SUPREME COURT OF QUEENSLAND

CITATION:	*State of Qld v Ward & Anor* [2003] QCA 366
PARTIES:	**STATE OF QUEENSLAND** (plaintiff/respondent) **v** **TIMOTHY JOHN WARD** (first defendant/appellant) **SHARK FINANCIAL SERVICES PTY LTD** ACN 083 322 132 (second defendant/appellant)
FILE NO/S:	Appeal No 6383 of 2002 SC No 5515 of 1999
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	29 August 2003
DELIVERED AT:	Brisbane
HEARING DATE:	3 June 2003
JUDGES:	McPherson and Jerrard JJA and Wilson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. By consent, the appeal be allowed to the extent of setting aside the orders imposed on 14 June 2000 by order 2(a)(vii) and (xii) and 2(b)(iv) and (xiii) of the orders made that day** **2. Otherwise, the appeal is dismissed with costs to be assessed on the standard basis**
CATCHWORDS:	CONSUMER CREDIT – CREDIT PROTECTION – FINANCE BROKERS AND CREDIT PROVIDERS – DISCIPLINARY ACTION – where appellants prohibited under s 23 *Consumer Credit (Queensland) Act* 1994 (Qld) from providing consumer credit – where appellants do not complain about prohibitions imposed – where learned trial judge found that appellants had provided credit unfairly and had repeatedly engaged in unjust conduct – where conduct involved extortionate interest rates and threats of unlawful conduct – where learned trial judge relied on this unjust conduct in making the prohibition orders – whether unjust conduct relevant to imposition of civil penalty CONSUMER CREDIT – CREDIT PROTECTION –

FINANCE BROKERS AND CREDIT PROVIDERS – UNJUST CONDUCT BY – where learned trial judge found that appellants had provided credit unfairly and had repeatedly engaged in unjust conduct – where civil penalties imposed under s 102(4) *Consumer Credit Code* (Qld) – where appellants contend that learned trial judge erred in taking into account the unjust conduct when imposing the civil penalties – where no challenge made to the categorisation of the appellants' conduct as "unjust" – whether s 102(4) makes irrelevant to the imposition of a civil penalty the unjust conduct of the appellants

CONSUMER CREDIT – CREDIT PROTECTION – GENERAL – OPERATION OF CREDIT LEGISLATION – INTERPRETATION AND DEFINITIONS – LOAN CONTRACT – where appellants loaned money for "business or investment purposes" – where appellants effectively forced clients into signing documents declaring such purposes – where appellants exploited a loophole in credit legislation – where client files demonstrate that professed purposes were false – where learned trial judge found that the appellants had repeatedly and systematically contravened key requirements of the *Consumer Credit Code* (Qld) – whether purpose of credit legislation is to regulate conduct of credit providers or to protect borrowers

STATUTES – OPERATION AND EFFECT OF STATUTES – PARTICULAR CLASSES OF STATUTE – PENAL – PUNISHMENT AND PENALTY – where appellants contend that the criminal standard of proof should have been used in imposing the civil penalty – where sections of the *Consumer Credit Code* (Qld) distinguish between the imposition of a civil penalty and prosecution for a criminal offence – where case authority recognises the existence of civil proceedings to enforce a penalty – whether criminal standard of proof ought to have been applied

STATUTES – OPERATION AND EFFECT OF STATUTES – PARTICULAR CLASSES OF STATUTE – PENAL – PUNISHMENT AND PENALTY – where appellants contend that the penalties imposed in toto were excessive – where learned trial judge imposed same penalty of $10,000 in respect of each client – where relevantly identical conduct found in each case – where same key provisions contravened in each case – whether total effect of the penalties imposed manifestly disproportionate to objectives of the *Consumer Credit Code* (Qld)

Consumer Credit Code (Qld), s 6, s 11, s 15, s 102, s 103, s 183
Consumer Credit (Queensland) Act 1994 (Qld), s 17, s 23
Crown Proceedings Act 1980 (Qld)
Customs Act 1901 (Cth)

Excise Act 1901 (Cth)

