CASE UPDATE

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Paciocco v Australia and New Zealand Banking Group Limited: [The Enforceability of Late Payment Fees]

6 May 2015

Introduction

The issue concerning credit card late payment fees first came to light in the Australian Federal Court case of *Andrews v Australia and New Zealand Banking Group Limited ("ANZ")*[1], which went up to the High Court of Australia.

In *Andrews*, the High Court ruled that relief against penalties is available even if a fee is not payable on a breach of contract. The proper approach is to consider whether the substantive purpose of the fee is to secure performance of a contractual obligation. A fee may not be treated as a penalty is it is substance a charge for further services or accommodation: *Metro-Goldwyn-Mayer v Greenham*[2].

In *Paciocco v ANZ,*[3] Justice Gordon held that credit card late payment fees charged to customers by ANZ amounted to penalties at law and equity, and were thus unenforceable. Gordon J also held that honour fees, dishonour fees, non-payment fees and over-limit fees ("Other Fees") were not penalties and were otherwise lawful. The Full Court of the Federal Court of Australia[4] overturned the first instance judgment and ruled that such fees were not penalties and thus enforceable. The Full Court also rejected Paciocco's appeal against Justice Gordon's findings that honour, dishonour and over-limit fees charged by ANZ were not penalties, unconscionable or unfair.

The Facts

The case concerns proceedings brought, on behalf of about 43,500 other customers, by Mr. Lucio Paciocco and a company controlled by him, Speedy Development Group Pty Ltd, in which they sought to set aside bank fees charged by the Appellants on various bases. The fees were disputed on the basis that they were either penalties at common law or equity, or were unconscionable, unjust or unfair under various legislations. The main contention was the credit card late payment fees, as they were incurred each time a customer failed to repay the minimum amount on their credit card each month. The fees were incurred regardless of lateness or amount of payment.

The Full Court Decision

Chief Justice Allsop ("**Allsop CJ**") delivered the main judgment (with whom Justices Besanko and Middleton agreed), and allowed the appeal by ANZ.

<u>Adopting a forward-looking assessment of actual loss</u>

Whether or not the fees could be considered penalties depends on whether they are extravagant, exorbitant or unconscionable. In determining whether fees charged are such, Justice Gordon adopted an *ex post* assessment of actual loss from the breaches. Allsop CJ, on the other hand, adopted an *ex ante* analysis in

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[1] (2012) 247 CLR 205
2 [1966] 2 NSWLR 717
[3] [2014] FCA 35
[4] [2015] FCAFC 50

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determining whether the level of fees was extravagant, exorbitant or unconscionable, having regard to the greatest loss that could flow from a breach, assessed as at the date of the contract. Furthermore, the onus lies on the customer to prove extravagance, exorbitance or unconscionability as at the date of contracting.

Size of fees is not conclusive of unjustness or unfairness

In determining whether the transactions were unjust or unfair, it was held that all circumstances must be evaluated against the standards of unjustness and unfairness. In particular, Allsop CJ stressed that, in evaluating such, "price may affect such an evaluation but it does not determine it". Other considerations, such as how clear the terms were, whether there was undue influence or whether the measures to bring the terms to attention were adequate had to be taken into account.

Other Fees

Allsop CJ rejected Paciocco's appeal that Justice Gordon had erred in her conclusions that the Other Fees charged by ANZ were payable for further accommodation or further contractual benefit, and were therefore not penalties. Allsop CJ also rejected Paciocco's contention that the Other Fees charged were unconscionable, as Paciocco had failed to demonstrate that the requisite unconscionability, unjustness or unfairness applied to any of the fees.

Comments

While the Australian High Court case of *Andrews v ANZ* appears to have considerably broadened the doctrine of penalties in Australia, the decision in *ANZ v Paciocco*, although limited to the facts before the court, seems to represent a setback for similar class actions based on penalties. At present, Singapore courts still adopt the approach that the applicability of penalty laws depends on whether there is a breach of contract[5]. However, the decision in *ANZ v Paciocco* is an interesting case study of the specific application of the penalties doctrine to bank charges.

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[5] See *Stansfield Business International Pte Ltd v Vithya Sri Sumathis* [1999] 3 SLR 239. For a comparison of the penalty laws in various jurisdictions, see our case update.

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