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Article

Statutory demands and agreements to arbitrate

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A creditor ought not be allowed to avoid a statutory demand by belatedly serving a notice to arbitrate, unless the debt is genuinely disputed on substantial grounds. The New Zealand Courts have not yet been asked to decide whether the standard test of "substantial dispute" ought to be applied where any such dispute is the subject of an arbitration clause. When the issue does arise, the test should be the same regardless of whether the parties have agreed to submit disputes to arbitration.

There is overseas authority that suggests an application to wind up a company ought to be dismissed if the debtor can show there is a dispute in relation to the debt which is the subject of an arbitration agreement, provided the dispute is not being raised in abuse of the court's process.[1] In the United Kingdom, it is also necessary to show that the creditor has taken steps to begin an arbitration in accordance with the agreement.[2] In most New Zealand cases, this means serving a notice of dispute or notice to arbitrate.

However, these authorities arise in the context of applications to liquidate companies and are not universally accepted. While the United Kingdom, Malaysia and Singapore authorities favour dismissing applications to liquidate if these requirements are met, the Eastern Caribbean Court of Appeal refused to follow this line of authority because the need to establish that the debt is disputed on genuine and substantial grounds is "too firmly a party of BVI law".[3] The most recent Hong Kong judge to comment on the debate speaks firmly in favour of the traditional approach such that a debtor resisting a winding up petition must establish a bona fide dispute on substantial grounds, regardless of whether the debt is the subject of an arbitration clause.[4]

Whatever the overseas position to applications to liquidate a company, the traditional approach must be applied by the New Zealand courts in applications to set aside a statutory demand under s 290(4) of the Companies Act 1993 (CA). As a matter of statutory interpretation, the New Zealand courts cannot allow service of a notice to arbitrate to override the requirement that a creditor establish a genuine and substantial dispute that the debt is due, which is expressly mandated by s 290(4)(a).

The legislation

The relevant statutes in the context of applications to set aside statutory demands are the Arbitration Act 1996 (AA) and the CA. Section 9(1) and sch 1 art 8(1) of the AA provide:

> **9 Arbitration under other Acts**
>
> (1) Where a provision of this Act is inconsistent with a provision of any other enactment, that other enactment shall, to the extent of the inconsistency, prevail.
>
> **8 Arbitration agreement and substantive claim before court**
>
> (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting that party's first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative, or incapable of being performed, or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred.

Section 290(4) CA provides the court may grant an application to set aside a statutory demand if it is satisfied that:

(a) there is a substantial dispute whether or not the debt is owing or is due; or

(b) the company appears to have a counterclaim, set-off, or cross-demand and the amount specified in the demand less the amount of the counterclaim, set-off, or cross-demand is less than the prescribed amount; or

(c) the demand ought to be set aside on other grounds.

Section 290(4)(a) requires a substantial dispute to be established, but not proven, before the court will set aside a statutory demand. The courts have held that mere assertion is not enough.[5] A dispute must be shown to be a real and

1. *An An Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company)* [2020] SGCA 33.
2. *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2014] EWCA Civ 1575, [2015] 3 WLR 491.
3. *Jinpeng Group Ltd v Peak Hotels and Resorts Ltd* BVIHCMAP2014/0025 and BVIHCMAP2015/003.
4. *Re Asia Master Logistics Ltd* [2020] HKCFI 311; see also *Sit Kwong Lam v Petrolimex Singapore Pte Ltd* [2019] HKCA 1220, *But Ka Chon v Interactive Brokers LLC* [2019] 5 HKC 238, [2019] 4 HKLRD 85.
5. *Confident Trustee Ltd v Garden and Trees Ltd* [2017] NZCA 578 at [16].

not a fanciful or insubstantial dispute.[6] This is consistent with the policy behind the CA that the condition of the privilege of being a separate legal entity is that the company be able to pay its due debts.[7]

The New Zealand courts have not yet expressly addressed the question of whether an application to set aside a statutory demand is "a proceeding" to which sch 1 art 8 AA applies or the circumstances under which an application to set aside a statutory demand ought to be stayed and any dispute referred to arbitration. In particular, must a creditor asserting a debt is disputed establish a real and not a fanciful or insubstantial dispute before the application will be set aside, consistent with the established application of s 290(4) (the traditional approach)? Or must the creditor only show that he or she has issued a notice to arbitrate for the Court to set aside the demand and refer any dispute to arbitration, consistent with sch 1 art 8 AA (the contrary approach)?

Preliminary comments

Before considering this question, it is worth noting two points. First the mere existence of an arbitration agreement cannot be grounds to set aside a statutory demand. The existence of an arbitration agreement does not amount to a dispute or to the commencement of an arbitral proceeding. Arbitral proceedings in respect of a particular dispute only commence when a request for the dispute to be referred to arbitration is received by the respondent.[8] Until a notice to arbitrate has been issued, parties are free to resolve the dispute in any way they see fit, including by issuing proceedings in the High Court. This is entirely consistent with party autonomy, a foundational principle of contract and arbitration law.

Setting aside a statutory demand because of the existence of an arbitration agreement would also be contrary to arts 8 and 21 of sch 1 AA which together require the parties to arbitrate a dispute only when a notice to arbitrate has been given and there is a real, bona fide dispute to be the subject of an arbitration.

Second, it is arguable that there is no or very little difference between the thresholds in sch 1 art 8(1) AA and s 290(4)(a) of the CA. Section 290(4)(a) is not equivalent to a summary judgment application.[9] The hearing of an application to set aside a statutory demand is to be short and to the point and the test in s 290 is a review with a low threshold.[10] Only if it is accepted that s 290(4)(a) creates a higher threshold for establishing a dispute than art 8(1) does the interplay between the two sections need to be resolved.

A matter of statutory interpretation

Where an application to set aside a statutory demand is made on the basis that the debt is disputed, s 290(4)(a) of the CA expressly requires the creditor to satisfy the court that there is a "substantial dispute", as to whether the debt is owing, before the application be granted. This express wording in the section must apply even when a notice to arbitrate has been issued.

In some New Zealand cases it is suggested that if parties have submitted their dispute to arbitration, sch 1 art 8 AA requires a stay of proceedings and a statutory demand has to be set aside under s 290(4)(c).[11] However, if a notice to arbitrate constitutes "other grounds" for the statutory demand to be set aside under s 290(4)(c), without any enquiry into the genuineness of the dispute raised in the notice to arbitrate, that would result in s 290(4)(c) being interpreted in a way that is inconsistent with s 290(4)(a). A statutory provision is to be interpreted consistently. Section s 290(4)(c) cannot be interpreted as allowing a lower threshold to establishing a dispute than the standard test for which s 290(4)(a) expressly provides.

A statutory provision should be interpreted to apply in the same way in all circumstances. There should not be a different threshold for establishing a dispute when the statutory demand relates to a debt that is subject to an arbitration agreement than when it relates to a debt that is not subject to an arbitration agreement.