Briginshaw v Briginshaw (1938) 60 CLR 336, considered
Canham & Ors v Australian Guarantee Corporation Ltd & Anor (1993) 31 NSWLR 246, considered
Custom Credit Corporation Ltd v Gray [1992] 1 VR 540, applied
Environment Protection Authority v Caltex Refining Co Pty Ltd (1993) 178 CLR 477, referred to
GE Capital Finance Australia v Various Debtors (2000) ASC 155-036, discussed
Hudson v United States 522 US 93 (1997), followed
Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd & Ors (2002) 188 ALR 493, distinguished
Martin v Osborne (1936) 55 CLR 367, followed
Newstead Wharves & Stevedoring Co Pty Ltd v Chamberlain; ex parte Chamberlain [1954] St R Qd 331, referred to
The King v The Associated Northern Collieries and Ors (1910) 11 CLR 738, referred to

COUNSEL: P J Roney for the appellants
W Sofronoff QC, with P J Flanagan SC for the respondent

SOLICITORS: Nyst Lawyers for the appellants
Crown Solicitor, C W Lohe, for the respondent

[1] **McPHERSON JA:** I have read the reasons for judgment of Jerrard JA. I agree with them. The appeal should be dismissed with costs.

[2] **JERRARD JA:** On 14 June 2002 the appellants Timothy Ward (referred to hereafter as the first appellant) and Shark Financial Services Pty Ltd (referred to hereafter as the second appellant) were prohibited, by an order of this court made pursuant to s 23 of the *Consumer Credit (Queensland) Act* 1994 (Qld), from thereafter providing consumer credit. That order stated that the grounds for the prohibition were that the appellants had provided consumer credit unfairly, and had repeatedly engaged in unjust conduct in the course of provision of consumer credit. The court also by order declared that those two appellants had contravened key requirements of the *Consumer Credit Code* (Qld) specified in the declaration, and in respect of each such contravention imposed a civil penalty of $10,000.00 pursuant to s 102 of that Code. There were 14 such declarations of contravention in respect of the first appellant, and 13 in respect of the second. Those civil penalties thus totalled $270,000.00. The appellants appeal those orders for civil penalties, but not the prohibition orders.

[3] The judgment under appeal records that the Act and Code came into force on 1 November 1996. Their enactment resulted from the culmination of almost eight years of work by Consumer Affairs Ministers and officers throughout Australia, and the uniform *Consumer Credit Code* enacted in Queensland was based on the State and Territories Uniform Credit Laws Agreement 1993. The object of that legislation was not to regulate business credit, but rather credit intended to be provided solely or predominantly for personal, domestic, or household purposes. The Act by s 4 applies the Code as a law of Queensland and by s 3 defines

"consumer credit" and "credit business". The latter means a business of providing consumer credit and the former relevantly means credit to which the Code applies.

Act and Code provisions relevant to the appeal

[4] Section 6 of the Code applies to the provision of credit, if when the credit contract (defined in s 5 of the Code as being a contract under which credit is or may be provided) is (relevantly) entered into:

- the debtor is a natural person ordinarily resident in Queensland; and
- the credit is provided or intended to be provided wholly or predominately for personal, domestic, or household purposes; and
- a charge is or may be made for providing the credit; and
- the credit provider provides the credit in the course of a business of providing credit.

[5] Section 11 of the Code provides certain applicable presumptions. By s 11(1), in any proceedings in which a party claims that a credit contract is one to which the Code applies, it is presumed to be such until the contrary is proved; and s 11(2) provides that credit is presumed conclusively for the purposes of the Code **not** to be provided solely or predominantly for personal, domestic, or household purposes, if the debtor declares before entering into the credit contract that the credit is to be applied solely or predominantly for business or investment purposes (or for both such purposes). That latter provision was particularly relied on by the two appellants in the course of the business they admittedly carried on for the purpose of the provision of credit.

[6] The judgment under appeal answered that contention by the application of s 11(3) of the Code. It provides that such a declaration is ineffective for the purposes of s 11(2) if the credit provider knew or had reason to believe, at the time the declaration was made, that the credit was in fact to be applied wholly or predominantly for personal, domestic, or household purposes.

[7] Section 12 of the Code provides that a credit contract must be in the form of a written contract document, and s 15 provides matters that must be contained in the contract document. These include:

- [by s 15(B)] the amount of the credit to be provided;
- [by s 15(C)] the annual percentage rate or rates (of interest);
- [by s 15(D)] the method of calculation of the interest charges payable and the frequency with which interest charges are to be debited.

