁵², and their reference to the

⁵⁰ Appellants' submissions [32].

⁵¹ Appellants' submissions [33].

⁵² [2013] FCAFC 90 at [23].

material summarised in Annexure 4 of the Trial Reasons, are misconceived. In the passage in *Lux Distributors* referred to, the Full Court of the Federal Court (Allsop CJ and Jacobson and Gordon JJ) discussed the identification of the normative standard of conscience by which the statutory term “unconscionable” was to be understood. The Full Court said⁵³:

10 “*The task of the Court is the evaluation of the facts by reference to a normative standard of conscience. That normative standard is permeated with accepted and acceptable community values. ...The content of those values is not solely governed by the legislature, but the legislature may illuminate, elaborate and develop those norms and values by the act of legislating, and thus standard setting...*”.

39. The above passage does not suggest that the application of the statutory prohibition of unconscionability to the relevant conduct is to be undertaken by surveying community attitudes to the conduct. In the context of the late payment fee, it is trite to observe that most consumers would prefer lower charges or indeed no charges by their bank. The fact that members of the community dislike a particular fee is not germane to an assessment of whether charging the fee is unconscionable. The material summarised in Annexure 4 of the Trial Reasons is not evidence of “*a normative standard of conscience*” referred to by the Full Court in *Lux Distributors*.

20 40. More generally, the trial judge declined to make factual findings based on the material because the material was used selectively and “...*was incomplete. A number of documents were drafts with significant sections blank. Other material rose no higher than proposals which were neither implemented nor accepted by ANZ*”⁵⁴. The Full Court reached the same conclusion⁵⁵. The Appellants’ submissions at [33] again make selective and misleading use of the material, referring to material out of its chronological context and material that relates only to fees other than late payment. ANZ highlights the following matters:

⁵³ Ibid.

⁵⁴ Trial Reasons [127] – [129].

⁵⁵ Full Court Reasons [228] – [231].

- (a) Much of the material is directed to fees other than late payment fees, particularly honour and dishonour fees.
- (b) The material from 2006 concerns changes that ANZ made to exception fees at that time. None of the changes related to late payment fees⁵⁶.
- (c) Between 2007 and 2008, there was consumer, political and regulatory attention focussed upon exception fees. Unsurprisingly, ANZ monitored the debate⁵⁷. In late 2008, ANZ began to consider revising its exception fee provisions so as to refer more expressly to the services provided to customers in connection with the fees⁵⁸. This did not concern the late payment fee.
- 10 (d) In 2009, other banks reduced the level of some of their fees⁵⁹ and ANZ reduced its late payment fee to \$20⁶⁰.
41. The Appellants submit that the fees were unilaterally set by ANZ in the context of a standard form consumer contract which was not open to negotiation by a customer⁶¹. But as observed by the trial judge and the Full Court, Mr Paciocco had a choice whether to open the credit card accounts, whether to draw on the credit in any amount at any time and whether to maintain or close the accounts at any time⁶². Indeed, Mr Paciocco had accounts with other banks⁶³. ANZ supplied credit card services in competition with a large number of other financial institutions⁶⁴. Regardless of the costs occasioned by late payments, ANZ was not free to set the
- 20 late payment fee in disregard of competitive constraint. As noted above, in 2009 ANZ reduced the late payment fee from \$35 to \$20 by reason of changed fees announced by some of its competitors.

⁵⁶ The changes that were made are summarised in the Exception Fee briefing paper dated July 2006: Exhibit 33, Exception Fee Briefing Paper July 2006, pages 31-32.

⁵⁷ See eg Exhibit 33, email between various ANZ employees subject "Confidential: Update: banks seek control of penalty fee debate", pages 36-41.

⁵⁸ Exhibit 33, Exception Fees updates; Exception Fees Strategy dated September 2008, page 76.

⁵⁹ NAB: Exhibit 33, Email from John Harries to Graham Hodges and others subject "Exception Fees", page 251; Westpac: Exhibit 33, Email from John Harries to Mandy Simpson, Steve Rubenstein, Michael Bock and Charles Read, subject "FW: Westpac announcement re exception fees today", page 261; CBA: Exhibit 33, Extract Management Board Minutes dated 7 September 2009, page 269.

