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FROM THE BACK

August 2016

FOREIGN RESIDENT CAPITAL GAINS WITHHOLDING REGIME



Sean Gomes will be presenting our latest breakfast seminar on the Foreign Resident Capital Gains Withholding Regime on 24 August 2016. The details are as follows:

Date: 24 August 2016 at 7:30am

Venue: The Western Australian Club, Level 11, 12 St Georges Terrace, Perth WA 6000

For more information, or if you are interested in attending, please contact Leaker Partners at reception@leakerpartners.com.au or on (08) 9324 8590.

BANK FEES NOT PENALTIES – HIGH COURT HAS THE FINAL SAY

- The High Court has recently given its long-awaited opinion on the legality of bank fees in *Paciocco v Australia New Zealand Banking Group* [2016] HCA 28.
- Case involved a class action against banks for charging exception fees, including late fees
- The High Court found in favour of the banks, holding that they were entitled to protect their legitimate business interests by charging fees.

What has happened?

The High Court of Australia has recently handed down its decision in *Paciocco v Australia and New Zealand Banking Group* [2016] HCA 28. The Court dismissed the class action against ANZ bank, entitling banks to charge fees, including late fees, in protection of their legitimate business interests.

Where did it all start?

Mr Paciocco and his company held credit card, savings and business deposit accounts with ANZ Bank. ANZ had charged Mr Paciocco and his company a whole slew of 'Exception fees', including late payment fees, overlimit fees, honour and dishonour fees and non-payment fees. A class action was brought by Mr Paciocco on behalf of ANZ customers, arguing that these amounted to illegal penalties.

The position of penalties in contracts

The position of penalty clauses in contracts is based on a judgment that is now over a century old. In *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79, the UK House of Lords held that a clause that provides for a liquidated sum to be paid for breach of the contract cannot be a penalty.



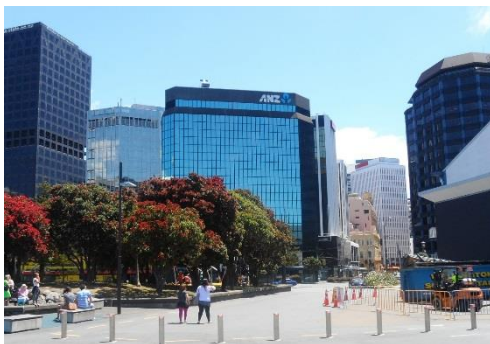
A liquidated sum is the specified and certain amount payable by a party who has breached a term of a contract to the other party who has suffered loss as a result. The liquidated sum must be a genuine pre-estimate of the damage (loss) suffered as a result of the breach.

It will amount to a penalty if the amount required to be paid is extravagant and unconscionable in comparison with the greatest loss that could conceivably be proved to have followed from the breach. If the clause is deemed a penalty, it will be invalid and unenforceable under contract law. This precedent was the basis of the lawsuit against the bank.

What did the courts decide?

At the first court to hear the matter, the Federal Court held that only the late payment fees charged by the bank on credit card facilities could be considered penalties. However, this would have opened the floodgates and meant the bank would be liable to reimburse thousands of customers that had paid late payment fees – potentially totalling hundreds of millions of dollars for all the banks combined. ANZ appealed to the Full Court of the Federal Court, who upheld the appeal and overturned the earlier decision.

Mr Paciocco appealed to the High Court. A majority of the High Court held that it could not be considered that the late payment fees were a disproportionate charge against the bank's customers compared to the greatest loss that could conceivably arise from a late payment.



They determined that the appropriate test is to determine whether such a sum is 'out of all proportion' to the interests of the party to be protected. These include business and financial interests. Importantly, the test is not restricted to losses resulting directly from the breach. That is, the bank could take into consideration more than merely the costs directly caused by the default (which would only have amounted to about \$3 at most).

The bank's legitimate interests could also extend to its interests in maintaining or enhancing its revenue stream in order to make a profit. The late payments affected the bank's interests in terms of operational costs, loss provisioning and increases in regulatory capital costs. Considering the total loss based on such a broad interpretation, the fees were not out of all proportion to the potential loss. The loss was greater than the fee imposed and therefore the fee was not a penalty.

The decision casts significant doubt over the probabilities of success of other penalties class actions. It is likely that similar class actions against the other major banks will be abandoned.

How does the judgment affect me?

The judgment is likely to have broad ramifications to contract law, particularly in relation to liquidated damages clauses in contracts. It makes it more difficult to challenge liquidated damages clauses, because of the wide range of matters considered in determining the non-breaching party's loss and the extent of costs that can be justified. If you enter into a supply contract, it may be worth looking at the liquidated damages clause and seeking to negotiate the clause if necessary before signing the contract.

Leaker Partners advises on contracts and commercial law generally. If you would like specific advice on how the judgment may affect you, please contact us on (08) 9324 8590 or info@leakerpartners.com.au