Applying the technical principles of statutory interpretation, s 290(4)(a) and (b) are examples of specific instances in which a court may grant an application to set aside a statutory demand. Subsection (c) is a more general provision. The general provision in s 290(4)(c) ought not to be interpreted so as to derogate from the more specific provisions in s 290(4)(a) and (b).[12]

Expecting parties to an arbitration agreement to comply with s 290(4)(a) of the CA is also consistent with the AA. Section 9(1) provides that where there is an inconsistency between any provision of the AA and any other enactment the other enactment is to prevail. If there is any inconsistency between s 290(4)(a) of the CA and sch 1 art 8(1) of the AA, then s 290(4)(a) of the CA must prevail.

Contrary approach

There is some support for the contrary approach of making the notice to arbitrate paramount in New Zealand in the

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6. *AAI Ltd v 92 Lichfield Street Ltd (in rec and in liq)* [2015] NZCA 559 at [21]–[22].
7. *Commissioner of Inland Revenue v Chester Trustee Services Ltd* [2003] 1 NZLR 395 (CA) at [42].
8. Arbitration Act 1996, sch 1 art 21.
9. *Industrial Group Ltd v Bakker* [2011] NZCA 142 at [24]–[25] cited in *AAI Ltd v 92 Lichfield Street Ltd (in rec and liq)* [2015] NZCA 559 at [21].
10. *Industrial Group Ltd v Bakker*, above, at [25].
11. *TransDiesel Ltd v MTU America Ltd* [2016] NZHC 280 at [47]; *LRM Builders Ltd v Jamon Construction & Civil Ltd* [2016] NZHC 1058 at [10].
12. Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 465.

decision of the Supreme Court in *Zurich Australian Insurance Ltd t/a Zurich New Zealand v Cognition Education Ltd*.[13] *Zurich* concerned competing applications for summary judgment and for a stay of proceedings under sch 1, art 8 of the AA. The Supreme Court held that a stay ought to be granted unless the Court found the arbitration agreement was null and void, inoperative or incapable of being performed or, more relevant for present purposes, it was immediately demonstrable either that the defendant was not acting bona fide in asserting that there is a dispute or that there was in reality no dispute.[14]

Zurich has subsequently been considered in relation to applications to set aside a statutory demand by the Court of Appeal and the High Court. In those cases, although reference was made to the *Zurich* principles applying to s 290, the references were obiter only and the principles of *Zurich* were not determinative. Although the Court of Appeal and the High Court seemed to accept *Zurich* applied, there was no explanation as to why.[15]

Traditional approach still correct

The analysis in *Zurich* does not automatically apply to s 290(4). *Zurich* was a decision about the interpretation of "dispute" in sch 1, art 8(1) of the AA. Section 290(4) contains subs (a), which expressly requires a *substantial* dispute to be established before a statutory demand is set aside.

Zurich involved a contest between a stay under art 8 and an application for summary judgment. It concerned private rights between the parties in relation to the different processes of arbitration and summary judgment. As already said, an application to set aside a statutory demand is quite different to an application for summary judgment.[16] In *Zurich*, the Supreme Court expressly referred to the fact that a court could properly determine questions of law, including contractual interpretation on an application for summary judgment.[17] It would be less likely for such determinations to be made on an application to set aside a statutory demand.

The different policies behind the insolvency provisions of the CA and the AA also mean the *Zurich* reasoning cannot automatically be introduced into applications to set aside statutory demands. The purposes of the AA include facilitating the recognition and enforcement of arbitration agreements.[18] The insolvency policy of the companies legislation is that: (1) insolvency results in winding up, and (2) insolvency is proved by inability to establish a substantial dispute over the debt or by way of cross-claim.[19] Applying *Zurich* to applications under s 290 would be contrary to this policy.

The insolvency processes in the CA are also for the benefit of creditors generally, not only the creditor party to the debt which is the subject of the statutory demand. Another creditor is able to apply to be substituted as the plaintiff in an application to put a company into liquidation and to rely on the failure to comply with the statutory demand, although it was not a party to the debt which is the subject of statutory demand.[20] It is appropriate for the insolvency processes to be given priority in the context of a statutory demand.

The importance of contractual bargains is frequently put forward as the justification for requiring parties to submit disputes to arbitration. It is said that the parties have agreed to do so by contract and a party ought not be able to bypass that agreement by issuing a statutory demand. However, an agreement to arbitrate requires parties to have disputes *determined* in the arbitration forum.[21] A court is not making any determination of the parties' dispute in the context of an application to set aside a statutory demand. The court's task is to make a prompt judgment as to whether or not there is a substantial dispute.[22]

The Court of Appeal has said that the "exceptional power" to allow a company that is unable to pay its debts to continue to operate must be confined to cases which clearly justify departure from the fundamental principle that insolvency, evidenced by a failure to pay debts, should bring the end of a company's existence.[23] An example is where there is an abuse of the statutory demand process.[24] The mere issue of notice to arbitrate does not justify departure from this fundamental policy unless the debt is genuinely disputed on substantial grounds.

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13. *Zurich Australian Insurance Ltd t/a Zurich New Zealand v Cognition Education Ltd* [2014] NZSC 188, [2015] 1 NZLR 383.
14. *Zurich*, above, at [52].
15. *Soil Research Ltd v Outdoors and Beyond Ltd* [2017] NZHC 145 at [18]–[19]; *Manchester Securities Ltd v Body Corporate 172108* [2017] NZCA 527 at [29]–[32].
16. *Industrial Group v Bakker*, above n 9, at [24]–[25].
17. Zurich, above n 13, at [37]–[38].
18. Arbitration Act 1996, s 5(e).
19. *Commissioner of Inland Revenue*, above n 7, at [45].
20. High Court Rules 2016, r 31.24.
21. *Re Asia Master Logistics Ltd*, above n 4, at [66]–[71].
22. *Industrial Group v Bakker*, above n 9, at [24].
23. *Commissioner of Inland Revenue*, above n 7, at [48].
24. *Commissioner of Inland Revenue*, above n 7, at [60].

The Court of Appeal's interpretation of "substantial dispute" in *AAI Ltd v 92 Lichfield Street Ltd (in rec and in liq)* adequately protects parties to an arbitration agreement.[25] There is no need to require a lesser test. A party that genuinely wishes to commence arbitration to dispute a debt will readily establish that it has a substantial and genuine dispute so as to set aside a statutory demand. A party that belatedly seeks to rely upon an arbitration clause will invariably fail to establish a substantial dispute.

To allow such a party to avoid the statutory demand process by the mere service of a notice to arbitrate would invite recalcitrant debtors with arbitration clauses in their underlying agreements to issue notices to arbitrate as a tactic to avoid the operation of the insolvency process. Even if it were possible, the statute ought not be interpreted in a way that would encourage such a ploy.

Headnotes

ANZ Bank New Zealand Ltd v Bushline Trustees Ltd

[2020] NZSC 71

Interest rate swaps — loan agreement — margin — fixed rate — floating rate — rural lending — contract law — contractual interpretation — pleading argument

Introduction

This case involved issues relating to contractual interpretation.

ANZ Bank New Zealand Ltd (ANZ) had entered into a loan agreement with the trustees of Bushline Trust One and the trustees of Bushline Trust Two (Bushline). Under the loan agreement, ANZ advanced $19.466 million dollars to Bushline for a loan period of 12 months. The interest rate was a floating rate plus a margin of 0.7 per cent per annum (the 0.7 per cent margin). The interest rate clause in the loan agreement stated that the 0.7 per cent margin was "reviewable at any time". The loan agreement was accompanied by three related swap transactions, under which ANZ swapped the floating rate payable by Bushline for a fixed rate.