⁶⁰ Exhibit 33, ANZ exception fee response – Recommendation, page 298.

⁶¹ Appellants' submissions [34].

⁶² Trial Reasons at [122] and [290]; Full Court Reasons [346].

⁶³ Trial Reasons [293]; [298].

⁶⁴ Trial Reasons [290].

42. The Appellants' contentions to the effect that ANZ was free to profit significantly from the imposition of the late payment fee⁶⁵, and that the late payment fee gave ANZ windfall gains⁶⁶, were never the subject of pleaded allegations and are contrary to the evidence.

43. At [35] of their submissions, the Appellants repeat the central contentions in their penalty claim. Indeed, the Appellants' argument on statutory unconscionability reduces to no more than a repetition of their penalty contentions, and is based on the proposition that the fee is unconscionable because it exceeds the loss in fact suffered by ANZ by reason of Mr Paciocco's actual late payments. For the reasons
10 given above, that argument is incorrect factually and should be rejected as a matter of principle in any event.

Unjust transactions

44. The Appellants' arguments in respect of s 76 of the National Credit Code⁶⁷ do not differ in any material respect from their arguments in respect of statutory unconscionability. This reflects the nature and structure of the Appellants' arguments advanced at trial and on appeal to the Full Court. It is therefore unsurprising that the reasons of the trial judge and the Full Court in respect of the National Credit Code are relatively brief. In that context, the Appellants' criticism that the Full Court did not grapple with the Appellants' claims⁶⁸ is unjustified.

20 45. The Appellants correctly note that s 76 of the National Credit Code is directed to circumstances at the time of entry into the contract⁶⁹. Indeed, the matter can be stated more broadly than that. As observed by the trial judge, s 76 is directed to the relevant credit contract and its provisions, not specific transactions undertaken pursuant to the contract⁷⁰. In the context of the late payment fee, therefore, the provisions have a similar "forward-looking" dimension to the penalty cause of action, in that whether the term is unjust is assessed at the date of contract not knowing the circumstances in which a late payment might occur in the future. Thus,

⁶⁵ Appellants' submissions [34].

⁶⁶ Appellants' submissions [35(d)].

⁶⁷ Appellants' submissions [37] – [39].

⁶⁸ Appellants' submissions [39].

⁶⁹ Appellants' submissions [38].

⁷⁰ Trial Reasons [318].

the Appellants' arguments in the context of statutory unconscionability, that the focus of the enquiry should be on the individual transactions of Mr Paciocco and an assessment of unconscionability undertaken at that time, have no relevance to the unjust transactions regime. The arguments are unsound in any event, for the reasons given above.

- 10 46. As observed by the Appellants⁷¹, the factor referred to in s 76(2)(e) (whether or not any of the provisions of the contract impose conditions that are unreasonably difficult to comply with, or not reasonably necessary for the protection of the legitimate interests of a party to the contract) is substantially the same as s 12CB(2)(b) considered above. ANZ relies on its earlier submissions relating to that provision.
47. Section 74(4) is expressed differently from s 12CB(4)(a) but it is to the same effect. It excludes from consideration any injustice arising from circumstances that were not reasonably foreseeable. Contrary to the Appellants' submissions⁷², considerations that go to the justice or fairness of the transaction are not so confined. In any event, for the reasons given above, Mr Inglis' analysis of "maximum conceivable loss" identified costs that were reasonably foreseeable at the time of the contract⁷³.
- 20 48. The Court is *required* to have regard to "all the circumstances of the case"⁷⁴. The Full Court undertook that analysis in relation to the unjust transaction contentions⁷⁵.

Unfair contract terms

49. The Appellants' arguments⁷⁶ in respect of the unfair contract term provisions (Part 2B of the FTA in its "Phase 2" form⁷⁷) raise similar arguments as advanced in respect of statutory unconscionability.
50. The approach taken by the trial judge and the Full Court reflected the Appellants' arguments advanced at trial and on appeal to the Full Court. This also explains why

⁷¹ Appellants' submissions [37].

⁷² Appellants' submissions [38].

⁷³ cf Appellants' submissions at [38].

⁷⁴ Section 76(2).

⁷⁵ Full Court Reasons [359], [361].

