



HIGH COURT OF AUSTRALIA

6 September 2012

ANDREWS v AUSTRALIA AND NEW ZEALAND BANKING GROUP LTD

[2012] HCA 30

Today the High Court granted leave to appeal against a decision of the Federal Court of Australia and allowed the appeal. The Court held that the fact that particular fees were not charged by the respondent, Australia and New Zealand Banking Group Ltd ("the ANZ"), upon breach of contract did not render the fees incapable of being characterised as penalties.

The applicants, approximately 38,000 group members, commenced representative proceedings in the Federal Court of Australia. They sought, amongst other remedies, declaratory relief that certain provisions between each of them and the ANZ were void or unenforceable as penalties. On that basis, the applicants claimed repayment of fees charged to them by way of "honour fees", "dishonour fees", "late payment fees", "non-payment fees" and "over limit fees" (collectively, "exception fees").

The applicants asked the Federal Court, by way of separate questions, whether the exception fees were payable by the applicants upon breach of contractual obligations owed to the ANZ, and, in the alternative, whether it had been the responsibility of the applicants to see that the circumstances occasioning the imposition of the exception fees did not arise. If either question was answered in the affirmative, the applicants then asked whether such fees were capable of being characterised as penalties.

On 5 December 2011, the Federal Court held that only the late payment fees were payable upon breach of contract. Following the decision of the New South Wales Court of Appeal in *Interstar Wholesale Finance Pty Ltd v Integral Home Loans Pty Ltd* (2008) 257 ALR 292, the primary judge held that the penalty doctrine was limited to breaches of contract and thus could only be applied to the late payment fees. The applicants sought leave to appeal to the Full Court of the Federal Court of Australia.

On 11 May 2012 the High Court, acting pursuant to s 40(2) of the *Judiciary Act* 1903 (Cth), removed the application for leave. A question before the Court was whether the *Interstar* decision correctly stated the law with respect to penalties and whether the modern doctrine respecting penalties had become wholly a doctrine of the common law, rather than of Equity.

The High Court unanimously rejected the proposition that the penalty doctrine applies only where there has been a breach of contract. The question is one of substance rather than form. The Court also rejected the proposition in *Interstar* that the doctrine had been absorbed into the common law. The fact that the honour, dishonour, non-payment and over limit fees were not payable for breach of contract did not prevent them from being characterised as penalties. It will be for the Federal Court on the further hearing of the matter to decide whether these exception fees are penalties.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*