ANZ reviewed and changed the 0.7 per cent margin. Bushline claimed that this was contrary to a representation or undertaking given by ANZ prior to the signing of the loan agreement that the 0.7 per cent margin would be fixed for a period of five years.

Bushline's claim had failed in the High Court. The High Court found that no representation had been made to fix the margin for a period of five years. The Court of Appeal had overturned this finding. ANZ appealed.

Background

The Bushline trusts were associated with Mr Coomey and Mrs Coomey. Bushline had been a customer of ANZ for many years prior to entering into the swaps.

ANZ's conduct in relation to swaps was the subject of an investigation by the Commerce Commission (the Commission). ANZ reached a settlement with the Commission under which it agreed to consent to the High Court making a declaration that ANZ's conduct was misleading and deceptive conduct in breach of the Fair Trading Act 1986. The declaration said that the misleading and deceptive conduct was that ANZ had understated some of the risks and/or overstated some of the benefits of interest rate swap arrangements to specified customers. ANZ agreed to pay compensation of up to $18.5 million to specified customers that were affected by its conduct. ANZ offered Bushline a settlement of $155,000 which was declined by Bushline.

The claims pursued at trial were based on allegations of representations or undertakings by ANZ that (at [12]):

- the 0.7 per cent margin would be held for five years on all of ANZ's lending to Bushline;
- the swaps operated like a fixed rate loan, except with greater flexibility and benefits;
- the swaps were transferable and ANZ would not prevent Bushline from refinancing;
- ANZ would monitor and/or manage Bushline's swaps on an ongoing basis to ensure that Bushline was able to take advantage of the flexibility and benefits, and to manage its exposure to interest rate risk; and
- ANZ would be there for Bushline "in good times and bad".

The swap agreement allowed the customer, having borrowed money at a floating rate (the BKBM rate) plus a margin, to obtain some certainty about the amount of interest it would have to pay by swapping its obligation to pay that floating rate for an obligation to pay a fixed rate. The customer was swapping its obligation to pay the floating rate for an agreed fixed rate on a notional amount. It was

25. *AAI Ltd*, above n 6, at [21]–[22]:

> What the applicant must show is that the dispute it raises has substance; the applicant must explain to the court what the dispute is; and the dispute so shown must be a real and not a fanciful or insubstantial dispute.

best practice for the payments to be timed to match the interest payment dates on the loan.

Bushline's claim commenced in May 2014. An amended statement of claim was filed in November 2015. Neither of these statements of claim contained an express allegation that ANZ had made a representation or given an undertaking to fix the margin at 0.7 per cent for five years. Bushline filed a further amended statement of claim (the third statement of claim) in September 2016. This included a pleading that there had been a representation or undertaking. ANZ argued that the fact that this claim was made only in the third statement of claim was significant because it undermined the argument that there was such a representation or undertaking.

All of Bushline's claims were dismissed in the High Court. This judgment was reversed by the Court of Appeal which found that ANZ had agreed that it would fix Bushline's margin at 0.7 per cent for five years. The Court of Appeal said that this undertaking applied to the loan made under the April 2008 loan agreement and any re-advances of that loan over the five-year period. This meant that the undertaking to fix the 0.7 per cent margin for five years must have also been an undertaking that ANZ would continue to lend the principal amount for five years, even though the term of the loan as set out in the loan agreement was only for one year.

ANZ was granted leave to appeal. Since the granting of leave, the parties settled all issues apart from that involving the "margin undertaking". The Court had to decide whether ANZ undertook or represented to Bushline that the 0.7 per cent margin would be fixed for a five-year period and, if so, whether ANZ was bound not to raise the margin during that five-year period.

The rate of interest specified in the loan agreement for the $19.466 million loan had been a floating rate. The rate was defined (at [20]) as:

> "the rate of interest ... for New Zealand Dollar bills of exchange for [the specified period] which appears on the Reuters Screen BKBM Page opposite the caption 'BID' as of 11.00am on [the relevant] date".

The BKBM rate was derived from the rate applicable to bank bills. The 0.7 per cent margin was added to the BKBM rate to reflect the credit risk attaching to the customer.

For the arrangement between ANZ and Bushline, the payment obligations were effected as two separate transactions, rather than by way of a netting off. Bushline would pay ANZ the floating interest rate payable under the loan plus the margin, and then there would be an adjustment payment reflecting the difference between the floating rate and the fixed rate. If the swap was "in the money" from Bushline's point of view, the adjustment payment would be made by ANZ to Bushline. If the swap was "out of the money" then the adjustment payment would be from Bushline to ANZ. This meant that the operation of the swaps was clearly recorded in Bushline's bank statements.

ANZ had begun promoting interest rate swaps to rural customers in July 2005. Stuart Esquilant, a dealer at ANZ, had made presentations to the Coomeys in 2005. Bushline had entered into its first swap on 7 October 2005. The swap terms were provided to Bushline by ANZ in December 2005. Clause 10.1 of the relevant swap document provided that the customer entered into the transaction in reliance on its own independent advice and that ANZ was not liable for the customer's loss in any circumstances.

ANZ had issued a swap confirmation for the first swap on 23 February 2006. This was a standard form document, which was to be signed by the customer when a swap was entered into. It stated that by signing the confirmation, the customer confirmed that the terms and conditions that it had previously been provided with governed the swap. The confirmation also included the following statement, set out in capital letters and framed with bold black lines (at [28]):

> EACH PARTY AGREES THAT IT HAS NOT RELIED ON ANY ADVICE (WHETHER ORAL OR WRITTEN) FROM THE OTHER PARTY (OTHER THAN AS SET OUT IN THIS CONFIRMATION) AND THAT (A) IT HAS THE CAPACITY TO EVALUATE THE TRANSACTION AND (B) IT UNDERSTANDS AND ACCEPTS THE RISKS AND OBLIGATIONS INVOLVED.

Bushline entered into further swap transactions on 21 March 2006 and 28 September 2006. Confirmations on the standard form were signed on behalf of Bushline in respect of both transactions. The transcript of a telephone call between an ANZ dealer and Mr Coomey confirming the details of the March 2006 swap was in evidence. In that conversation, Mr Coomey confirmed to the dealer that he had done a swap transaction before. When asked about his understanding of the transaction, he said "it's not so bad this time" (at [29]). In his evidence at the trial, Mr Coomey said that looking back he had very little idea what the dealer was talking about in that phone call and did not understand what swaps were before 2008.

By early 2008, Bushline had a total debt to ANZ of $11.97 million recorded in a number of loan agreements. None of these loan agreements referred to a margin, as was the case in relation to the loan agreement at issue in this appeal. Rather, the floating interest rate was defined in broad terms.

In February and March 2008, Bushline purchased a farm in Waverley for $7.25 million. ANZ's relationship manager dealing with the Bushline account was Mr Harvey. He had prepared a lending proposal for the Waverley purchase to go to ANZ's credit department. ANZ had agreed to lend the amount required to purchase the farm on 28 February 2008, without any specification of the terms.

