IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY

No M220 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' REPLY

PART I : Certification re Internet Publication

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

PART II: Argument on Reply

Facts

2. **Re RS [6] and [11]**. While it is true that the applicable interest rate was not *increased* if there was a late payment, the material point is that the respondent was compensated by interest (at a high rate) for the non-timeous payment of the sums owing. Given that interest was not charged if payment was made of the full closing balance by the due date, if indeed late payment (by even a day) did increase the credit risk, the fact that interest came to be charged on the amount equal to the minimum monthly payment if it was not made on time did represent, in practical terms, an increase in the money payable
30 to the respondent associated with any increased credit risk. The late payment fee was, of course, charged in addition to that interest. And interest was payable on the late payment fee until it too was paid.

---

20 November 2015

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)

3. **Re RS [12]**. The trial judge did not find that late payments caused the respondent to incur the additional costs in the three categories claimed by the respondent. Her Honour found that the loss or damage was no more than $5.50, though in most cases it was in fact assessed as $0.50 (J Annex 3 (column entitled "Finding"): see AS [11]), and rejected loss provisions and increases in the cost of regulatory capital, as well as most aspects of the operational costs claimed by the respondent. The Full Court did not find that late payments caused the respondent to actually incur additional costs in those three categories either. As FC [162], [164], [169] and [170] make clear, the Chief Justice was considering whether these things were part of the "*legitimate business interest*" of the respondent which the Full Court considered to be an aspect of applying the law of penalties. The Full Court made no finding as to whether these categories of costs could be characterised as having been caused by a breach of contract so as to be legally compensable. That is the gravamen of Appeal Grounds 2, 3 and 4(b).

Costs v damages

4. **Re RS [40]-[42]**. It remains the case that no decided case can be identified (and none is identified in the RS) which has found that costs of the kind claimed by the respondent are legally compensable as damages.[1] Nor do first principles assist the respondent:
   (a) as to the first rule in *Hadley v Baxendale* – which depends partly upon an assessment of what a reasonable person *in the position of the contract breaker* would have understood[2] – a consumer who contracts with a bank agreeing to pay interest on amounts paid late, would not have appreciated that loss provisions (being an internal accounting matter) might occur on late payment; or that lost profits associated with increases in regulatory capital ("*loss of the additional return*": RS [12(b)]) might occur on late payment in circumstances where interest continued to be charged at 12.24% on the outstanding amount. There was no reference in the standard terms and conditions governing the first appellant's credit card accounts to

---

1 It has been observed that there are few cases where damages for late payment of debts has been considered, other than in the context of debts which should have been paid before a currency devaluation, or fluctuation: see C. Proctor, 'Changes in Monetary Values and the Assessment of Damages', in Saidov, D. and Cunnington, R. (eds), *Contract Damages: Domestic and International Perspectives* (2008), Hart Publishing at 487. Where such claims have been successful it has generally been on account of evidence (in the form of provisions of the contract) showing that the parties had turned their mind to the impact of exchange losses (e.g. *Aruna Mills Ltd v Dhanrajmal Gobindram* [1968] 1 QB 655) or evidence that the contract breaker knew the business of the aggrieved party was being run in a foreign currency (e.g. *Ozalid Group (Export) Ltd v African Continental Bank Ltd* [1979] 2 Lloyd's Rep 231 (Comm)).

2 See *C Czarnikow Ltd v Koufos* [1969] 1 AC 350 at 385 per Lord Reid.

such matters. There was reference to what might be termed the "collections costs".[3] These, together with any lost interest and enforcement costs would be the reasonably foreseeable measure of probable[4] loss in the contemplation of the parties (one of whom was an ordinary retail customer) at the time of contract. There was no evidence which would support the proposition that the parties objectively contemplated anything more. This is a type of consumer contract which is heavily regulated and to which the disclosure requirements of the National Credit Code applied. In any event, the respondent's contention that "*financial costs*" would be foreseeable is expressed far too generally, and amounts to little more than saying that "economic loss" would have been reasonably foreseeable. This is not a satisfactory process of reasoning.[5]

(b) as to the second rule in *Hadley v Baxendale*, given it is based upon actual knowledge, the failure of the respondent to cross-examine the first appellant as to his knowledge of these things ought be determinative. The submission in RS [42] that the existence of the impugned penalty clause means that the second limb is satisfied is circular and lacks merit.

The bounds of the penalty doctrine

5. **Re RS [17].** The appellants have never suggested that *Dunlop* is to be treated as a code (see AS [19]). *Dunlop* does, however, provide a number of simple rules which are applicable to simple cases (of which the present is one): see AS [19]-[27], [43].

6. **Re RS [27], [46]-[49].** The respondent refers to the penalties doctrine as being connected somehow to an assessment of what is "commercially justifiable", or the "legitimate interest" of the innocent party, and to the recent decision of the Supreme Court of the United Kingdom in *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67. As to this:

(a) whether or not framing the inquiry in this way is consistent with the jurisprudence of this Court is very much open to debate, but it was not suggested by anyone in that

---

3 See J Annex 2, [5(8)]. Clause 29 provided that on "Default", the account holder was liable to be debited enforcement costs including "*[a]ny reasonable amount reasonably incurred or expended by ANZ in exercising its rights in relation to the credit card account arising from any default (including expenses incurred by the use of ANZ's staff and facilities)*". See also J [155].

