IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY

No M219 of 2015

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN

LUCIO ROBERT PACIOCCO
First Appellant

10 **SPEEDY DEVELOPMENT GROUP PTY LTD**
(ACN 006 835 383)
Second Appellant

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED
(ACN 005 357 522)
Respondent

APPELLANTS' SUBMISSIONS

20 **PART I: Certification re Internet Publication**

1. These submissions are in a form suitable for publication on the internet.

PART II: Issues

2. The question on appeal is whether the Full Court of the Federal Court erred in:

   (a) failing to deal with the appellants' case that late payment fees contravened the statutory norms of "unconscionable conduct" (and similar norms proscribing "unjust" transactions and "unfair" contractual terms);

   (b) failing properly to appreciate and apply the differences between what was required to prove contravention of those statutory norms in their application to late payment fees charged under standard form consumer contracts, and what

30 was required to prove a contractual provision is a penalty at general law; and

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Filed on behalf of the Appellants
Maurice Blackburn Lawyers
Level 10, 456 Lonsdale Street
MELBOURNE VIC 3000

DX: 466 Melbourne
Tel: (03) 8102 2007
Fax: (03) 9258 9600
Email: SFoale@mauriceblackburn.com.au
Ref: Steven Foale (3052394)

(c) finding that, in circumstances where the late payment fees were prima facie penal, that it was not possible for the disproportion between the quantum of the late payment fees and the cost to the respondent from the late payments to give rise to statutory "unconscionability", "unjustness" or "unfairness", if it could not be proven that the fees were exorbitant from the respondent's perspective (without having regard to whether the costs the respondent claimed were reasonably foreseeable).

PART III: Judiciary Act 1903, s 78B

3. The appellants consider that notice is not required pursuant to s 78B of the *Judiciary Act 1903* (Cth).

PART IV: Report of Reasons for Judgment

4. The decision of the Full Court of the Federal Court is reported: (2015) 321 ALR 584; [2015] FCAFC 50. The decision of the primary Judge (Gordon J) is also reported: (2014) 309 ALR 249; [2014] FCA 35.

PART V: Relevant Facts

5. The relevant facts are identical to those in proceeding M220 of 2015, which concerns whether the late payment fees[1] are penalties. The appellants adopt Part V of the Appellants' Submissions in M220 of 2015.

PART VI: Argument

Introduction

6. The Statutory Claims were brought in the alternative to the Penalty Claims, and required consideration if the unwritten law doctrine failed to provide relief. Both the primary Judge and the Full Court held that the late payment fees were payable as a collateral or accessory stipulation, as security for, or in terrorem of, the primary stipulation, being timely repayment according to the terms of credit. The late payment fees were thus prima facie penalties. The remedy sought by the Statutory Claims, in effect, was the same as would obtain if the late payment fees were penalties.[2]

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1 Other fees were at issue in the proceedings in the Federal Court, but do not remain contentious.

2 The relief claimed in respect of the Statutory Claims at trial was primarily declaratory in nature, but monetary relief was also claimed which mirrored the relief originally sought in respect of the Penalty

7. It follows that the Statutory Claims are, in practical terms, necessary to be determined if the appellants fail in their appeal in proceeding M220 of 2015. The statutory regimes are not constrained by the factors which led the Full Court of the Federal Court to hold that the late payment fees were not penalties.

The statutory regimes

8. The dealings between the first appellant and the respondent in respect of the card accounts were subject to three statutory regimes:

   (a) one prohibiting "unconscionable conduct" in connection with the supply of financial services – this being prohibited concurrently by s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) and s 8 of the *Fair Trading Act 1999* (Vic) (**FTA**) (until the latter was replaced by the *Australian Consumer Law* (**ACL**));

   (b) one regulating the provision of credit – including enabling the reopening of "unjust transactions" under s 76 of the *National Credit Code*, in force pursuant to the *National Consumer Credit Protection Act 2009* (Cth), which came into force on 1 July 2009 to replace the *Uniform Consumer Credit Code* (which had been enabled by various State laws); and

   (c) one rendering void "unfair" contractual terms – this being pursuant to Part 2B of the FTA which, after the enactment of the ACL, was preserved in its application to the first appellant's card accounts by transitional provisions until 1 July 2012 (and is now contained in the ACL).