Mr Harvey communicated this approval to Mr and Mrs Coomey. That verbal commitment was sufficient for Bushline to enter into an unconditional sale and purchase agreement the following day. ANZ lent Bushline the amount needed to pay the deposit. However, Mr Coomey made it clear to ANZ that he was considering refinancing with one of ANZ's competitors. This was a matter of concern for ANZ because Bushline was a significant customer.

This led to an exchange between Mr and Mrs Coomey and two executives of ANZ, Robert Simcic and Christopher Harvey, on 18 and 19 March 2008 (the 18/19 March meetings). The evidence of what occurred at this meeting was at the heart of the key issue in the case. There was no doubt that ANZ agreed to lend the required money on a floating rate basis with a margin over the BKBM rate of 0.7 per cent. But the duration of any commitment by ANZ to hold that margin at 0.7 per cent was disputed.

Mr Harvey and Mr Simcic had met with Mr and Mrs Coomey on 18 March 2008. The focus of the discussion was on the margin. Mr Coomey said he had favourable fixed margin offers from both ASB Bank Ltd (ASB) and Bank of New Zealand (BNZ). He wanted ANZ to match these competing offers. No agreement was reached on 18 March 2008. However, ANZ had delivered two letters to the Coomeys at the 18 March 2008 meeting. The Coomeys had also signed a standard form "acceptance of finance offer" document.

Mr Harvey and Mr Simcic met with the Coomeys again on 19 March 2008. Mr Coomey showed them a copy of the offer he had received from ASB. Mr Simcic then went to his car and called the responsible officer in ANZ, Mr Graham. While in his car, he photographed certain pages of ASB's offer. He returned and confirmed an offer of funding at a margin of 0.7 per cent above BKBM. Mr Harvey recorded the outcome in a handwritten note on the agenda of that day as being "Agreed — 70pts ongoing". Mr Simcic emailed the photographs he had taken of the ASB offer to Mr Graham the following day.

Bushline's case was that ANZ's offer had involved not only a commitment to a margin of 0.7 per cent but also a commitment to fix that margin for five years, thereby largely matching the terms of ASB's offer.

In early April it was agreed that two of the three existing swap contracts between ANZ and Bushline would be restructured so that the amount of the loan would be covered by three swaps. The two restructured swaps had terms of approximately two years, eight months, maturing in December 2010 ($7.905 million) (the December 2010 swap) and three years six months, maturing in October 2011 ($8.847 million) (the October 2011 swap). One of the existing swaps ($3.15 million) remained in place. It had just over a year to run, maturing in June 2009 (the June 2009 swap). In August 2008, the notional amount of the June 2009 swap was reduced to $3.041 million. The documentation for the loan was finalised on 21 April 2008. The loan was advanced on 1 May 2008 and was repayable on 1 May 2009.

The purchase of the Waverley farm was not a success for Bushline. Like other dairy farmers they faced difficult conditions after 2008, in part because of the global financial crisis (GFC). ANZ became concerned about the sustainability of Bushline's business. Bushline attempted to sell assets to reduce debt, and in mid-2012 it was successful in selling 12 out of 15 certificates of title of the Waverley property, which reduced its overall debt to about $16 million.

Up until October 2008, the swaps had worked in Bushline's favour, with the amount payable by Bushline to ANZ on the swap transactions being less than the amount payable by ANZ to Bushline. However, that changed in October 2008. ANZ increased the margin on its loans to Bushline above the 0.7 per cent that had been agreed in March 2008. In December 2008, ANZ increased the margin on the $19.466 million loan from 0.7 per cent to 0.85 per cent. It increased it again in March 2009 to 0.97 per cent. Meanwhile, the BKBM rate fell significantly. Bushline's fixed rate payment obligation under the swaps for April 2009 alone was over $70,000 more than the BKBM rate amount payable by ANZ to Bushline under the swaps.

The margin increases in December 2008 and March 2009 resulted in Bushline paying approximately $76,000 more in interest than it would have if the margin had been held at 0.7 per cent for the term of the swaps. This was the measure of Bushline's loss if ANZ's commitment to maintain the 0.7 per cent margin was for the period of the swaps, rather than the five years alleged by Bushline. If the commitment was to maintain the margin for five years, Bushline's loss was nearly $3.8 million.

Issues

The Court had to decide whether ANZ had committed to fix the margin for a period of five years.

Court's findings

The Court started its analysis by rejecting an argument from ANZ that the Court of Appeal should have deferred to the High Court's finding of fact. However, the Court did engage with another aspect of the Court of Appeal's reasoning. The focus of the Court of Appeal's analysis had been on the meaning of the terms "70pts" and "ongoing". This related to Mr Harvey's handwritten note that the parties had agreed to "70pts ongoing".

In order to determine whether ANZ had made a commitment to hold the 0.7 per cent margin the Court of Appeal had applied the methodology for the construction of contracts set out in *Investors Compensation Scheme Ltd v West Bromwich Building Society* and *Boat Park Ltd v Hutchinson*. The Court of Appeal asked itself what the reasonable bystander would have understood was the meaning of ANZ's offer of 70 basis points ongoing. The Court of Appeal concluded that a reasonable bystander would have understood that the offer was being made by reference to the five-year period Mr Coomey wanted to have Bushline's margins fixed for.

The Court did not think that the methodology derived from *Investors Compensation Scheme Ltd* and *Boat Park Ltd* had a role to play in determining whether ANZ had agreed to fix the 0.7 per cent margin. Rather, the task was to determine whether an oral contract had been entered into or a representation had been made. Ascertaining whether an oral contract was entered into and, if so, what its terms were, was a question of fact. The question was therefore whether Bushline had proved its case that an oral contract had been entered into on 19 March to fix the 0.7 per cent margin for five years.

Bushline's case was founded on Mr and Mrs Coomey's account of what occurred at the 18/19 March meetings and other evidence that allegedly supported that narrative. Bushline relied on multiple arguments to support its case that ANZ's representatives at the 18/19 March meetings had agreed to fix the 0.7 per cent margin for five years.

First, Bushline argued that the evidence had to be seen in context. As acknowledged by ANZ, Bushline was an important customer. The market for rural lending at the relevant time was highly competitive. As confirmed by an expert witness, "handshake deals" were common at the time. The Court accepted that the evidence confirmed all of these features applied at the time of the 18 and 19 March meetings.

Second, Mr Coomey said that he had told Mr Simcic and Mr Harvey that he had an offer from ASB that involved a margin of 0.65 per cent for a term of five years and that he wanted ANZ to match this.

Mr Simcic confirmed that a competing offer from ASB had been put before him and Mr Harvey on 19 March and that Mr Coomey was seeking an immediate commitment to a margin of 0.7 per cent. Mr Simcic thought when ANZ had agreed to the 0.7 per cent margin, it was agreeing to hold that margin for the term of the swaps. However, in cross-examination he accepted that Mr Coomey had said to him that Bushline had a competing offer featuring a margin of 0.65 per cent and that this margin was to be fixed for a five-year period. The Court accepted that this concession by Mr Simcic provided significant support for Bushline's case as to what had happened at the 18/19 March meetings.

There was evidence from an ASB employee, Mr Robinson, that ASB's offer had not involved a commitment to fix the margin for five years, as Mr and Mrs Coomey claimed. Mr Coomey said this evidence was wrong, but the Court did not consider his evidence on that point to be convincing.