[8] Section 20 of the Code provides:

"**Offence for noncompliance**

A credit provider must not –

(a) enter into a credit contract that contravenes a requirement of this Division; or

(b) otherwise contravene a requirement of this Division.

Maximum penalty – 100 penalty units."

[9] Section 100 of the Code provides:

> "(1) For the purposes of this Division, a "**key requirement**" in connection with a credit contract … is any one of the requirements of this Code contained in the following provisions –
>
> (a) section 15(B);
> (b) section 15(C);
> (c) section 15(D);
>
> …"

[10] Section 102 of the Code provides that:

"**(1) Declaration as to key requirement.** The Court must, on an application being made, by order declare whether or not the credit provider has contravened a key requirement in connection with the credit contract or contracts concerned.

(2) Penalty orders. The Court may make an order, in accordance with this Division, requiring the credit provider to pay an amount as a civil penalty, if it is of the opinion that the credit provider has contravened a key requirement.

(3) Prudential standing. The Court, in considering the imposition of a civil penalty, must have regard primarily to the prudential standing of any credit provider concerned, … if the credit provider … takes deposits or is a borrowing corporation …

(4) Other matters to be considered. The Court, in considering the imposition of a civil penalty, must have regard to the following –

(a) the conduct of the credit provider and debtor before and after the credit contract was entered into;
(b) whether the contravention was deliberate or otherwise;
(c) the loss or other detriment (if any) suffered by the debtor as a result of the contravention;
(d) when the credit provider first became aware, or ought reasonably to have become aware, of the contravention;
(e) any systems or procedures of the credit provider to prevent or identify contraventions;
(f) whether the contravention could have been prevented by the credit provider;
(g) any action taken by the credit provider to remedy the contravention or compensate the debtor or to prevent further contraventions;
(h) the time taken to make the application and the nature of the application;
(i) any other matter the Court considers relevant.

…"

[11] Section 103 of the Code provides that where the application is made by a debtor or guarantor for an order, the maximum civil penalty that may be imposed is an amount not exceeding (relevantly) the interest charges payable, unless the Court is satisfied that the debtor has suffered a loss, in which case the amount is to be not less than that loss. By s 105, however, when the application is made by the Government Consumer Agency for an order, the maximum civil penalty that may

be imposed by a Court for a contravention of a key requirement relating to a contract affected by the application is an amount calculated so that the total civil penalty for all contraventions of the requirement does not exceed $500,000.00. Section 106 provides that an amount of a civil penalty ordered to be paid on the application by the Government Consumer Agency must be paid by the credit provider into a fund established and operated for the purposes of that section; and if no such fund is established then paid to the Government Consumer Agency. Section 107 provides that the court may, on application by a debtor or guarantor, order that the credit provider pay to the debtor or guarantor an amount by way of compensation for loss arising from the contravention (of a key requirement).

[12] Section 113 provides:

> "**Offences**
> Nothing in this Division affects the liability of a person for an offence against this Code or the regulations."

Section 178 provides:

> "**Penalty at end of provision**
> (1) In this Code, a penalty specified at the end of –
> (a) a section (whether or not the section is divided into subsections);
> …
> indicates that an offence mentioned in the section, subsection or part is punishable on conviction by a penalty not more than the specified penalty.
> …"

Section 180 provides:

> "**Summary offences**
> An offence against this Code or the regulations is punishable summarily."

[13] Those provisions of the Code are relevant to the arguments by the appellants about the imposition upon them of the orders for civil penalties. The provisions of the Act relevant to that argument, and to the prohibition orders made, are the following. Section 23 of the Act provides that on application by the Chief Executive (of the Department, who has the functions of the Government Consumer Agency – s 8) the court may make an order prohibiting a person from providing consumer credit, if the court considers the person is not an appropriate person to provide consumer credit having regard to whether the person – (s 23(3))

> "…
> (c) has carried on a business dishonestly or unfairly; or
> …
> (e) has repeatedly engaged in unjust conduct in the course of a credit business;
> ..."