9. The statutory regimes applied in different forms, at different times to different late payment fees, as follows:[3]

Claims, which like the pleading considered in *Andrews*, claimed that the provisions enabling charging of late payment fees be declared void, or alternatively void to the extent that the late payment fees exceeded the damage suffered by the respondent as a result of the events giving rise to the charging of exception fees. Having regard to the decision of the Court in *Andrews*, the appellants acknowledge that the second of these alternatives may be thought by the Court to be the more appropriate outcome in the event contravening conduct is established.

3 Information taken from: Gordon J, [275]-[278], [311]-[313], [326]-[341]; FC [250]-[256].

	"Unconscionable" Conduct	"Unjust" Transactions	"Unfair" Terms	Fee
Jun 2006 to 11 Jun 2009	ASIC Act, s 12CB and FTA, s 8	Uniform Consumer Credit Code (State law)	FTA, Pt 2B (Phase 1)	*Acc 9522 opened* Fees: 4, 5, 6, 7, 8, 9, 10, 11
11 Jun 2009 to 30 Jun 2009			FTA, Pt 2B (Phase 2)	
1 Jul 2009 to 1 Jul 2010		s 76 National Credit Code (Cth law)		*Acc 9629 opened* Fees 14, 16
1 Jul 2010 to 31 Dec 2010			FTA, Pt 2B (Phase 3, Phase 2 still applying pursuant to transitional provisions)	
1 Jan 2011 to 1 Dec 2011	ASIC Act, s 12CB and ACL, Pt 2-2 (as State law)		FTA, Pt 2B (Phase 4, Phase 2 still applying pursuant to transitional provisions) and ACL, Pt 2-3 (as State law)	Fees: 17, 18
1 Jan 2012 to 1 Jul 2012	ASIC Act, s 12CB (amended) and ACL, Pt 2-2 (as State law)			Fees: 23, 27, 28
1 Jul 2012 onwards			ACL, Pt 2-3 (as State law)	Fees: 31, 34, 36, 37, 38, 41, 42, 45, 46, 47, 49

10. Each of the three statutory regimes is applicable nationally.[4]

11. The statutory regimes are each different, and merit separate consideration. Having regard to the extrinsic materials and to the order in which the regimes were enacted, they represent legislative attempts to expand progressively the range of circumstances in which courts will vitiate or give remedies in respect of consumer contracts beyond those circumstances in which courts would intervene under the general law (or pursuant to statutory regimes which depend upon the general or "unwritten" law).[5]

12. The progression is illustrated by:

    (a) the introduction of a second form of statutory unconscionability beyond that which was dependent on the unwritten law, namely that for which s 12CB of the ASIC Act provides, to give courts greater ability to deal with the perceived problem of "*the general disparity of bargaining power*" between providers and consumers;[6]

    (b) the introduction of a concept of an "unjust" transaction was expressly contemplated to involve broader considerations than might attract the description of statutory unconscionability;[7]

    (c) the introduction of a concept of an "unfair" contractual provision, which was contemplated to "*strengthen*" the "*consumer protection measures*" in the FTA

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4 (A) As to the "unconscionable conduct" regime – this has always been part of Commonwealth law (ASIC Act, s 12CB), but it is also now found in Part 2-2 of the Australian Consumer Law which is uniform legislation across all the States and Commonwealth (though it applies to financial services only pursuant to State law): see *Competition and Consumer Act 2010* (Cth), s 131A; *Fair Trading Act 1987* (NSW), ss 28 and 32; *Australian Consumer Law and Fair Trading Act 2012* (Vic), s 12; *Fair Trading Act 1989* (Q), s 26; *Australian Consumer Law (Tasmania) Act 2010* (Tas), s 6; *Fair Trading Act 2010* (WA), s 19; *Fair Trading Act 1987* (SA), s 14; *Fair Trading (Australian Consumer Law) Act 1992* (ACT), s 7; *Consumer Affairs and Fair Trading Act* (NT), s 27.