Bushline argued that even if ASB had not offered to fix its 0.65 per cent margin for five years, this did not necessarily undermine Bushline's case. What was important was what ANZ thought it had to match, rather than what ASB had actually offered. There was no suggestion that Mr and Mrs Coomey had misled ANZ as to what ASB was offering. Rather, their evidence was based on their recollection as to what ASB had actually offered. This left open the possibility that Mr and Mrs Coomey thought ASB was offering to fix the 0.65 per cent margin for five years, even though they were mistaken in that regard.

Fourth, Mr Harvey's handwritten note on the agenda for the meeting on 19 March recorded "Agreed — 70pts ongoing". Bushline argued that this supported its case that the commitment was for a five-year period. It was common ground that the term "ongoing" had not been discussed by the parties during the meeting. But the case for Bushline was that it must have referred to a period of five years, given that this was what was being proposed by ASB and what ANZ was matching. The Court accepted that "ongoing" could refer to a five-year commitment, but it was also open to other interpretations.

Finally, an undated file note made by Mr Harvey, which appeared to have been written in November 2009, recorded under the heading "Interest Rates": "ASB offer @ .65 margin 5 yrs" (at [81]). Bushline said that this supported its version of events, namely that this was what the Coomeys had told ANZ they had been offered by ASB, and what ANZ had agreed to match on 19 March.

The Court accepted that this note may have provided some corroboration for what Mr and Mrs Coomey thought the ASB offer had been. But it did not think that a note of what Mr and Mrs Coomey told Mr Harvey more than 18 months after the events in question provided assistance in determining what had been agreed at the 18/19 March meetings.

ANZ's case was that the High Court had correctly found that there was no undertaking given to fix the margin for five years at the 18/19 March meetings. ANZ placed particular weight on two of the reasons given by the High Court. First, that the ASB offer had not involved a commitment to fix the margin for five years. Second, that the allegation of a five-year commitment by ANZ had not been made until the third statement of claim.

Mr Coomey had said that he understood ASB's offer to be for a loan with a floating rate based on BKBM with a margin of 65 points fixed for a five-year period. He claimed that there was an attachment to ASB's offer document that included a handwritten amendment showing that the offer was for a floating interest rate of BKBM plus a 65-point margin for a five-year period.

But Mr Coomey had been unable to produce this attachment. ANZ said that if this attachment to the offer document was the basis on which ANZ had formulated its competing offer, it could have been expected that Mr Simcic would have photographed it. But he did not, and neither he nor Mr Harvey had been asked whether they recalled this attachment. Mr Robinson also did not mention such an attachment in his evidence.

The Court said that the fact that Mr and Mrs Coomey could not produce the attachment which included ASB's offer to fix the margin for five years undermined their ability to prove that such an offer was made, as did the failure to ask Mr Robinson, Mr Simcic or Mr Harvey whether they recalled seeing the attachment.

The Court was therefore not satisfied that there was sufficient evidence of what ASB had offered and what Mr Simcic and Mr Harvey thought ASB was offering to conclude that when ANZ had agreed to a margin of 0.7 per cent, it was agreeing to fix that for a five-year period. Relevant to this conclusion was that the representatives of ASB and BNZ both denied agreeing to fix the margin for five years. BNZ also indicated that no bank was offering that sort of commitment at the time.

The Court then looked at the argument that there was no assertion of a five-year commitment until the third statement of claim. The High Court thought it was significant that Bushline had never suggested that there was a commitment to fix the margin for five years until its third version of the statement of claim despite all of the earlier opportunities to raise the point.

In contrast, the Court of Appeal had not considered that it was of "particular significance" that Bushline's express pleading of an undertaking to fix the margin for five years had not appeared until the third statement of claim. The Court of Appeal said that the central focus of the claim from the outset had been ANZ's promise to fix the margin along with its characterisation of the combined effect of floating rate loans and fixed rate swaps. The Court of Appeal had noted that Bushline had pleaded that its loss could be measured on the basis that had it not entered into the swaps, it would have accepted ASB's offer to fix all borrowings for five years at a margin of 65 basis points.

The Court considered that the Court of Appeal had been wrong to discount the significance of this factor. It agreed with the High Court that it was not just the failure to plead this cause of action until the third statement of claim that was significant, but also the fact that there had been a number of occasions on which it could have been expected that Bushline would have asserted an agreement to hold the margin for five years if such an agreement had been reached.

It was true that, as the Court of Appeal had noted, the earlier pleading focused on a commitment of fixed margins and the characterisation of the combined effect of floating rate loans and fixed rate swaps. But that said nothing about a commitment for a five-year duration and did not explain the omission of a pleading of a representation or undertaking that the margin would be fixed for five years.

The Court's view was that this could be seen as more consistent with a commitment for the period of the swaps only. Bushline's pleading that it would have taken up ASB's offer had it not entered into the swaps with ANZ did not say anything about whether ANZ had agreed to match ASB's offer. It could have been expected that the express reference to ASB's offer as a yardstick for quantifying loss would have prompted Bushline and its legal representatives to refer to ANZ's commitment to fix the margin for five years if such a commitment had been made.

Similarly, the fact that Bushline had pleaded an implied term that ANZ could not increase margins to minimise its own losses had the opposite effect to that attributed to it by the Court of Appeal. The Court of Appeal had seen this pleading as supporting Bushline's case that a five-year commitment had been entered into. But the Court saw it in the opposite light. If ANZ had made the five-year commitment, it was hard to see why there was any need to plead an implied term that ANZ would not increase margins to minimise its own losses or to plead that increasing margins had been oppressive conduct.

It was also significant that in the second statement of claim, Bushline had pleaded that ANZ had made what was characterised as "the Margin Representation". The nature of that representation was said to be that margins on swaps and the funding provided by ANZ would not change. It could have been expected that this would have gone on to refer to the five-year commitment if such a commitment had been made.

The failure of Bushline and its legal representatives to mention the alleged five-year commitment in the period between 2008 and 2016 counted against the existence of a contractual commitment by ANZ to fix the margin of 0.7 per cent for five years.

ANZ drew support for its case from the evidence of Mr Schurr and Mr England, trustees of the Bushline trusts, who said that they had no knowledge of any agreement to fix the 0.7 per cent margin for five years. Mr England also advised on that agreement and certified to ANZ that he had explained it to the trustees, including Mr and Mrs Coomey.

The High Court had considered that this was a significant factor. It was reasonable to assume that Mr and Mrs Coomey would have mentioned such an important promise to their fellow trustees and, at the very least, would have been expected to say something to Mr England when he was advising them on the terms of the loan agreement, given that agreement specifically provided that the margin was reviewable at any time.

The Court of Appeal had not engaged with this point in its judgment. The Court's view was that it was significant for the reason given by the High Court. The evidence was that Mr England would go through the important aspects of a loan agreement when explaining it to a client. It was hard to imagine that this would have ignored explaining how the interest rate was calculated, the fact that the margin was reviewable and the fact that the term of the loan was for one year only, with no commitment to roll over the loan at the end of that period.