⁷⁶ Appellants' submissions [40] – [44].

⁷⁷ Trial Reasons [326].

the reasons of the trial judge and the Full Court in respect of Part 2B of the FTA are relatively brief. The Appellants' criticism that the Full Court did not grapple with the Appellants' claims⁷⁸ is unjustified.

51. Like s 76 of the National Credit Code, unfairness of a term under Part 2B of the FTA must be assessed at the time of the contract, not at the time that the term is enforced.⁷⁹

52. Further, there is a material difference between statutory unconscionability and Part 2B of the FTA. Under the latter, regard must be had to the rights and obligations of the parties under the contract as a whole⁸⁰. The Appellants failed to show that the late payment fee caused a significance imbalance in the parties' rights and obligations arising under the contract to the detriment of the customer.⁸¹ It was necessary for the Appellants to show that the late payment fee would cause that imbalance, having regard to the range of benefits received by the customer from the credit card (as both a payment facility and revolving line of credit) and the range of charges (fees and interest) payable for the credit card.

53. The Appellants rely on an assertion that the fee was "prima facie penal"⁸². As noted above, no such finding was made by the Full Court. The Appellants also advance an unpleaded and unsupported assertion of profiteering⁸³.

Part VII: Estimate

20 54. ANZ estimates it will require 4 ½ hours for presentation of its oral argument in this appeal and the appeal in M220 of 2015.

⁷⁸ Appellants' submissions [43].

⁷⁹ *Jetstar Airways Pty Ltd v Free* [2008] VSC 539 at [119].

⁸⁰ *Jetstar Airways Pty Ltd v Free* [2008] VSC 539 at [127], referred to by the trial judge at Trial Reasons [331]; *Director General of Fair Trading v First National Bank Plc* [2002] 1 AC 481 at [17].

⁸¹ Full Court Reasons [358], [359].

⁸² Appellants' submissions [44].

⁸³ Appellants' submissions [44].

Dated: 6 November 2015



<p>A. C. Archibald Tel: (03) 9225 7478 Fax: (03) 9225 8370 Email: archibaldsec@ vicbar.com.au</p>	<p>M. H. O'Bryan Tel: (03) 8600 1710 Fax: (03) 8600 1725 Email: mhobryan@ chancery.com.au</p>	<p>C. van Proctor Tel: (03) 9225 6338 Fax: Email: vanproctor@ vicbar.com.au</p>
---	---	---

SCHEDULE A

Inaccuracies in the table in the Appellants' submissions at [9]

1. In relation to the unconscionable conduct regime, the Appellants alleged contravention of s 12CB of the ASIC Act and section 8 of the FTA in the period prior to 1 January 2011, but only s 12CB of the ASIC Act in the period after 1 January 2011⁸⁴. The Appellants did not allege contravention of Part 2-2 of the Australian Consumer Law⁸⁵. It is common ground that s 12CB of the ASIC Act applied to Mr Paciocco's late payment fees throughout. However, recovery for late payment fee 4 is time barred by s 12GF(2) of the ASIC Act⁸⁶.
- 10 2. In relation to the unjust transaction regime, the Uniform Consumer Credit Code had no application to Mr Paciocco's late payment fees⁸⁷. Again, recovery for late payment fee 4 is time barred by s 77 of the National Credit Code⁸⁸.
3. In relation to the unfair contract terms regime, the applicable statutory provisions were those in Part 2B of the FTA as amended by the *Fair Trading and Other Acts Amendment Act 2009 (Vic) (Phase 2)*⁸⁹. The provision applied to Card Account 9629 from the date the account was opened (on or about 12 July 2009) and to Card Account 9522 from December 2009⁹⁰. Those "Phase 2" provisions continued to apply (by reason of transitional provisions⁹¹) until the FTA was repealed by the *Australian Consumer Law and Fair Trading Act 2012 (Vic)*, with effect on 1 July
20 2012⁹². The Appellants did not allege contravention of Part 2-3 of the Australian Consumer Law. Accordingly, the claims under the unfair contract terms regime are

⁸⁴ Amended Statement of Claim [80]; Trial Reasons [276].