(B) As to the "unjust transactions" regime – this was previously applicable under uniform state legislation, but is now in force pursuant to the *National Consumer Credit Protection Act 2009* (Cth).

(C) As to the "unfair terms" regime – this is now found in Part 2-3 of the Australian Consumer Law which is uniform legislation across all the States and Commonwealth (though it applies to financial services only pursuant to State law (see fn 4(A) above)).

5 E.g., s 51AA of the *Trade Practices Act 1974* (Cth), which is the equivalent of s 12CA of the ASIC Act, which has been considered by this Court on a number of occasions: *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51; *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392.

6 See the Report of the Trade Practices Review Committee to the Minister for Business and Consumer Affairs (August 1976) ("the Swanston Report") at [9.59], which was the impetus for the amendments to the *Trade Practices Act 1974* (Cth) made by the *Trade Practices Revision Act 1986* (Cth) which introduced s 52A (later renumbered s 51AB): Explanatory Memorandum to the *Trade Practices Revision Bill 1986* at [79] (p 22).

7 See Explanatory Memorandum to the *National Consumer Credit Protection Bill 2009* (Cth) at [8.163].

(which already proscribed unconscionable conduct) and to do so on the assumption that "*some terms in consumer contracts, especially standard form consumer contracts, may be inherently unfair*", regardless of the particular characteristics of the consumer (or even the consumer's assent to the terms).[8]

13. The introduction of a second form of statutory unconscionability ensured that the norm of conduct is not limited by the received meaning of "unconscionable" under the general law. The use of terms such as "unjust" and "unfair" in the later statutory regimes was intended, it is submitted, to suppress any subconscious subservience of the statutory conception to its equitable antecedents.

10 ***The Full Court failed to appreciate the critical feature of the late payment fee***

14. The primary Judge found it was unnecessary to consider the first appellant's statutory claims in respect of late payment fees because of her finding that those fees were penalties: J [278]. Her Honour went on to consider the statutory claims only in respect of other fees which were in issue before her, but not in issue in this Court.

15. The Full Court proceeded on the basis that the late payment fee statutory claims were raised only by Notice of Contention: FC [325]. This was not so. The applicants had appealed.[9]

16. Although Allsop CJ stated that he was directing his reasoning on the statutory claims to all the exception fees (FC [325]), in fact his reasoning was substantively directed to
20 fees other than the late payment fees. This can be seen from his Honour's continual reference to matters which could have no relevance to late payment fees, such as "limits", and description of the fees as a "price" for further credit (FC [310], [335], [347], [358]-[359], [365]). The Chief Justice's reference to these matters is explicable so far as the overlimit fees (not in issue in this Court) were concerned, but does not reconcile with his earlier rejection of the respondent's contention that late payment fees were payable for an extension of credit, and his Honour's acceptance that they were collateral stipulations as security for, or *in terrorem*, of the primary stipulation of timely repayment: FC [87]-[89].

17. The approach taken by the Full Court on this issue involved inconsistency. The late
30 payment fees were found to be amounts payable on breach of contract and prima facie

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8 See Explanatory Memorandum to the *Fair Trading (Amendment) Bill 2003* (Vic), at p 1.

9 See the appellants' Notice of Appeal in VID 141 of 2014.

penal. The other fees challenged in the proceedings were not. Yet when it came to dealing with the Statutory Claims, the late payment fees were simply treated as if they were no different in kind from the other fees: see FC [325]-[347], [352]-[365]. The difference, however, was of great significance. In no sense could the late payment fees be regarded as the price for any service being provided by the respondent; no question of the Court being transformed into a "*price regulator*", as the Full Court feared (FC [335]) could reasonably be thought to arise.