The fact that Mr Schurr and Mr England did not know of the agreement was also significant because as trustees of both of the Bushline trusts, they were binding the trusts to the loan agreement of 21 April 2008. ANZ's loan was to Bushline, not to the Coomeys. Although the Coomeys were clearly acting on Bushline's behalf at the 18 and 19 March meetings, it is surprising that they would not have informed their fellow trustees of what was said to have been agreed on 19 March, namely the margin being fixed for five years. The Court said it seemed unlikely that Mr England would have signed the loan agreement without seeking alignment between the written terms and the verbal agreement if such an agreement had been made and he had been informed of it.

The Court also thought that the swap context provided some support for ANZ's argument that if any commitment to maintain the margin had been made, it would have been for the period of the swaps, rather than for five years.

The High Court had said that the discussion about margins was in the context of an interest rate that was to be hedged by swaps. The formal discussion about swaps had not occurred until 28 March 2008, but the High court considered that it must have been contemplated by all parties that Bushline would continue to use swaps to hedge its lending, given that swaps had worked well for Bushline in the previous three years.

Certainty in relation to interest costs was more important for Bushline than ever before given that the Waverley purchase had increased Bushline's overall debt considerably. These factors led the High Court to conclude that the reference to "ongoing" in Mr Harvey's notes referred to the duration of the associated swaps, rather than the five-year term alleged by Bushline.

The Court of Appeal considered that Mr Simcic's recollection that "ongoing" referred to the term of the swaps was difficult to reconcile with the sequence of events that followed. It was not until April that it had been agreed that all of Bushline's financing, both existing and new debt, would be provided under one 12-month BKBM loan with three associated swaps. This arrangement was then confirmed in a fresh approval dated 15 April 2008.

Mr Simcic had accepted that ANZ's loan offer was not conditional on swaps being entered into. However, that did not mean that there was not an underlying assumption that swaps would be entered into. Bushline had entered into swap transactions from 2005 onwards, and these had been advantageous to it when compared to fixed rate lending. Mr and Mrs Coomey had denied receiving a briefing on swaps in September 2005 and said that they did not understand that they had entered into swaps before 2008.

Mr Simcic's evidence was that ANZ would not have disclosed, let alone negotiated, a margin on anything other than a BKBM loan that was to be hedged by swaps. ANZ's variable or fixed rate loans would involve "all up" rates, which would incorporate a margin that was not disclosed to the customer. The Court of Appeal had noted that it was not clear that the parties were thinking of a 12-month BKBM loan during the 18/19 March meetings because ANZ's policy of 12-month lending was new and almost certainly unknown to Mr Coomey at the time.

The Court's view was that it was hard to accept that Mr and Mrs Coomey had not realised that Bushline was entering into the swap transactions that occurred between 2005 and 2008. They had signed a confirmation letter after each swap transaction entered into in the period between October 2005 and April 2008. They had been advised by Mr England on the terms of the swaps signed in 2005.

The Court therefore held that the evidence did not establish on the balance of probabilities that an agreement had been reached between ANZ and Bushline on 19 March 2008 that ANZ would fix the 0.7 per cent margin for five years. Nor did the evidence establish that ANZ had made a representation to that effect.

Judgment

Having found that Bushline did not prove that ANZ made the five-year commitment, the Court allowed ANZ's appeal.

Cases cited in judgment

ANZ Bank New Zealand Ltd v Bushline Trustees Ltd [2019] NZSC 115;
Austin, Nichols & Co Inc v Stichting Lodestar [2007] NZSC 103, [2008] 2 NZLR 141;
Boat Park Ltd v Hutchinson [1999] 2 NZLR 74 (CA);
Brownlie v Shotover Mining Ltd CA181/87, 21 February 1992;
Bryson v Three Foot Six Ltd [2005] NZSC 34, [2005] 3 NZLR 721;
Bushline Trustees Ltd (as trustees of Bushline Trust One) v ANZ Bank New Zealand Ltd [2017] NZHC 829;
Bushline Trustees Ltd v ANZ Bank New Zealand Ltd [2017] NZHC 2520;
Bushline Trustees Ltd v ANZ Bank New Zealand Ltd [2018] NZHC 454;
Bushline Trustees Ltd v ANZ Bank New Zealand Ltd [2019] NZCA 245, [2019] 3 NZLR 455;
Carmichael v National Power plc [1999] 1 WLR 2042 (HL);
Commerce Commission v ANZ Bank New Zealand Ltd [2015] NZHC 1168, (2015) 14 TCLR 71;
Edwards-Tubb v JD Wetherspoon plc [2011] EWCA Civ 136, [2011] 1 WLR 1373;
Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 (HL);
Kawarau Village Holdings Ltd v Ho [2017] NZSC 150, [2018] 1 NZLR 378;
Lodge Real Estate Ltd v Commerce Commission [2020] NZSC 25;
PAE (New Zealand) Ltd v Brosnahan [2009] NZCA 611, (2009) 12 TCLR 626;
Rae v International Insurance Brokers (Nelson Marlborough) Ltd [1998] 3 NZLR 190 (CA);
Sayers v Clarke Walker [2002] EWCA Civ 910;
Sena v Police [2019] NZSC 55, [2019] 1 NZLR 575;
Thorner v Major [2009] UKHL 18, [2009] 1 WLR 776.

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Harmoney Ltd v Commerce Commission

[2020] NZCA 275

Credit Contracts and Consumer Finance Act 2003, ss 5, 41 and 42 — peer-to-peer lending — loan transactions — credit fee — establishment fee — Financial Markets Conduct Act 2013 — creditor

Introduction

This case involved issues related to credit fees under the Credit Contracts and Consumer Finance Act 2003 (the CCCFA).

The appellant, Harmoney Ltd (Harmoney), operated a web-based platform that matched consumers wishing to borrow money with investors wishing to lend money, commonly known as peer-to-peer (P2P) lending. These loan transactions were consumer credit contracts.

The primary issue was whether, as the Commerce Commission (the Commission) contended, the fee Harmoney charged to borrowers for arranging the loans (the Platform Fee) was a credit fee, in particular an establishment fee, subject to the statutory control in s 41 of the CCCFA. If the Commission was correct and the Platform Fee was a credit fee, then it had to be set at a level that was reasonable.

The High Court had found that the Platform Fee was a credit fee because it was payable by a debtor under a credit contract and was payable to Harmoney in connection with a credit contract. Harmoney appealed.

Background

The factual background consisted largely of the contractual terms. Prior to any lending transaction, a prospective borrower was required to register with Harmoney. Harmoney would then receive, consider and approve applications for registration in accordance with its eligibility criteria. Harmoney would then perform various tasks, including receiving and assessing loan applications and undertaking credit checks.

If the borrower wanted to take out a loan, he or she was required to complete a loan application. The loan application process was designed to assess a borrower's credit grade, which in turn was used to determine the applicable interest rate and the maximum loan amount.

The loan would then enter the online marketplace, where investors decided whether or not to fund the loan through placing an order. Investors made orders in $25 increments, referred to as "notes", for each investment until the loan was fully funded. Investors paid the amount they wanted to invest into an "investor account". Harmoney held the investor account in trust for investors whose funds had been deposited into that account.

Once there were sufficient orders to fully fund the loan listing, Harmoney transferred the investor funds from the investor account to an "advance account", a separate bank account held by the trustee on trust for investors.

Harmoney would then transfer the loan principal into the borrower's nominated account. The borrower did not sign a loan contract, as the contract was stated to come into existence immediately after Harmoney provided a loan disclosure. From that point, the trustee held the loan on trust for the benefit of investors.

