

HIGH COURT CONSIDERS FEES NOT IN THE NATURE OF PENALTIES

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

Paciocco & Anor v Australia and New Zealand Banking Group Limited (2016) 90 ALJR 835 considered two key questions: first, whether provisions for various bank fees (e.g. for late payment) were unenforceable as penalties and, second, whether their inclusion in customer contracts contravened statutory provisions relating to unconscionable conduct, unjust and unfair contract terms.

In dismissing the appeal, the majority (French CJ and Kiefel, Gageler and Keane JJ; Nettle J in dissent) considered the commercial interests of the bank seeking to uphold the clause, including the recovery of operational costs, loss provisioning and increases in regulatory capital.

The majority reasoned that, although the fee imposed by the bank was greater than what could be recovered in a claim for damages, this did not (of itself) render the fee a penalty. A fee stipulated for payment on default may “*protect an interest that is different from, and greater than, an interest in compensation for loss caused directly by the breach of contract*”, provided that the fee charged is not out of proportion to the interests said to be damaged in the event of the default. Importantly, the bank’s admission that the late payment fees were not genuine pre-estimates of damage did not affect the characterisation of the fee. As such, the majority held that the contractual late payment fee was not used to ‘penalise’ customers for late payments. The majority also dismissed the appellant’s statutory claims regarding unconscionable and unfair conduct.

By clarifying the broad range of circumstances that can be taken into account when determining whether a fee is a penalty, the decision provides banks and other providers of financial services with increased confidence when including late payment fees within their credit card contracts. It is now unlikely that a Court will accept a challenge to payment default fees, unless the fees themselves are out of proportion to the losses suffered.

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.



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