18. In short, when considering the late payment fees in the context of the Statutory Claims, the Full Court failed to start from the correct point: see paragraphs 6 and 7 above.

10 ***The limitations of the penalty doctrine do not apply to the Statutory Claims***

19. The Full Court's failure to appreciate the critical distinction between the late payment fees and the other fees meant that it failed:

    (a) to focus on the relevant features of the late payment fees in its purported application of the statutory regimes; and

    (b) to give consideration to those aspects of the statutory regimes which were pertinent to that distinction.

20. The factors which had led the Full Court to hold that the late payment fees were not penalties were not fatal to the Statutory Claims. Indeed there were aspects of the statutory tests which should have resulted in the opposite conclusion.

20 *Statutory unconscionability*

21. Section 12CB of the ASIC Act mandates a course fundamentally different from that held applicable under the general law. The question is whether the conduct of a person supplying financial services to a consumer is "*in all the circumstances, unconscionable*". Unlike s 12CA it is not dependent on the "*unwritten law*"; indeed, it is fair to characterise it as a consumer protection provision, the purpose of which was to create a norm of behaviour which was an extension of, and not constrained by, seemingly analogous causes of action under the general law or in equity.[10]

22. Subject to one matter, the Court is not limited in the matters to which it may have regard, although Parliament saw fit expressly to set out a number of matters to which

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10 See *Tonto Home Loans Australia Pty Ltd v Tavares* (2011) 15 BPR 29,699; [2011] NSWCA 389 at [291]; *Director of Consumer Affairs Victoria v Scully* (2013) 303 ALR 168 at 177 [29]-[30]; [2013] VSCA 292.

the Court "*may*" have regard, one of which – s 12CB(2)(b)[11] – is whether the consumer was "*required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier*". That consideration is of obvious significance where the question relates to a contractual condition requiring payment of an amount upon breach of contract. The Chief Justice did not expressly refer to s 12CB(2)(b), but he considered that the circumstances required to be considered for the purposes of determining whether the respondent had contravened s 12CB included "*an assessment of the legitimacy of the fee from the perspective of the bank's business*" (FC [330]), and that the appellants were required to demonstrate that the fees were exorbitant "*from any reasonable perspective*" (FC [334]).

23. The requirement so imposed, however, differs from and is more favourable to the supplier than that provided for by s 12CB(2)(b). It was an erroneous test to apply.

24. Further s 12CB(4)(a) required that in determining whether there had been a contravention of s 12CB(1), regard *must not* be had "to *any circumstances that were not reasonably foreseeable at the time of the alleged contravention*".[12]

25. The Chief Justice's reasons do not, with respect, appear to have appreciated the limitation for which s 12CB(4)(a) provided. His Honour did not refer to it, and the terms of s 12CB(4)(a) made it in any event inappropriate to be relying solely on evidence looking to the position as at the time of entry into the contract, and ignoring evidence looking at the position as at the time of each breach.

26. The essence of his Honour's analysis was that because two perspectives were available, one of which was that of the respondent (as reflected in Mr Inglis' evidence), the appellants could not succeed: FC [331]-[333].

27. It followed, however, from the express words of s 12CB(4)(a), that it could not be the case that the Court could consider the bank's "*perspective*" to the extent it included circumstances that were not reasonably foreseeable as at the time of breach, and it could not be the case that the appellants had to show the fees were exorbitant from any "*reasonable perspective*" if such a perspective were not similarly limited. Moreover,

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11 Section 8(2)(b) of the FTA is in the same terms, so far as the proscription on unconscionable conduct in connexion with the supply of services for personal, household or domestic purposes in s 8 of the FTA is concerned.

12 Section 8(4)(a) of the FTA is in the same terms.

the "*legitimate interest*" of the respondent (for the purposes of s 12CB(2)) could not be expanded by reference to matters which were not reasonably foreseeable.