4 There is a difference between "probable loss" (the *Hadley v Baxendale* measure) and "possible loss" (the lesser standard applicable under other rules of remoteness, such as the United Nations Convention on Contracts for the International Sale of Goods, Art 74). See *C Czarnikow Ltd v Koufos* [1969] 1 AC 350 at 390 per Lord Reid.

5 See the discussion by Heerey J in *Garraway Metals Pty Ltd v Comalco Aluminium Ltd* (1993) 114 ALR 118 at 133-4.

case that *Dunlop* had ceased to have relevance to "*straightforward*" cases.[6] Indeed, the contrary is the case and in such simple cases, compensation measured by damages will be the only "legitimate interest" which requires consideration;

(b) the respondent has not hitherto contested these proceedings on the basis that it had a legitimate commercial interest beyond compensation for loss it asserted was referable to late payments, and its position appears not to have changed (see RS [13]). The entirety of its expert evidence was directed to that proposition. No evidence was called to support the proposition that the late payment fees were to be "justified" in some other way. There was no evidence, for example, of the kind which supported the findings made in *Dunlop* as to the commercial purpose of the clause (as referred to in *Cavendish* at [23]-[24]), or the kind of evidence which resulted in similar findings in the *ParkingEye* appeal (see *Cavendish* at [97]);

(c) what the Supreme Court was grappling with in *Cavendish* was characterised accurately by Lord Neuberger and Lord Sumption as a "price adjustment" clause (see [74]-[77]). In this sense, it has some conceptual similarity with the other exception fees litigated below (which are not pursued on appeal to this Court). It had nothing in common with the late payment fee.

7. **Re RS [30]-[33]**. Whether the expression "genuine covenanted pre-estimate of damage" is a description of legal characterisation or not, it is clearly relevant that the party which stipulated the impugned amount in its sole discretion did not do so (actually or "genuinely") by reference to a sum that would have been recoverable as damages (that being the interest it now claims it was protecting by the clause), and, together with the other matters relied upon by the trial judge, justified her Honour's finding that the fee was a penalty.

The Limitation Act (Notice of Contention)

8. **Re RS [51]-[56]**. The respondent's argument as to the construction of s 27 of the *Limitation of Actions Act 1958* (Vic) (**Limitations Act**) ought be rejected.

(a) There is no textual basis for reading an implication into s 27 to limit the ambit of the word "*mistake*" to mistake of fact only, and no contextual basis to support the contention either. The Court should simply apply the statutory language.[7] As a

---

6 See *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67 at [32] per Lords Neuberger and Sumption.

7 As it did in rejecting an analogous contention in *Deming No 456 Pty Ltd v Brisbane Unit Development Corporation Pty Ltd* (1983) 155 CLR 129 at 151.

matter of history, it is also not the case that at the time of enactment the phrase "relief from the consequences of a mistake" was understood to be confined only to mistake of fact. The legislative history[8] suggests that the intention was to make applicable to "*all cases*" an equitable principle which was equally applicable to mistakes of fact and those of law (given that, as this Court pointed out in *David Securities* there was no firm distinction in the equitable jurisdiction between the two).[9]

(b) Given the Limitation Act specifically adopted the equitable rule, it would be surprising if it did so on the premise that it only applied to common law actions. Moreover, it would not promote coherency in statutory construction to proceed on the basis that the statutory bar imposed by the Limitation Act is ambulatory so as to extend to new causes of action (such as restitution at law based on mistake of law), yet hold that the exception to it in s 27 is fixed at a historical point in time.

(c) The perceived "*undesirable consequences*" referred to in RS [57] are not so much consequences of the construction of s 27 which was approved by the Full Court (following *Kleinwort Benson*[10]) as consequences of claims based on mistake of law itself. Should those consequences be thought so undesirable as to require review, that is a matter for Parliament.[11] Most of those consequences depend, in any event, upon factual contest – not every claimant will be able to prove the requirements of s 27 of the Limitation Act.

Dated: 20 November 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

---

8 Section 27 of the Limitations Act was enacted in Victoria in 1955, copied from s 26 of the *Limitation Act 1939* (UK), which was the product of the report of the Law Revision Committee, 'Fifth Interim Report (Statutes of Limitation)' (1936) (Cmnd. 5334); see at pp 31-32.

9 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 370-6, especially at 374. See also Heydon, J.D., Leeming, M.J., and Turner, P.G., *Meagher, Gummow & Lehane's Equity Doctrines and Remedies* (5th ed) at [14-015]. See also the following article cited by French CJ in *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560 at 570 [6] (fn 12) ('Relief Under Mistakes of Law' (1907) 7 Columbia Law Review 279).

10 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 388-9 per Lord Goff of Chieveley.

11 It may be noted that since *Kleinwort Benson* was decided more than 15 years ago, the UK legislature has not seen fit to amend s 32 (otherwise than in relation to payments of tax): *Finance Act 2004* (UK), s 320; *Finance Act 2007* (UK), s 107.