Section 17 of the Act defines "unjust conduct" by a credit provider as

> "(a) dishonest or unfair conduct;
> (b) anything done, or omitted to be done, in breach of a contract, whether or not a proceeding in relation to the breach has been

brought;
…"

Matters not in contention

[14] The judgment under appeal records that the proceedings were brought pursuant to the *Crown Proceedings Act* 1980 (Qld) on behalf of the Chief Executive of the Government Consumer Agency, and that the first appellant Timothy Ward was at all material times subsequent to 8 July 1998 the sole shareholder and director of the second appellant, which was incorporated on that day. From then on the second appellant carried on the business of being a "credit provider" within the meaning of the Code. The judgment records the satisfaction of the learned judge that prior to that incorporation, the first appellant had provided credit of the sort to which, upon their commencement, the Act and Code applied; and that therefore with respect to loan transactions subsequent to 1 November 1996 and prior to 8 July 1998, the first appellant was subject to the constraints of the Act and Code, and both appellants were subject to those statutory constraints after 8 July 1998. The learned judge noted that s 183 of the Code provides that where a corporation contravened a provision of the Code, each officer of the corporation was taken to have contravened the provision if the officer knowingly authorised or permitted that contravention, and that officer could be proceeded against and convicted whether or not proceedings were taken against the corporation.

The appellants' contentions

[15] The appellants' principal complaint regarding the orders for civil penalties is that the learned trial judge erred in law by taking into account, when imposing those penalties, the conduct found to be "unjust conduct" in the course of the provision of consumer credit by the appellants, and upon which the learned judge relied for the making of prohibition orders. The appellants made a very limited challenge to the findings by the learned judge as to what actual conduct occurred[1], and which the judge held to be "unjust conduct" as defined. There is no challenge to the categorisation of the conduct found as "unjust" conduct; and the complaint made instead is that s 102(4) of the Code, by its provision of a list of matters to which a court must have regard when imposing a civil penalty, makes irrelevant to both the imposition of a civil penalty and its quantum that conduct of the appellants found to be relevantly unjust.

Evidence of the appellants' unjust conduct

[16] The evidence before the learned judge included evidence from a number of witnesses and transcripts of surveillance tapes made in July, August, and September 1998, recording conversations between Mr Ward and various intending borrowers and associates of his, which conversations took place in the unit at Surfers Paradise in which he and the second appellant conducted his and its credit providing business activity. The evidence also included copies of contracts entered into between various borrowers and the second appellant. The learned judge's view of that evidence, a view not actually challenged on the appeal and which view resulted in the making of the prohibition orders, was described by the judge in the reasons for judgment (at [103]) as being:

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1 The very limited challenge made is described in [53] and [56] below.

> "That … [the appellants] lent monies to criminal classes of borrowers and to foolish and impoverished people unable to obtain loans elsewhere in relatively small sums at outrageously exorbitant rates of interest, non-payment of which on a weekly basis would attract the infliction of serious physical injury by groups of brutal and merciless people with ability to track down those seeking to hide from them."

Witnesses

[17] The evidence amply justified that description, and it was not suggested otherwise. A Kathleen Beaver gave evidence that she had been on a disability pension for some 13 years, and had wanted a loan for some parts for her car, screens for her daughter's bedroom windows, and for some Christmas presents. The relevant contract (which commences at AR 459) records the purpose of the loan as being for "car parts and screen for house". She borrowed $2,000.00, and the first appellant explained that the interest payments were $60.00 per week ($30.00 interest per $1,000.00 borrowed per week) (AR 42), that interest must be repaid on time, and that it was $5.00 a day extra if she was late (at AR 44). The capital was only repayable in $500 amounts or the $2,000.00 outright (at AR 45). She got the loan in September 1997, and repaid $120.00 per fortnight until late April 1999, when she borrowed $2,000.00 from her daughter and repaid the loan amount. The rate of interest she actually paid was 156% per annum (i.e. $3,120.00 per annum).

[18] The contract document clearly shows her to be an invalid pensioner, and she swore she did not appreciate that she was actually paying that staggering rate of interest. She agreed she had told the first appellant she would like to get her de facto a cheap car or bike so that he could work. As the learned judge found, the contract Kathleen Beaver entered into contravened the key provisions in s 15(B) of the Code. That finding was not challenged.