28. By relying upon the existence of Mr Inglis' evidence as one "*reasonable perspective*" which needed to be taken into account (and part of the "*legitimate interest*" of the respondent), the Chief Justice erred by taking into account matters not permitted to be considered by reason of s 12CB(4)(a).

29. Mr Inglis' opinion was not in any way tempered by notions of reasonable foreseeability, but rather was expressed in terms of "*costs that may have been incurred*" and the "*maximum amount of costs that ANZ could conceivably have incurred*" as a result of a late payment event without any particular consideration of whether the incurrence of costs of this kind, or magnitude, was reasonably foreseeable if the appellants were to pay late. His evidence was directed to ascertaining the "*maximum conceivable loss*", a notion that the respondent contended to be relevant to the Penalties Claim and which it contended was unconnected to notions of reasonable foreseeability. Indeed, the s 12CB(4) limitation provides powerful support for why Mr Regan's evidence as to the actual damage incrementally resulting to the respondent by reason of the first appellant's late payments was the proper approach and the inquiry required by s 12CB.

30. The Chief Justice went on to make some remarks about what would follow if Mr Regan's evidence was "*the only appropriate assessment of ANZ's legitimate interest in the exception fee events*" (FC [338]-[339]), but that passage of his Honour's judgment is, with respect, difficult to follow. His Honour appears to be saying that, if that were the case, the appellants would have succeeded on the Penalty Claims in respect of the late payment fees. In the next paragraph, however, he moves to consider "*the other fees* [which] *were not payable upon breach*" (FC [340]ff) without, apparently, concluding what would have been the result for the Statutory Claims. It is hard to avoid the conclusion that the gravamen of his Honour's reasoning was that the fee did protect the respondent's "legitimate interest" because that interest included the "*maximum conceivable loss*" assessed by Mr Inglis (FC [332]-[334]).

31. It is unclear whether the Full Court even considered it was dealing with late payment fees (although it did refer to them in passing in the context of its consideration of statutory unconscionability), but it certainly did not refer to the distinction between

them and the other fees. What follows is made on the (perhaps large) assumption that the Full Court did make relevant findings concerning the applicability of the statutory regimes to late payment fees.

32. In applying s 12CB to late payment fees, the proper response to the matter referred to in s 12CB(2)(b) – given the late payment fee was charged at an amount which was higher than the reasonably foreseeable loss from any late payment by the first appellant – was to conclude that the late payment fee was not reasonably necessary for the protection of the legitimate interests of the respondent. The Full Court erred in not so finding.

33. Because the Full Court failed to find there was any disparity between the level of the late payment fee and the legitimate interest of the respondent to be protected, it did not go on to assess whether that disparity meant that charging such a fee was "unconscionable" having regard to values, norms and community expectations (which can develop and change over time).[13] There was relevant evidence tendered going to what community values, norms and expectations were (and the respondent's awareness of the extent to which its fees accorded with those values, norms and expectations), but the Full Court made no reference to any of it. This evidence indicated that:

(a) the respondent knew that its exception fees were not set at an amount "*limited to cost recovery only*",[14] and that while consumers were prepared to pay for services they received, but considered that the fee levels did not reflect this;[15]

(b) to the respondent's knowledge, the Australian Bankers' Association had commissioned a review of the Code of Banking Practice in late 2007 which had noted that exception fees were of particular concern to consumers and regulators, particularly the issue of whether amounts charged were disproportionate to the cost to the banks;[16]

(c) there was by 2008 legislative interest at both a Commonwealth[17] and Victorian[18] level in regulating exception fees, most importantly, by limiting them to cost

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13 *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90 at [23], and see Middleton J, FC [403].

14 See J Annex 4 [19], [33], [52]; see also Exh 33 pp 68, 77, 180, 250.

15 See J Annex 4 [1], [35], [67]-[68].

16 See J Annex 4 [16], referring to the *Review of the Code of Banking Practice, Final Report, December 2008,* page 98, Exh 33, p 780.

