

Article Information

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Late payment fees are not penalties as bank's total loss taken into account

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The High Court has given guidance on penalties in the high profile case of *Paciocco & Anor v Australia and New Zealand Banking Group Limited* [2016] HCA 28. **Partner, Ian Nathaniel** and **Senior Associate, Ben Hartley**, review and discuss.

At the crux of the appeal was whether late payment fees charged by ANZ on consumer credit card accounts were penalties and therefore prohibited. In a 4-1 decision, the majority held that the late payment fees were not penalties. A second appeal arguing that late payment fees contravened statutory prohibitions was also dismissed by the Court.

The dispute involved arguments about how the Bank could assess its loss when a customer failed to pay the minimum amount due on the credit card account each month. The customer's argument was that at most, the Bank could charge an amount that would restore the Bank to the position as if the customer had paid on time. That amount was assessed at no more than \$3.00 for each instance of late payment and anything in excess was to be interpreted as a punishment to the account holder. Yet that amount did not take into account the totality of the loss incurred by ANZ, merely the compensable loss to ANZ flowing from each breach of the stipulation for payment.

The majority agreed with the Full Federal Court and held that the compensable loss was not the full extent of the loss suffered or could be suffered by the Bank. Rather, as assessed by the Bank's independent expert, the Bank stood to incur additional costs including provision costs, regulatory capital costs and collection costs which all affected the legitimate interests of the Bank. Importantly, these costs were held to be in the commercial interests of the Bank and not wholly disproportionate to the late payment fee charged to the customer.

Interestingly, Keane J stated that the categories of costs above, whilst not being recoverable in an action for damages, did not alter the conclusion that they were in the legitimate interest of the Bank. Further, even though the late payment fees were not genuine pre-estimates of damage and even if the amount charged was found to be disproportionate to the actual loss suffered by the Bank, this did not automatically render the late payment fees penalties. The customer's acceptance of the credit card contract for the recovery of loss due to late payments was consistent with the lack of indicia of a penalty.

Clients should be aware that it is clear that under Australian law a stipulated sum may be a penalty even in the event that there is no breach of contract. However, the Court has left open the ability for businesses to include loss provision and regulatory costs in their late payment fees without attracting the penalty regime.