[19] Evidence was called from a Raymond Gilleland, who received an aged pension. In March 1997 he had borrowed $2,000.00 from the first appellant and swore that he would have explained that he needed a loan, he could not get one anywhere else, and he needed it for household expenses "or food, whatever, because of the problem at home" (at AR 66). Mr Ward also explained to him that repayments were at the rate of $30.00 per week for each $1,000.00 borrowed, and that the capital was repayable in amounts of $500.00 only. Mr Gilleland borrowed a second amount of $1,000.00 in September 1997, and a third sum ($2,000.00) in March 1998. By that stage his repayments (of interest only) were $150.00 per week. He borrowed a further $500.00 in June 1998, and repaid interest at the rate of $165.00 per week. This was his full pension. He paid that amount until July 1999, and then by agreement with the first appellant began repayment of only $50.00 per week, in reduction of the principal debt. He made that $50.00 payment until Christmas 2000 when he stopped payments completely, being of the view that:

> "…well, I have paid a huge amount of money back, far more than just interest, commercially, and I thought, I just can't continue anymore, so I just stopped."

[20] That resulted on 5 May 2001 in his being assaulted in the street in Labrador via Southport, after the first appellant rode by on a motor cycle as Mr Gilleland was

walking along. He was punched in the stomach and asked why he had stopped making payments. Mr Gilleland was then 70. Mr Ward told Mr Gilleland:

> "…that if I did it to him again he would take me up a dark alley and kick the living daylights out of me, was roughly the translation for this Court."

He restarted payments on 22 May 2001, and paid until Christmas 2001. By that time he had paid an amount of between $16,000.00 to $18,000.00 on the $5,000.00 borrowed. He too had paid 156% interest, had not made any relevant declaration, and the unchallenged ultimate finding was that all the key requirements of s 15 had been breached by the appellants.

[21] Evidence was called from a Sue Patching, who also did not provide any relevant declarations under s 11 of the Code to the appellants. She had conducted a business in which she provided strippers for "gentleman's'" lunch functions once per month. In November 1996 she borrowed $3,000.00 from the first appellant, informing him that she needed the money because her daughter was coming from New Zealand (AR 100). She too was told she must repay at the rate of $30.00 per week per $1,000.00 borrowed. She repaid interest at that rate from November 1996 until late 1998, when she made a repayment of $2,500.00 of the capital, and thereafter paid weekly interest at $10.00 per week on the remaining $500.00. In late 1998 she borrowed a further $2,000.00, informing the appellant that this was for personal use for herself (AR 103), and made repayments on that. Altogether she paid a total of $12,380.00 on borrowings of $5,000.00. It was put to her, and she denied, that she had said she wanted the money for her lunch business.

[22] A Mr Allan Harding, who existed on a disability pension, was also called. He had borrowed $1,500.00 in early 1997 from the first appellant to "pay some personal bills" ("telephone account, back rent, power account"), and he provided no relevant declaration to the first appellant. He swore that Mr Ward had never discussed with him any business that Mr Harding might have. Some six months after his first borrowing he borrowed a further $500.00. Mr Ward had explained the need to repay interest at the rate of $30.00 per week per $1,000.00 borrowed, which Mr Harding did until May 1999. He then found that Mr Ward was in possession of a ring owned by Mr Harding and he stopped payment. He had by then repaid $7,400.00 on a borrowing of $2,000.00.

[23] A witness who did sign a relevant declaration, a Justin Lincoln, was called. Mr Lincoln was unemployed at the time and told Mr Ward that (at AR 139). On 4 August 1998 he borrowed $500.00, and was told he must repay that at the rate of $20.00 per week by way of interest, and the capital as a lump sum. That interest rate was 208%. He was told by Mr Ward:

> "…that I'd have to sign a document stating that it was for a business loan and he didn't give – he didn't give an F about what I wanted the money for, just as long as I repaid it."

He in fact was not in any business, and did not say that he was. Rather, he presented his job seeker card, which Mr Ward photocopied, and Mr Ward recorded Mr Lincoln's family's addresses and phone numbers.

[24] As time passed Mr Lincoln got to be late in his payments, and that resulted in his being threatened by some "Really very big, muscley men" (sic) and told that he was

a "scumbag" and that if he was "ever late with a payment ever again, that, you know, something was going to happen to me" (AR 144). It was put to him that he had told Mr Ward he wanted to buy some lawn mowing equipment; but Mr Lincoln had no recollection of saying that.

