ANDREWS & ORS v AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (M48/2012)

Court from which cause removed: Full Court of the Federal Court of Australia

Date cause removed: 11 May 2012

The applicants are customers of the respondent bank ("ANZ"), who have been charged a variety of fees for overdrafts, overdrawn accounts, dishonour fees and overlimit credit card accounts ("the exception fees"). They brought a representative proceeding in the Federal Court, on their own behalf and on behalf of approximately 38,000 group members, seeking various forms of relief. The applicants claimed: that each of the exception fees was a penalty and was out of all proportion, or unrelated to, the likely damage sustained by the respondent; that the imposition of the exception fees was unconscionable, in contravention of the *Australian Securities and Investments Commission Act* 2001 (Cth), the *Trade Practices Act* 1974 (Cth) and the *Fair Trading Act* 1999 (Vic) ("the FTA"); that the contracts under which the exception fees were imposed in relation to personal credit card accounts were unjust transactions in contravention of the former *Uniform Consumer Credit Code* and the *National Credit Code*; and that the terms imposing the exception fees in relation to personal saving and transaction accounts and personal credit card accounts were unfair terms, and therefore void, under the FTA.

On 5 May 2011 the primary judge (Gordon J) made orders for the determination of separate questions in relation to seventeen exception fees. The questions were, in substance:

(a) whether the fee was imposed upon the relevant applicant in circumstances where the applicant had committed a breach of his or her contract with the respondent;
(b) alternatively, whether the fee was imposed upon the relevant applicant in circumstances that fell within what the applicants contend is the true scope of the doctrine of penalties; and
(c) in light of the answers to (a) and (b), whether the fee is capable of being characterised as a penalty by reason of that fact.

Gordon J delivered judgment in relation to the separate questions on 5 December 2011. Her Honour found that the doctrine of penalties was limited to circumstances of breach of a contractual obligation, and on the proper construction of the terms and conditions imposed on the applicants by the ANZ, only the late payment fees on personal and business credit card accounts were imposed in circumstances where the applicant had committed a breach of his or her contract with the ANZ and were therefore capable of being characterised as a penalty.

The applicants filed an application for leave to appeal to the Full Court of the Federal Court on 21 December 2011. They sought removal of that application (and, if leave be granted, the appeal) into this Court on the grounds that it raised important issues regarding the true scope of the law of penalties in Australia, which may have significant implications beyond the scope of this proceeding. They noted that the Court of Appeal of New South Wales, in *Interstar Wholesale Finance Pty Ltd v Integral Home Loans Pty Ltd* (2008) 257 ALR 292 felt constrained by existing authority to limit the

doctrine of penalties to circumstances of breach of contract. This view has subsequently been endorsed by the Court of Appeal of Victoria and the Full Court of the Supreme Court of South Australia.

On 11 May 2102 this Court ordered that so much of the cause pending in the Federal Court as concerned the question of the scope of the equitable jurisdiction to relieve against penalties and the question of whether a person can only be relieved against a penalty if it becomes payable for a breach of contract, be removed into this Court.

The issues to be determined by this Court include:

- Whether the ”jurisdiction” in respect of penalties is available only in law or remains alive in equity, and if so, what is its scope and doctrinal basis.

- Whether in law or equity, a party can *only* be relieved against a penalty if it becomes payable for a *breach of contract*, a limitation expressed by the House of Lords in *Export Credit Guarantee Department v Universal Oil Products Co* [1983] 2 All ER 205; [1983] 1 WLR 399.