⁸⁵ With effect from 1 January 2011, Part 2 of the FTA (including s 8) was repealed by s 9 of the *Fair Trading Amendment (Australian Consumer Law) Act 2010 (Vic)* and the FTA was amended to enact the Australian Consumer Law as a law of the State of Victoria (which included the unconscionable conduct provisions in Part 2-2). With effect from 1 July 2012, the FTA was repealed, and the Australian Consumer Law was re-enacted by the *Australian Consumer Law and Fair Trading Act 2012 (Vic)*.

⁸⁶ Trial Reasons [369] and [370].

⁸⁷ Trial Reasons [313].

⁸⁸ Trial Reasons [371].

⁸⁹ Trial Reasons [327].

⁹⁰ Trial Reasons [334].

⁹¹ Trial Reasons [337] and [340].

⁹² Trial Reasons [341].

limited to fees 14, 16, 17, 18, 23, 27 and 28 and to the “Phase 2 regime” that was repealed in 2012. The “Phase 2 regime” did not apply nationally⁹³.

SCHEDULE B

Pleading chronology

1. In the related Andrews proceeding⁹⁴, the Fast Track Statement (FTS) originally alleged (in subparagraph 19(f)) that: *“the first applicant, the second applicant and the Saving Group Members were required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of ANZ”*.
- 10 2. By a memorandum titled “Respondent’s Categories of Evidence” prepared for a scheduling conference before the docket judge on 15 December 2010, ANZ informed the Court of the categories of evidence that would be required to address the allegations made in subparagraphs 19(f), (k), (l) and (m) of the FTS. The categories were wide ranging, concerning many aspects of ANZ’s business including the assessment and analysis of credit risk and profitability⁹⁵.
3. In February 2011, the applicants in the Andrews proceeding applied to amend the FTS by deleting subparagraphs 19(f), (k) and (m). The affidavit in support of the application explained that the applicants proposed to “withdraw some wide-ranging allegations which potentially required a detailed forensic and factually intensive
20 investigation” and had determined not to press these allegations “in an effort to achieve a quicker, more efficient and much less costly determination or settlement” of the proceeding⁹⁶. The amendment was made in March 2011, prior to the initial hearing in that proceeding.
4. The Appellants, Mr Paciocco and his company Speedy Development Group Pty Ltd, commenced this proceeding in March 2013. The Appellants represent a different class to the Andrews proceeding, but the proceeding raises the same allegations against ANZ. After the High Court decision in the Andrews

⁹³ Cf Appellants’ submissions at [10].

⁹⁴ Federal Court Proceeding VID 811 of 2010.

⁹⁵ At paragraphs 18 and 20.

⁹⁶ Affidavit of Bernard Murphy dated 22 February 2011 at [12] and [13].

proceeding⁹⁷ and the subsequent remittal to the trial judge, the parties agreed to take the Paciocco proceeding rather than the Andrews proceeding forward to trial⁹⁸.

5. The allegations withdrawn in the Andrews proceeding were not introduced into this proceeding, save in one respect which is not relevant. At paragraphs 97 to 100, the Appellants alleged that the credit card contracts were subject to the unfair contract regime in the ASIC Act. That regime differed from the regime in Part 2B of the FTA: it required the Appellants to establish that the fees were not reasonably necessary to protect the legitimate interests of ANZ (s 12BG(1)(b)). An allegation to that effect was made in paragraph 99(b) of the Amended Statement of Claim.
- 10 However, to address the evidentiary concern previously raised by ANZ, the Appellants amended the allegation to confine its scope. As amended, the only allegations of fact relied on by the Appellants in proof of 12BG(1)(b) were that (i) ANZ charged interest on the amount of the credit card loan and (ii) the fee exceeded the measure of compensation or damages at law for late payment. The allegation in paragraph 99 is of no relevance in this appeal because the trial judge concluded that the unfair contract regime in the ASIC Act did not apply to Mr Paciocco's credit card accounts⁹⁹. There was no appeal from that decision.

⁹⁷ *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205.

⁹⁸ Following the High Court's decision in *Andrews* and the consequential remittal to the trial judge, a dispute had arisen between the parties as to whether the applicants in the Andrews proceeding were bound by the factual findings made in the initial trial, or were able to amend their pleading and adduce further evidence.

⁹⁹ Trial Reasons [347].