[25] Affidavit evidence was read from a David Harwood (at AR 1260), who described how in April 1997 he had borrowed $500.00 from the first appellant, when needing money to set up a house after living interstate. He had bills in respect of a bond, washing machine and furniture. He told Mr Ward the object of the borrowing, and:

> "Tim did not seem worried about what the loan was for. Tim explained about the loan and said he was the person I would be dealing with. He said the loan was a full $500, the interest payments were $30 per week. To be able to pay off the principal it had to be in a lump sum of $500. If payment was not received on a Monday there would be $5 a day late fee. The money was to be put into an envelope and placed through a slot in the door.
>
> Tim said to us if we did not make a repayment on time "I have collectors who are not adverse to the odd kneecap." By this statement I was not going to be late in repayments."

The file seized in respect of Mr Harwood contains a blank standard format declaration (AR 1269) (not signed by him) declaring that the credit was provided predominantly for business or investment purposes.

Tape recorded conversations

[26] That evidence from witnesses either called, or from whom affidavits were obtained, presents a portion of the flavour of the appellants' credit business. Perhaps more revealing are the covertly recorded conversations the first appellant held in and about that business. These demonstrate the first appellant's keen awareness of the critical provisions of s 6 and s 11 of the Code, and the need for him to obtain a declaration that the lending was predominantly for business purposes when in fact providing credit for personal, domestic, or household purposes. At AR 861 the transcript records the appellant remarking that:

> "And we found…we found a loophole. And we've been able to make money work for us. But like I say, one day they could cl…close down our loophole."

and a little later

> "That's why we've had to restructure our contracts. Like before November last year, we could just loan personal loans to anyone. …They tightened it up but they…it's still not foolproof, you know."

[27] It is noteworthy the first appellant did not remark that he had changed in any way the nature of the loans he made, as distinct from changing the paper work. What he thought that loophole was is demonstrated in other transcripts, including one (at AR 895) in which he was recorded remarking that:

> "These contracts are cunts of things mate… Just time consuming fucken waste of paper …we have to act outside the Consumer Credit Code now. But with…the Consumer Laws changed last…last November or some fucken thing. And now, it made it really hard to

> borrow people money. So now what we have to do is we have to, we can only borrow for business or investment purposes." (sic)

and a little later in the same conversation (with a borrower)

> "So of course this is what we're using the money for isn't it?";

and later again

> "Yep, just there. It's just crap. Just initial there and sign there."

[28] In case there was any doubt what was meant, this was explained to another client in these terms that:

> "This is just stating that you're gonna use it for business or investment purposes okay so just print your name on the top."

This was said in a conversation (at AR 950) in which no reference was made at all to the actual purpose of the borrowing.

[29] The same applies to a remark recorded (at AR 965), made to another borrower, who was told:

> "…this last page is the most important page of the contract cause what it states is that you're using the money for business or investment purposes so you're starting up a little business."

although the tape recorded conversation had nothing about such a business.

[30] The most revealing transcript was that recorded (at AR 941) with a borrower who was a little slower in comprehension than some others. That borrower had explained that he just needed "a bit to not get me out of trouble but I mean it's a bit of a pain to sort of pay rent and stuff like that and you know pay back or whatever but you know I'd like to get a nice little telly or something like that". (AR 940) After those remarks Mr Ward advised:

Tim	"now bearing in mind also that I can only do I can only do business or investment loans so you need to be starting up a little Amway business or something like that well you need to be"
M1	"Well yeah you'd have to show me how to do it"
Tim	"no no no no no"
M1	"I don't get what you mean"
Tim	"aaaah you coming to me for a loan to start off a little business aren't ya?"

[Finally, the borrower got the point]

M1	"oh yeah yeah I am".

Discussions about the use of violence

[31] The transcripts are replete with conversations about, and threats of, violence. The other frequently recurring feature is the insistence that borrowers provide photographs of themselves, together with many details identifying them, so that as explained to a borrower (at AR 846):

> "…we have had people who run away and guys I give the file to never know who they are really looking for so this just stays in your file and I'll ask you to smile" (a camera is heard).

[32] A borrower called "Danny" was told: (on his answering service, in a message Mr Ward left).

> "…I'll hunt you down you little cunt rip your fucking throat out" (AR 917).

