

[2013] HCATrans 133

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Brisbane

No B4 of 2013

B e t w e e n -

WENDY KELLAS-SHARPE

First Applicant

GOLDIWAY PTY LTD (ACN 075 755 074)

Second Applicant

OPM HOLDINGS QLD PTY LTD (ACN 118 505 641)

Third Applicant

and

PSAL LIMITED (ACN 118 825 120)

Respondent

Application for special leave to appeal

HAYNE J
KEANE J

TRANSCRIPT OF PROCEEDINGS

FROM CANBERRA BY VIDEO LINK TO BRISBANE

ON THURSDAY, 6 JUNE 2013, AT 11.49 AM

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MR A.J.H. MORRIS, QC: May it please the Court, I appear with my learned friend, **MR J.P. MURPHY**, for the applicants. (instructed by Porter Davies Lawyers)

MR D.A. SAVAGE, SC: If the Court pleases, I appear with my learned friend, **MR C.R. COULSEN**, for the respondent. (instructed by Michael Sing Lawyers)

HAYNE J: Yes, Mr Morris.

MR MORRIS: Your Honours, when this Court handed down its judgment in September last year in the matter of *Andrews v ANZ Bank*, it did what on one view had been lacking for almost a century since the House of Lords decision in *Dunlop*, and that is to provide a single, unifying and comprehensive statement of the penalty doctrine in a way which is capable of being applied in every case. One might suggest that there is a similarity with Wolfgang Mozart's *Requiem* in the sense that it is a work so far as it goes which is comprehensive and as near to perfection as one could get, but what it lacks - - -

HAYNE J: Dies Irae is about to start playing, Mr Morris, yes.

MR MORRIS: I hope not a requiem, your Honours. What it lacks is the fact that it is not finished. The job is not yet done because there is one area of the law relating to penalties which the Court did not address, and that is this anomaly – there is no other word which can be applied to it – that in the contracts in the nature of loan agreements, only in such contracts does the court give weight to form rather than substance, does the court apply a principle that if the punitive provision is treated as being the ordinary or standard condition and there is a concession if a party is in compliance, then the doctrine of penalties does not apply.

As long ago as 1916 in the article, which your Honours will see at item 7 in our authorities, the applicant's authorities, there was published in *The Law Quarterly Review* a critique of the unique rule applied to such contracts. I am not sure that I could state it more effectively than it is stated in that article at page 164 in our bundle of authorities where the learned author remarks:

> It is hard to see what real difference there is between 'you shall pay £5 per cent., if you pay punctually, but if you do not, you shall pay £6 per cent.', and 'you shall pay £6 per cent. *if you do not pay punctually*, but if you do, you shall pay £5 per cent.'; but as the learned Vinerian Professor of Law tells us –

that is a reference, of course, to Blackstone:

> the latter was deemed 'a conscientious, the former an unrighteous bargain' –

That article is useful also in that it traces how this anomaly came about and the learned author makes the point at page 425 that "at the close of the eighteenth century" this anomaly was "in a highly critical condition". Lord Northington - - -

HAYNE J: Let it be assumed, for the purposes of argument only, that these are matters upon which the Court could or should embark. Why would this be the case in which to do it in light of what is said at application book, page 23, paragraph [73] which says that the higher rate of interest was not "out of all proportion to the damage likely to be suffered", was not "extravagant and unconscionable", was not shown to be "not a genuine pre-estimate of the loss"?

MR MORRIS: That is certainly what the learned primary judge said, looking at the higher rate of interest by itself. But then later in the reasons for judgment, his Honour adverted to the fact that there was not just this higher rate of interest, but there was this higher rate of interest compounding at monthly rests. So that the combined effect of the higher interest rate and the compounding was to increase the effective interest rate to something of the order of 130 or more per cent per annum.

HAYNE J: Be it so, in light of the conclusion reached, of which your side still has the benefit, that the unconscionability provisions of statute are engaged to result in a particular outcome, why should this Court embark upon the waters that you would have us embark upon?

MR MORRIS: Well, your Honours, that is, if I may say so with the deepest respect, equivalent to saying since we got second prize the Court should not even consider whether we should have got first prize.

HAYNE J: I am suggesting you got first prize, Mr Morris. You got first prize because the rate was re-assessed according to the demands of conscience.

MR MORRIS: That is what occurred, rather than the effect of applying equitable principles and dispensing with the punitive provision altogether so that the moneylender would be entitled only to recover its actual loss, and that is the difference. Rather than substituting the court's view of what would have been a conscionable provision in the circumstances, equity would say, no, you go back to taws, if you have stipulated for a penalty you do not get that benefit and all you can get is the actual loss that you prove.

The actual loss proved in the present case, bearing in mind, your Honours - and I am not sure that this is sufficiently highlighted - bearing in mind that there were other provisions in the loan agreement entitling the moneylender to recover its out-of-pocket expenses, or some of its out-of-pocket expenses arising from the default, so the question then is, what loss has it suffered? The evidence at trial was that its actual cost of money was no more than 2 per cent per month. Its actual prospective profit had it, for example, lent the money to someone else who was able to repay, was no more than 2 per cent per month.

So there is an absolute ceiling on the amount which could have been claimed by way of damages for breach of the contract as 4 per cent per month, as compared with the rate of 7.5 per cent per month stipulated in the contract, or rate of 5 per cent per month which the learned primary judge considered could be justified as a conscionable rate. That is why, with the deepest respect - - -

KEANE J: So, Mr Morris, your approach to equitable principle would have us mending the bargain?

MR MORRIS: No, your Honours, not mending the bargain. That was the approach that resulted from the statutory remedy for unconscionability.

KEANE J: That is right.

MR MORRIS: Equity's approach would be to say, no, when you stipulate for something that is a penalty you do not get it. You do not get it at all and all you get is your actual loss.

KEANE J: Not the profit that your client promised?

MR MORRIS: Not that profit but the actual loss would include the profit that could have been obtained by lending the money elsewhere and that is why I say there are - - -

KEANE J: That does sound as if equity is mending the bargain.

MR MORRIS: It is mending the bargain only in the sense of deleting that which equity has always said cannot be obtained – a penalty. Taking that out of the equation and saying, but he who seeks equity must do it and you have to pay the actual damages, the actual loss, including, in this case, not only the cost of the money but also the profit which could have been made from lending the money to another borrower. I have the sense, in any event, that your Honours understand the nature of our submission. I am not sure I can usefully take it any further.

HAYNE J: Thank you very much, Mr Morris. We will not trouble you, Mr Savage.

In light of the declarations made at trial, the validity of neither of which is challenged, the applicant would enjoy insufficient prospects of disturbing the actual orders made in this matter to warrant a grant of special leave. Special leave to appeal is refused.

MR SAVAGE: Your Honours, we ask for costs.

HAYNE J: Can you resist costs, Mr Morris?

MR MORRIS: I cannot, your Honours.

HAYNE J: With costs.

AT 11.59 AM THE MATTER WAS CONCLUDED