17 See J Annex 4, [14]. On 14 February 2008, the *Australian Securities and Investments Commission (Fair Bank and Credit Card Fees) Amendment Bill 2008* was introduced to the Senate. The core of the bill was

recovery only. The respondent was conscious of these things (and indeed of the potential impact of "unfair" terms legislation), but set the late payment fees by reference to what it could get away with in the marketplace, and in order to preserve as much revenue as possible: see J [127(6)] and Annex 4 [1], [13], [62], [65].

34. As the background facts make clear, the late payment fees were unilaterally set by the respondent in the context of a standard form consumer contract which was not open to negotiation by a customer. Such contracts are very common in the contemporary marketplace. A consumer such as the first appellant had no practical option but to accept the inclusion of a late payment fee with penal characteristics in the terms governing his credit card at whatever level the respondent chose to set it, if the consumer wanted to have the respondent's credit card. The potential for a party in the respondent's position to profit (and profit significantly) from stipulating sums payable on minor breaches of contract is contrary to the policy of the law against sanctioning overcompensation.

35. The result of the Full Court's decision is that it was not unconscionable for the respondent to charge a late payment fee:

(a) which was not a price for any service being provided (but an amount payable upon breach of contract);

(b) which was not a genuine pre-estimate of loss agreed between the parties (on any ordinary understanding of those words);

(c) was intended to secure the performance by the first appellant of his contractual obligation to make timeous payment of monies borrowed; and

(d) which resulted in windfall gains to the respondent by reason of the disparity between the level of the late payment fee and the actual loss sustained by the respondent by reason of the late payments of the first appellant.

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to prohibit a 'default charge' which was not "*at or below a genuine pre-estimate of the damage likely to be suffered by the financial service provider resulting from the consumer default*" (proposed s 12FA), and to enable ASIC to determine a valid "default charge" which was a genuine pre-estimate of the additional administrative costs that might reasonably be expected to have resulted from the default (proposed s 12FB(5)(a)).

18 The Victorian legislation being considered was what became the *Fair Trading and Other Acts Amendment Act 2009* (Vic), which commenced on 11 June 2009. Its effect was to apply unfair terms legislation to consumer credit contracts.

36. In all the circumstances it was unconscionable, in terms of s 12CB, for the respondent to grant itself power within the contractual terms to levy consumers such as the first appellant with a late payment fee with such characteristics. The inclusion of the fee proceeded directly from the inequality of bargaining power.

Unjust transactions

37. The provisions of the National Credit Code had many similarities with the provisions of the ASIC Act to which reference has been made. The statute defined "unjust" to include "*unconscionable, harsh, or oppressive*". Moreover, and in particular, s 76(2)(e) was the equivalent of s 12CB(2)(b), and s 76(4) was similar to s 12CB(4)(a), prohibiting the Court from considering "*injustice arising from circumstances that were not reasonably foreseeable when the contract, mortgage or guarantee was entered into or changed*".

38. Section 76(4) is expressed somewhat differently from s 12CB(4)(a), in the sense that it looks at the circumstances at the time of entry into the contract, rather than at the time of breach, but no different result should be arrived at. The point is that the injustice complained of arose from circumstances that were reasonably foreseeable (namely that the actual loss to the respondent arising from late payment was much less than the late payment fee). By contrast a consideration of the "*maximum conceivable loss*" (necessarily incorporating loss which was not *reasonably* foreseeable at the time of contract) involves seeking to refute the prima facie unjustness of the transaction by reference to matters which ought not, by reason of s 76(2)(e), be considered. If a consumer is not entitled to raise unforeseeable consequences as a basis for setting aside the transaction, it is equally true that the finance provider should not be entitled to raise unforeseeable consequences to avoid what would otherwise be the result.

39. The Full Court, with respect, really did not grapple with the appellants' claims that the late payment fees were "unjust transactions". Its consideration of s 76 focussed on the proposition that the fee was a "price" which could be avoided by the customer "*keeping to her or his contractual limits*" (FC [358]-[359]). Such language was not apposite to the late payment fees. The late payment fees had a character fundamentally different from the other fees then under consideration, and reasoning similar to that set out in paragraphs 28 to 36 above ought to have led to the conclusion that the provisions

stipulating late payment fees was an "unjust" transaction in the relevant sense. The transaction was at least oppressive, for the reasons set out especially in paragraph 35.

