



HIGH COURT OF AUSTRALIA

27 July 2016

PACIOCCO & ANOR v AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED;
PACIOCCO & ANOR v AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED

[2016] HCA 28

Today the High Court, by majority, dismissed two appeals from the Full Court of the Federal Court of Australia. The majority of the High Court held in the first appeal that late payment fees charged by the respondent ("the Bank") on consumer credit card accounts were not unenforceable as penalties, and in the second appeal that the imposition of late payment fees did not contravene statutory prohibitions against unconscionable conduct, unjust transactions and unfair contract terms.

The first appellant ("Mr Paciocco") held two consumer credit card accounts ("the accounts") with the Bank. The terms and conditions of the accounts required Mr Paciocco, following receipt of a monthly statement of account, to pay a minimum monthly repayment. If the minimum monthly repayment plus any amount due immediately was not paid within a specified time, a late payment fee was charged. The late payment fee was \$35 before December 2009, and \$20 thereafter. 26 late payment fees were charged to Mr Paciocco's accounts.

Mr Paciocco and the second appellant, Speedy Development Group Pty Ltd, a company controlled by Mr Paciocco, were applicants in representative proceedings commenced against the Bank in the Federal Court of Australia, in which they alleged that the late payment fees, and various other fees charged by the Bank, were unenforceable as penalties. They also claimed that the Bank engaged in unconscionable conduct under the *Australian Securities and Investments Commission Act 2001* (Cth) ("ASIC Act") and the *Fair Trading Act 1999* (Vic) ("FTA"), that the contracts for the accounts were made by unjust transactions under the National Credit Code (a schedule to the *National Consumer Credit Protection Act 2009* (Cth)), and that the late payment fees were void as unfair terms under the ASIC Act and the FTA.

The appellants and the Bank each adduced expert evidence as to the losses suffered by the Bank upon the failure by Mr Paciocco to pay the amounts owing on the accounts by the due date. The expert retained by the appellants provided evidence of the amounts needed to restore the Bank to the position it would have been in had Mr Paciocco paid the amounts owing on time. The expert retained by the Bank provided evidence of the maximum costs that the Bank could conceivably have incurred as a result of Mr Paciocco's late payment, which included loss provision costs, regulatory capital costs, and collection costs. The primary judge held that the approach of the appellants' expert ought to be adopted and that the late payment fees were penalties because, amongst other things, they were extravagant and unconscionable in comparison with the greatest loss that could reasonably be proved. On appeal, the Full Court preferred the approach of the Bank's expert and held that the late payment fees were not penalties because, amongst other things, the legitimate interests of the Bank were affected by each of the categories of costs identified by its expert. The Full Court also rejected the statutory claims raised by the appellants, which were not considered by the primary judge.

By grant of special leave, the appellants appealed to the High Court. The majority of the High Court dismissed the first appeal, holding that the Full Court was correct to characterise the loss provision costs, regulatory capital costs and collection costs as affecting the legitimate interests of the Bank.

The fact that those categories of costs could not be recovered in an action for damages did not alter that conclusion. Further, neither the fact that the late payment fees were not genuine pre-estimates of damage nor the fact that the amounts charged were disproportionate to the actual loss suffered by itself rendered the late payment fees penalties. The High Court also dismissed the second appeal, the majority rejecting the statutory claims on their merits.

- *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.*