



## HIGH COURT OF AUSTRALIA

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### SST CONSULTING SERVICES PTY LIMITED v STEPHEN CHARLES RIESON AND SCOTT MURRAY BELL

A loan contract contravening trade practices laws is enforceable once the offending term is excised, leaving Mr Rieson and Mr Bell having to repay the loan, the High Court of Australia held today.

SST lent money to AFS Freight Management (USA), a company of which Mr Rieson and Mr Bell were directors. In June 1999, Mr Rieson had asked SST director Peter Sweeney for \$1 million for working capital and offered “certainty in relation to the work”. He and Mr Bell guaranteed repayment of the loan. The loan agreement obliged AFS USA to direct all work packing and unpacking shipping containers at certain ports to corporations specified by SST and if any work was directed elsewhere the loan would become due and payable. By lending money on these conditions, SST engaged in exclusive dealing, contrary to section 47 of the *Trade Practices Act* (TPA). This took the form of “third line forcing”, whereby a corporation supplies or offers to supply goods or services on condition that the recipient then acquires particular goods or services from another entity. SST lending money to AFS USA was a supply of services on the express condition that AFS USA would then acquire particular services from someone else, namely, corporations nominated by SST. The loan was made in instalments and was to be repaid in instalments, with 20 per cent compounded interest, by September 2003. AFS USA repaid some money then claimed it was not indebted to SST because the loan contract was illegal and unenforceable. SST claimed section 4L of the TPA required severance of parts of the loan agreement so AFS USA’s obligation to repay the loan plus interest remained enforceable.

SST commenced action in the New South Wales Supreme Court, claiming payment of the balance of the loan and interest. AFS USA pleaded that the loan agreement was for the illegal purpose of exclusive dealing and was therefore void and unenforceable. It also sought leave to bring a cross-claim for a declaration that the guarantee was void and/or unenforceable. The proceedings were transferred to the Federal Court. Justice Arthur Emmett entered judgment for the amount claimed – by then \$1,514,890. He held that SST was entitled to treat the unlawful provision as severed from the arrangement and that AFS USA’s obligations were valid and enforceable. The Full Court of the Federal Court allowed an appeal and held that severance was not possible so the whole agreement was illegal and void. This was because the way the parties had structured their arrangements indicated a mutual understanding that their obligations constituted an indivisible whole and severing the provision would fundamentally alter the character of their agreement. SST appealed to the High Court.

The Court, by a 5-1 majority, allowed the appeal. It held that severance is required, rather than simply permitted, by section 4L of the TPA. Under section 4L a contract is valid and enforceable except to the extent that the offending provision is severable. The Court held that in this case no difficulty arose in severing the offending provision. So much of the loan agreement as required repayment of the loan with interest was valid and enforceable.

- *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.*