Unfair contractual terms

40. The unfair contractual terms regime applicable to the first appellant was expressed differently again. An "unfair term" is simply one which "*causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer*" (FTA, s 32W). The statute at relevant times did not refer expressly to the legitimate interests of the party contracting with the consumer (although its current equivalent does).[19] Nor did Part 2B contain a provision equivalent to s 12CB(4)(a) of the ASIC Act.

41. An unfair term in a contract is void: s 32Y.

42. For the purposes of answering the statutory inquiry as to whether a term is "unfair" within the meaning of s 32W, the Court may consider any factor, including whether the term has an object or effect referred to in s 32X. One such object or effect is s 32X(c), "*penalising the consumer but not the supplier for a breach ... of the contract*". (At an earlier point (prior to 2009), Part 2B of the FTA also required it to be shown that the term was contrary to the requirements of good faith, but this criterion was removed in 2010.)

43. Again, it is submitted that the Full Court did not really deal with the first appellant's claims that the late payment fees were "unfair terms", nor did it give any consideration to how s 32W applied to sums exacted upon breach of contract. Its consideration of s 32W was limited to the proposition that the fee could be avoided by the customer "*keeping to her or his contractual limits*" (FC [358]), a form of words referring to concepts irrelevant to the late payment fees.

44. Once it is appreciated (which the Full Court did not) that the provision enabling levying of the late payment fee was prima facie penal, it is, with respect, necessarily a term which is at least very likely to cause an imbalance of the kind referred to in s 32W. There is an imbalance because the supplier is put in a situation where it can profit from breaches of contract by the consumer without any quid pro quo. The

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19 Section 24(1)(b) of the ACL adds a new criterion to the two which were present in s 32W at the relevant time, namely that the term "*is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term*".

significance of the imbalance is demonstrated by the lack of any meaningful relationship between the amount of the late payment fee and the reasonably foreseeable loss which would result to the respondent from late payment.

Concluding matters

45. The failures of the Full Court to appreciate the basic character of what it was dealing with (in circumstances where the primary Judge had not dealt with application of the statutes to the late payment fees because her Honour found them to be penalties), means that the proper order is that the matter ought be remitted to the Full Court for rehearing, having regard to the decision of this Court.

10 **PART VII: Relevant Provisions**

46. This appeal concerns the statutes or regulations referred to in paragraph 8 and 9 above, namely:

    (a) *Australian Securities and Investments Commission Act 2001* (Cth), s 12CB (as in force prior to, and after 1 January 2011);

    (b) *Fair Trading Act 1999* (Vic), s 8 and Part 2B (as in force prior to, and after 11 June 2009);

    (c) section 76 of the *National Credit Code*, in force pursuant to the *National Consumer Credit Protection Act 2009* (Cth), which came into force on 1 July 2009 to replace the *Uniform Consumer Credit Code*;

20 (d) *Australian Consumer Law,* Pt 2-2 and 2-3 (current).

47. See the List of Authorities filed with these Submissions, and attached as an Annexure.

PART VIII: Orders Sought

48. The appellants seek the orders set out in the Notice of Appeal.

PART IX: Estimate

49. The appellants' estimate is that 5 hours will be required for the presentation of their oral argument in this matter (together with their oral argument in M220 of 2015).

Dated: 16 October 2015

D.F. Jackson QC
T: (02) 9151 2009
F: (02) 9233 1850
jacksonqc@newchambers.com.au

M.B.J. Lee SC
T: (02) 9151 2201
F: (02) 9335 3500
mbjlee@level22.com.au

W.A.D. Edwards
T: (02) 9151 2216
F: (02) 9335 3500
edwards@level22.com.au