Settlement of a loan would occur within one business day after Harmoney had provided the loan disclosure. At settlement, Harmoney would deduct from the loan amount an amount equal to the Platform Fee and transfer it to Harmoney's own account. Harmoney would pay the balance of the loan amount to the borrower's nominated account.

The Platform Fee was defined in the borrower agreement as "the fee payable by the Borrower to Harmoney for arranging any Loan which Settles" (at [48]), as set out on the website under the "Interest Rates & Fees" section. The borrower agreement defined the "Loan" as "the total amount lent or to be lent by the Trustee" to the borrower (at [37]).

Following settlement, the borrower had an obligation to make all of the loan repayments specified in the loan disclosure to a "Collections Account" held in the name of the trustee as trustee for investors. Interest accrued on the whole of the loan amount, which included the Platform Fee.

Harmoney administered the loan accounts by receiving payments and undertaking recovery action. The documents stated that Harmoney did this as agent for the trustee. Harmoney charged a fixed service fee to investors for these services. As at December 2015, this fee was set at 1.25 per cent of the principal and interest payments collected on funds advanced by that investor.

The Commission took an interest in the Platform Fee and whether it was reasonable. Under s 100A of the Commerce Act 1986 it stated a case for the opinion of the High Court in relation to this.

Issues

The Court had to decide whether the High Court had erred in finding that:

- the credit contract did not also comprise the borrower agreement;
- Harmoney was a creditor;
- the investors were creditors;
- the Platform Fee was a credit fee on the basis that it was a "fee ... payable by the debtor under a credit contract"; and
- the Platform Fee was not a credit fee on the basis that it was not a "fee ... payable by the debtor ... for the benefit of ... the creditor in connection with a credit contract".

Court's findings

The Court started its analysis by looking at the CCCFA and the statutory context. Of particular relevance here was sch 1 which required disclosure of a description of the credit fees and charges (other than interest charges) that were or might become payable under the contract including when each fee or charge was payable.

Credit fees and establishment fees were defined in s 5 of the CCCFA. The issue of whether the Platform Fee was an establishment fee was important for Harmoney because of the requirements in ss 41 and 42 of the CCCFA.

Section 41 said that a consumer credit contract must not provide for a credit fee or a default fee that was unreasonable. Section 42 said that in determining whether an establishment fee was unreasonable, a court must have regard to whether the amount of the fee was equal to or less than the creditor's reasonable costs in connection with the application for credit, processing and considering that application, documenting the consumer credit contract, and advancing the credit, or whether the amount of the fee was equal to or less than the creditor's average reasonable costs.

P2P lending had not evolved when the CCCFA was passed in 2003. The Financial Markets Conduct Act 2013 (FMCA) duly made provision for the holders of market services licences to act as providers of prescribed intermediary services, including a P2P lending intermediary if prescribed by regulations. Harmoney's parent company was the holder of a lending licence granted by the Financial Markets Authority under the FMCA.

The FMCA regulates financial markets for the benefit of investors, including by requiring disclosure by the issuers of securities. Thus, its focus as regards P2P lending is the interests of the investors who lend money, principally relatively small short-term loans, to consumers.

However, legislation remains silent on the implications of the CCCFA for P2P lending. It was not until 2019 that the Credit Contracts and Consumer Finance Regulations 2004 were amended to provide a partial exemption from disclosure requirements which the CCCFA imposes on P2P lenders to retail consumers.

The Court said that it was clear that both the FMCA and the CCCFA had a role to play in regulating P2P lending arrangements. The issue was said to arise not because of any tension between the two statutes, but as a consequence of the steps which the Commission alleged Harmoney had taken to seek to exempt its fees from scrutiny under the CCCFA.

Did the High Court err in finding that the credit contract did not also comprise the borrower agreement?

The borrower agreement was the source of the borrower's obligation to pay the Platform Fee. It specified that the borrower must borrow the amount of the fee as part of the loan and pay the fee out of the loan amount. In the High Court, the Commission maintained that the borrower agreement, the loan contract, and the loan disclosure were all essential to the provision of credit and should be regarded as a single contract.

The High Court rejected the proposition that the borrower agreement was part of the credit contract.

The Commission argued on cross-appeal that the intention of the parties, determined in accordance with the objective test of agreement, supported reading the terms of the borrower agreement together with those of the other two documents. It said that the High Court had erred in finding that because the borrower agreement contained terms relevant to "general matters", it could not also contain terms necessary for credit to be provided to a borrower.

Harmoney argued that the loan contract and borrower agreement were separate contracts, with different principals and with distinct functions.

The Court disagreed with the High Court and said that any credit contract which was formed comprising the loan contract and the loan disclosure would also comprise the related borrower agreement.

There were several reasons for this finding. The loan contract did not contain any express reference to the borrower agreement and neither did the revised version of the loan disclosure. However, the original loan disclosure did. The Court said that Harmoney's objective in crafting a loan contract which avoided express reference to the Platform Fee was readily apparent.

However, the utilisation of discrete documents was ineffective in the particular circumstances where the definitions of relevant credit terms were contained in the borrower agreement and the specific details of individual loans were to be found only in the loan disclosure to which the loan contract expressly cross-referred. The degree of interrelationship among the three documents was of such a nature that, on an objective analysis, they would be read by a reasonable observer as operating together.

The High Court's conclusion that the borrower agreement did not form part of the credit contract was influenced by its view that the borrower agreement covered "general matters" and had independent existence. The Court did not consider that the fact that a document included both terms relevant to the loan transaction and other terms precluded it from being a part of the credit contract.

Did the High Court err in finding that Harmoney was a creditor?

The significance of the question as to whether Harmoney was a creditor was in the definition of credit fees under s 5 of the CCCFA. If Harmoney was a creditor, then the Platform Fee was a credit fee under the second limb of s 5.

There was no dispute that Harmoney Investor Trustee Ltd (HITL), the only creditor named in the loan contract, was a creditor. In the High Court, the Commission had contended that Harmoney was a creditor because it controlled HITL and therefore had effective control over the provision of credit. In finding that Harmoney was a creditor, the High Court had said that HITL was in fact the agent of Harmoney whose business it was undertaking.

The Commission's argument evolved on appeal and said that the key consideration was the way in which the right to incur a debt had been granted. The natural analysis of the particular circumstances of the Harmoney structure was that the right to incur a debt had been granted by Harmoney.

The Court said that an evaluation of the Commission's contention that Harmoney granted to the borrower the right to incur the debt necessitated a close analysis of the relevant contractual provisions.

The borrower agreement had set out the terms on which the borrower agreed to use the service provided by Harmoney to borrow money on a P2P basis from other persons via HITL. In order to access and use the P2P lending service provided by Harmoney through its website, the borrower had to first register as a borrower by completing the borrower application.

The borrower application was defined to mean the application to become a borrower set out on the website. Harmoney reserved the right not to register any person as a borrower if that person had not completed the registration process to Harmoney's satisfaction or did not meet Harmoney's eligibility criteria. Having secured registration as a borrower, the borrower could apply for a loan through the Harmoney website. The loan application process was then described in detail by the Court.

