

**PACIOCCO & ANOR v AUSTRALIA AND NEW ZEALAND
BANKING GROUP LIMITED (M219/2015) & (M220/2015)**

Court appealed from: Full Court of the Federal Court of Australia
[2015] FCAFC 50

Date of judgment: 8 April 2015

Date special leave granted: 11 September 2015

The appellants brought a representative proceeding in the Federal Court in which they sought to set aside bank fees charged by Australia and New Zealand Banking Group Limited (ANZ) on various bases. The attack on the fees was that they were either penalties at common law or equity; or were the product of unconscionable conduct by ANZ within the meaning of the *Australian Securities and Investments Commission Act 2001* (Cth) ('the ASIC Act'), ss 12CB and 12CC, or the *Fair Trading Act 1999* (Vic) ('the FT Act'), ss 8 and 8A; or were unjust under the National Credit Code in Schedule 1 to the *National Consumer Credit Protection Act 2009* (Cth); or as unfair contract terms under the FT Act, S 32W and the ASIC Act, s 12BG.

There were five kinds of fees charged: honour fees, dishonour fees, non-payment fees, late payment fees and overlimit fees. The primary judge (Gordon J) found the late payment fees to be penalties and the balance of the fees not to be penalties. Her Honour further found that none of the statutory provisions applied to impugn ANZ's conduct or the fees.

The appellants and the respondent each appealed and filed notices of contention in the other party's appeal. ANZ appealed the finding that the late payment fees were penalties and the appellants filed notices of contention on the basis of the primary judge's rejection of the statutory claims. They submitted, inter alia, that the primary judge impermissibly ran together and obscured the different legal tests for the different statutory provisions. The appellants appealed the findings in relation to the fees other than the late payment fees.

With respect to the claims of unconscionable conduct under the ASIC Act and the FT Act, the Full Court (Allsop CJ, Besanko & Middleton JJ), found it could not be concluded on the evidence before the primary judge that ANZ engaged in unconscionable conduct. In all the circumstances, (in particular, the lack of any proven predation on the weak or poor, the lack of real vulnerability requiring protection, the lack of financial or personal compulsion or pressure to enter or maintain accounts, the clarity of disclosure, the lack of secrecy, trickery or dishonesty, and the ability of people to avoid the fees or terminate the accounts), the Court, like the primary judge, did not consider the conduct of ANZ to have been unconscionable.

With respect to the claims for unjust transactions under the National Credit Code and unfair contract terms under the FT Act, the Court, like the primary judge, held that the transactions were not unjust and the terms were not unfair. The Court noted that s 76 of the National Credit Code and s 32X of the FT Act

provided considerations relevant to the conceptions of unjustness and unfairness. Considering the terms of s 32W of the FT Act, at the time of entry into the arrangements, it was difficult to see why the provisions in question would have caused an imbalance in the parties' rights and obligations to the detriment of the consumer. The provisions were clearly disclosed. In most instances the fees could be avoided. No trickery took place. Although set by the bank in contracts of adhesion, the contracts were terminable at the will of the customer; and the fee could be avoided by the conduct of the customer that was not unreasonable – keeping to her or his contractual limits.

Looking at s 76 of the National Credit Code, the same conclusion could be reached. Whilst the ANZ had the bargaining power to proffer the terms un-negotiated, 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 terms were not unreasonably difficult to comply with. Further, the terms were clear, intelligible, and openly disclosed. There was no unfair pressure, undue influence or unfair tactics. There was no evidence of hardship on the part of the appellants and it was not proved that the ANZ inflicted hardship on others by the fees.

The Court dismissed the appellants' appeal and allowed the respondent's appeal.

The ground of appeal in M219/2015 is:

- the Full Court erred in determining that the charging of the “late payment fees” by the respondent was not unconscionable in terms of s 12BC and /or s 12CC of the ASIC Act and or s 8 of the FT Act, and in determining that the contractual terms providing for them were not unfair terms for the purposes of s 32W and s 32X of the FT Act, or unjust for the purposes of s 76 of the National Credit Code.

The grounds of appeal in M220/2015 include:

- The Full Court erred in taking the view that the “late payment fees” were not penalties

The respondent has filed a Notice of Contention in M220/2015, on the ground that the Full Court should have found that s 27 of the *Limitation of Actions Act* 1958 (Vic) did not apply to the first appellant's claim for restitution in respect of exception fee 4.