

COURT RESTRICTS READING OF BANK'S 'LIMITING' CLAUSE AND HOLDS TERMS AND CONDITIONS NOT VALIDLY INCORPORATED INTO THE PARTIES' CONTRACT

22 February 2017 | Australia

Legal Briefings - By **Andrew Eastwood** and **Simone Fletcher**

The case of *National Australia Bank v Dionys as Trustee for the Angel Family Trust* [2016] NSWCA 242 concerned the incorporation of terms and conditions when establishing a bank account.

The respondent, Ms Dionys, had opened a Business Cheque Account with the bank for the purpose of depositing funds from a divorce settlement. In the course of opening the account, the respondent also signed an Account Authority Card that recorded her as the only person who could authorise transactions on the account. A week after the account was opened, nearly all of the funds in the account were transferred to a third party. This third party had also been added as a second authorised signatory on the account.

At trial, the primary judge had found that both withdrawals had occurred without Ms Dionys' authority and ordered judgment against the bank. An issue on appeal was whether the primary judge should have held that the terms and conditions of the account precluded Ms Dionys' claim. In particular, because Ms Dionys had failed to check her bank statement and/or notify the bank promptly of the unauthorised withdrawals contrary to cl 5.18 of the relevant terms and conditions which provided:

You must check your statements. Without limiting any part of these terms and conditions for your account, you must promptly review your statement of account to check for and tell NAB of any transaction recorded on your statement that you suspect for any reason that you did not authorise or for which the information recorded is incorrect. If you do not, then subject to any applicable law, you do not have any right to make a claim against NAB in respect of such a matter (for example, a forged cheque).

The Court of Appeal reasoned that the terms had not been validly incorporated into the contract between the bank and Ms Dionys. This was because:

- First, the terms and conditions were only delivered to Ms Dionys after she had signed the Authority Card.
- Second, the signing of the Authority Card had concluded the agreement between Ms Dionys and the bank and it could not be established that the signing of the booklet containing the terms and conditions was a necessary precondition to the finalisation of the agreement.

Accordingly, the Court held that it was not open to the bank to unilaterally introduce new terms and conditions into the agreement after Ms Dionys signed the Authority Card. In the alternative, even if the agreement was not finalised at the signing of the Authority Card, the Court considered that the bank would have had to specifically draw Ms Dionys' attention to cl 5.18 due to its limiting nature which made it 'unusual'.

The decision is an important reminder for banks to follow correct procedure when opening new accounts. The bank's position in this case would have been improved had it arranged for the customer to sign and acknowledge the receipt of the booklet containing the terms and conditions at the opening of a new account, and taken reasonable steps to draw the customer's attention to any 'unusual' or 'limiting terms'.

This article is part of a series highlighting a six judgments in the retail banking sector delivered by Australian courts last year covering a range of issues arising in banks' engagement with their clients, contractual arrangements and the application of standard terms and conditions. The cases provide a number of cautions for banks seeking to navigate through various traps. [Click here](#) to view the full list.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



**ANDREW
EASTWOOD**
PARTNER, SYDNEY

+61 2 9225 5442
Andrew.Eastwood@hsf.com

LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2021

**SUBSCRIBE TO STAY UP-TO-DATE WITH LATEST THINKING, BLOGS, EVENTS, AND
MORE**

Close

© HERBERT SMITH FREEHILLS LLP 2021