A woman called Jennifer was told by Mr Ward about her boyfriend, that:

> "If you can just let him know that he may have fucked with a lotta people and got away with it but this time he's done the wrong thing and we will maim him when we see him."

This was because, as Jennifer was told:

> "…we must exhaust every avenue to find this piece of shit." (AR 923)

[33] The first appellant was recorded explaining to another person that:

> "we don't give a fuck we'll bash women as well as guys you know I'm just being straight with you. I'm just telling you now to me tits and a pussy don't mean fuck all if your playing with my money I'll treat them the same way and I know other guys are exactly the same. Ok my theory is you you want to act like a man we'll treat you like a man". (At AR 1093)

[34] What being treated like a man meant was explained to someone else as being (at AR 1084) that:

> "…next time you miss a fucken payment … I'll be sending boys out there to fucken deal with you."

And the inadvisability of seeking help from the authorities was explained to another borrower, who was told that:

> "…go to the cops…come back next time we'll cut you up." (At AR 1088)

To another it was explained that:

> "Listen to me man, listen I've got fucken … I've got four hundred clients. And they're fucken drug dealers, they're fucken hookers. They are the lowest form of fucken life on this earth. Now, okay, well why would a family man fuck with me?" (At AR 1058)

The civil penalty orders

[35] The application for civil penalty orders involved 32 of the appellants' clients, of whom 21 had signed declarations in identical terms declaring that the credit to be provided "to me/us by the credit provider is to be applied solely or predominantly for business or investment purposes (or for both purposes)", with a view by the appellants to excluding the Code. Of the remaining 12[2] some (including the persons Beaver, Gilleland, Harding and Patching) gave evidence of a non-business usage communicated to the first appellant, or (like Howard) provided a statement to that effect. For example, the borrower Patricia Greene borrowed $2,000.00 for car repayments in August 1997, and swore in a statement that she was sure she told the first appellant that the money was for that purpose. She signed no documentation at all. After making repayments at the standard ($30.00 per week per $1,000.00) rate, she stopped making them in February 1999 and contacted the police. This led to the

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[2] Where there was no declaration, the effect of s 11(1) of the Code was that its provisions were presumed to apply to the credit contracts.

first appellant contacting her and telling her that "you have made a complaint against me and I will get you for it". She thereafter received telephone calls in which the callers told her "you're dead, you're dead, you're dead, you owe people money and we'll get you for it". All up she repaid $7,380.00 in interest.

[36] Of those 21 who did sign declarations, the files seized demonstrated that the professed business purposes were nonsense. If not, statements obtained from the borrowers said so. For example the borrower Mark Eastabrook made a statement (AR 1311) describing how when he borrowed $1,000.00 in early 1998, he told the first appellant that he needed that money to pay for arrears on his rent, and was told in return that:

> "…the loan must for business purpose. He said something to the effect that the loan would be for re-financing a business debt. I was required to sign a piece of paper saying the loan was for business purposes."

Likewise, the borrower Tracey Bentley who signed a relevant declaration on 6 May 1998 made it evident in her application that she was in fact a policewoman, then living with her parents and moving into police barracks in July; and there was no suggestion of any business she was contemplating. Other files from declarants identified them as tenants who were social security recipients, with no hint of any business purpose.

Unchallenged findings by the judge

[37] A substantial body of evidence of that nature resulted in findings including the following by the learned judge, none of which were challenged. These were that:

- unfair conduct within the meaning of s 17 of the Act was essential to the appellant's "loan shark" activities (as so described by the learned judge);
- the particulars on the "files" were more consistent with loans being for the personal use of the borrower than for the purpose of business or investment (at [10] of the reasons);
- the appellants had seized on s 11 as a loophole which fact was clear from the many tape recorded conversations (at [29]);
- the first appellant had made clear that he would only advance money to desperate people if they signed the necessary declaration (at [30]);
- the first appellant made that signature a condition precedent to borrowing (at [34]);
- the whole exercise of signing declarations was undertaken to avoid the impact of the Code on the money lent for non-business and non-investment purposes (at [35]);
- it was unlikely that a borrower would earn enough income from a lawful pursuit to pay the interest charged and the whole system was a charade (at [40]);
- there were a number of tape recordings of threats made explicitly and impliedly both before and after default by borrowers, and evidence from a number of

persons that violence had been applied as part of ordinary business activity of the appellants (at [39]);