The Commission argued that in this case the opportunity to incur a debt and the right to incur a debt had been granted by Harmoney. The Court accepted that the borrower registration and loan application processes set out above amounted to the grant by Harmoney to a borrower of an "opportunity" to incur a debt. The more difficult issue was whether it also amounted to the grant by Harmoney of a "right" to incur a debt.

The Court said that the dual steps of securing registration as a borrower and then obtaining approval for the listing of a loan application on the website involved part of the process comprising the grant of a right to incur a debt, at least conditional upon the placement of orders by investors with Harmoney.

All of these activities occurred before any steps were taken by HITL via the agency of Harmoney. The Court did not consider it realistic to say that the giving of CCCFA disclosure by HITL via Harmoney was the grant of the right to incur the debt. Nor did it consider that the fact that a loan contract then automatically materialised, as provided in cl 17 of the borrower agreement, was the first incident of the grant of the right to incur the debt the subject of the listed loan.

Rather, the process whereby Harmoney vetted borrowers, approved registered borrowers' loan applications for listing on its website, assigned a credit grade, specified key terms of the proposed loan, and then, upon the loan being fully funded, gave notification to the borrower of that outcome, comprised at least a significant part of the conduct of the grant to a borrower of the right to incur the debt.

The Court concluded that the High Court had not erred in its conclusion that Harmoney was a creditor. However, its conclusion that Harmoney was a creditor had been based on reasons which were different from the High Court reasons. It therefore followed from the parties' agreement that the Platform Fee came within the second limb of the credit fees definition.

Did the High Court err in finding that the investors were creditors?

Neither party contended in the High Court that the investors were creditors for the purposes of the CCCFA. However, without the benefit of argument, the High Court concluded that they were. Neither party presented an argument on appeal in support of that proposition. The Court agreed with the joint position that the investors were not parties to either the loan contract or the loan disclosure. The High Court had been in error by reaching a contrary conclusion.

Did the High Court err in finding that the Platform Fee was a credit fee on the basis that it was a "fee ... payable by the debtor under a credit contract"?

In the High Court, Harmoney had contended that the Platform Fee was not "payable under" the credit contract because the obligation to pay the fee had arisen under the borrower agreement and was charged for Harmoney's performance of services under that agreement. While the loan amount included the amount required to cover the Platform Fee, it was Harmoney's case that this was merely a mechanism for payment of the fee and did not make it "payable under" the credit contract.

The High Court rejected this submission, stating that although the obligation to pay the Platform Fee arose under the borrower agreement, payment was not required until settlement and must be by way of deduction from the amount of the loan. It was because the Platform Fee formed part of the loan amount, and therefore attracted interest, that it should be treated differently from the way it would be treated if it had been payable in cash.

If it were payable in cash directly to Harmoney, then it would not be payable under the credit contract; it would genuinely be a brokerage fee paid to Harmoney for arranging the loan. But the borrower had to incur the cost of credit under the loan contract and pay the fee from the loan moneys. This was not merely mechanical and in ordinary language the fee was payable under the loan contract.

The Court agreed with the High Court that the Platform Fee was payable under the credit contract, albeit for slightly different reasons. The loan contract recorded that the trustee agreed to advance the loan amount, and the definition of settlement in the loan contract provided that Harmoney would apply the loan amount as provided in the loan disclosure. Both versions of the loan disclosure provided for the amount of the Platform Fee to be paid to Harmoney from the sum advanced and for the balance to be credited to the borrower's bank account.

It followed that irrespective of the terms of the borrower agreement, the loan contract and the loan disclosure in conjunction specified that the Platform Fee was to be paid from the loan amount to Harmoney. Therefore, as the High Court said, the fee was payable under the credit contract comprising the loan contract and the loan disclosure.

Did the High Court err in finding that the Platform Fee was not a credit fee on the basis that it was not a "fee ... payable by the debtor ... for the benefit of ... the creditor in connection with a credit contract"?

This issue concerned the third limb of the definition of credit fees under s 5 of the CCCFA. The question assumed both that Harmoney was not a creditor and that the borrower agreement was not part of the credit contract. Thus, the benefit was for HITL alone.

In the High Court, the Commission argued that a benefit accrued for HITL in two ways:

- HITL charged interest on the loan amount comprising both the Platform Fee and the amount of the loan dispersed to the borrower; and
- the collection of the Platform Fee enabled HITL to provide loans which in turn conferred an entitlement to receive an agreed fee from Harmoney.

The High Court had rejected the contention that a benefit had been derived by HITL, reasoning that the direct benefit was said to be that the creditor charged interest on the increased loan amount. However, interest was specifically excluded from the definition of credit fee. Interpreting "benefit" so as to include interest would be contrary to the clearly stated ambit of the definition.

The Commission's alternative argument, that the fee provided an indirect benefit to the creditor because, without payment of the fee, HITL would not be able to make the loan nor receive its fee from Harmoney, was also not viable. Although it was self-evident that HITL's fee depended on the success of Harmoney's platform, that did not mean that the payment of the fee was for the benefit of HITL in its capacity as a creditor.

The Court agreed with the view expressed by the High Court that the definition of "credit fees", although designed to capture both payments made to a creditor and payments which, although not specifically made to a creditor, were nevertheless for the creditor's benefit, did not capture every payment that had a positive effect on a creditor.

However, the Commission also identified a third benefit, namely that the payment of the fee to Harmoney had allowed HITL to avoid the costs of either establishing the loans itself or paying Harmoney, or any other party, to establish such loans.

This argument specified that if Harmoney had not been paid the Platform Fee by the borrower, then HITL would have needed to either incur the costs required to provide the loans or pay Harmoney or another party to carry out these steps.

Harmoney responded that the Commission's assumption that HITL would have to carry out the arrangement of the loan itself was inconsistent with the P2P context where, under the regulations, there was a clear distinction between the licensed intermediary, who matched borrowers and investors, and the provider of the loan.

The Court was persuaded by Harmoney's submission that even if the borrowers did not pay the cost of arranging the loan and HITL had to take those steps, HITL would undoubtedly recoup that cost. Hence for HITL it would be neutral either way. The Court said that the fact that a creditor merely avoided a cost it would otherwise bear was too indirect and remote in order to give HITL "the benefit" of the fee.

This meant that there had been no error in the High Court's conclusion that the Platform Fee was not a credit fee on the basis that it was a fee payable by the debtor for the benefit of the creditor in connection with a credit contract.

Judgment

Aside from the finding that the High Court had erred in finding that the investors were creditors, the appeal was dismissed.

The Commission's cross-appeal was allowed in relation to the question of whether the High Court had erred in finding that the credit contract did not also comprise the borrower agreement.

Cases cited in judgment

Buckley & Young Ltd v Commissioner of Inland Revenue [1978] 2 NZLR 485 (CA);
Commerce Commission v Harmoney Ltd [2017] NZHC 1167, (2017) 23 PRNZ 644;
Commerce Commission v Harmoney Ltd [2017] NZHC 2421;
Commerce Commission v Harmoney Ltd [2018] NZHC 1107, [2019] 2 NZLR 81;
Firm PI 1 Ltd v Zurich Australian Insurance Ltd [2014] NZSC 147, [2015] 1 NZLR 432;
Harmoney Ltd v Commerce Commission [2019] NZCA 355;
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