

## Contract Penalty / Liquidated Damages Law - ? Resolution ?

The July 2016 decision by High Court of Australia's (HCA) in **Paciocco v Australia and New Zealand Banking Group Limited** [2016] HCA 28 (27 July 2016) (<http://www.austlii.edu.au/au/cases/cth/HCA/2016/28.html>), will hopefully end the tortuous litigious path of issues relating to whether certain bank fees do or do not amount to unenforceable contractual penalties.

In a majority decision, HCA, after a very detailed analysis of the doctrine of penalties and its history, both in equity and at common law, dismissed two appeals by the bank customer to do with:-

1. whether late payment fees charged by the bank on consumer credit card accounts were unenforceable contractual penalties; and
2. whether those fees were irrecoverable as in breach of statutory prohibitions against unconscionable conduct unjust transactions and unfair contract terms.

It is now clear from the decision that the Law does not require a demonstrable arithmetic link between the fee agreed to be paid upon certain events, such as late payment, and the "loss" to which it is intended to compensate the payee (the bank in this case).

Submissions by the customer that various amounts payable on happening of certain events, primarily late payment, were unenforceable as contractual penalties were rejected

Arguments to do with inequality of bargaining power between banks and customers were not seen as relevant to the issue of whether the particular agreed payment was a penalty

Justices of the HCA took the time to note but reject the suggestion made in a UK case that the law of contractual penalties in Australia and the United Kingdom was now going in different directions.

In the case HCA looked at and considered as relevant the sundry operating and administrative costs of the bank as background overhead costs to be borne and provided for, in part, by bank fees such as those in question. Those costs were significant but were not, of themselves, readily referable to a particular customer.

HCA decided, consistently with lots of former case law, that where "damages" are very hard to calculate, an agreed amount will be enforceable unless extraordinary or unconscionable.

The case, of course, is relevant beyond the bank situation. The principles apply in any contractual arrangement identified and agreed events will, upon their occurrence trigger a liability to pay agreed "fees", "payments" and/or "charges".

Please feel free to contact me if you consider the above may be of relevance to your contractual operations.



Gregory Ross

<http://www.eakin.com.au/our-team/partners/34-gregory-ross.html>