- threats of violence were repeatedly made to secure money due as interest, and on occasion persons were procured to use such violence (for that purpose) (at [39]);

- the recorded conversations showed that threats of violence were an essential part of the appellants' business activity (at [48]);

- it was more likely than not that a knife was actually produced to frighten Mr Lincoln (at [71]);

- the rate of interest charged was outrageous (at [39]);

- some borrowers were doing so to keep themselves supplied with unlawful drugs, some to finance drug dealing, and, or alternatively, lifestyles as prostitutes (at [50];

- the first appellant was a robust big man who regularly attended the gym, as did his associates and collectors (at [80]);

- the drug dealers and hookers were unlikely to complain of the threats of violence made to them (at [81]), and that it was significant in the judge's opinion that interest payments were suspended during the period of any prison sentence imposed on a borrower (at [82]).

The contraventions the judge found

[38] The learned judge concluded that the appellants had repeatedly engaged in unjust conduct as defined. On that evidence those findings were utterly unavoidable. It is unsurprising there is no appeal about the prohibition order. In respect of the second critical finding, that the appellants had repeatedly and systematically contravened key requirements of the Code (at [106]), the appellants do not challenge that general proposition, nor the finding of specific breaches of the Code described in [108] of the reasons and in detail at AR 1450 – 1455, where His Honour considered separately the case of each of the contracts with the various borrowers the subject of the application; and made repeated findings of breaches of either all key requirements, or of those in s 15(B), 15(C), and 15(D) of the Code. Where there was no written contract, a breach of all key requirements was found. Where there was one, the three standard breaches of s 15 were found.

The appellants' grounds of appeal

Onus of proof

[39] The appellants' complaints are as follows. Firstly, that the learned trial judge ought to have applied the criminal standard of proof beyond reasonable doubt, rather than that approved by the High Court in *Briginshaw v Briginshaw* (1938) 60 CLR 336. The appellants devoted quite some time to this argument.

[40] That complaint can fairly be considered entirely academic, since whatever standard of proof applied the same findings would inevitably be made. In any event the

submission otherwise lacks merit. It principally relies upon the words "contravention" or "contravened" in s 102 for the proposition they import the criminal standard. Accepting that proof of a contravention implies proof of some wrong doing, the appellants' arguments failed to recognise that sections 20, 113 and 178 of the Code plainly distinguish between the imposition of a civil penalty provided for in s 102 and prosecution under the Code in the manner provided by s 180 for the (criminal) offence created by s 20.

[41] The argument relies further upon the judgment by this court[3] in which it declared the criminal standard of proof applied to Customs Prosecutions under the *Customs Act* 1901 (Cth), and the like prosecutions under the *Excise Act* 1901 (Cth). The appellants place weight on the usage in the relevant provision of the *Excise Act* of the expression "a person who contravenes" (that legislation), but overlook that that legislation goes on to provide that such a person is "guilty of an offence punishable upon conviction"[4]. The relevant provision of the *Customs Act* likewise provides that "a person who contravenes" (the *Customs Act* provisions) "is guilty of an offence punishable upon conviction", and goes on to make reference to the imposition of a penalty where a person is "convicted of an offence" against the relevant paragraph.

[42] That legislation is plainly distinguishable from the provisions of the Code in s 102 by its use of the terms "guilty", "offence", and "punishable upon conviction". These are the expressions relevantly appearing in s 20 and s 178 of the Code, not s 102.

[43] There is the further matter that the provisions of s 107, which allow for orders that a credit provider pay compensation for losses arising from "the contravention" of a key requirement, plainly envisage applications in which the civil standard of proof is applied. The appellants' counsel somewhat reluctantly conceded as much. That means their argument is that the civil onus applies in s 107 on such applications, and a criminal onus in s 102 applications. Then there is the importance of the provision in s 113, clearly envisaging the possibility of both prosecution for an offence against the Code, and also the ordering of a civil penalty. This compares with s 181, which provides that if an act or omission constitutes an offence both under the Code and under another law (of Queensland), then where the offender has been punished in relation to the offence under that other law, the offender is not liable to be punished in relation to the offence under the Code.

[44] Case authority recognises the existence of civil proceedings to enforce a penalty. They are recognised in the judgment of Isaacs J in *The King v The Associated Northern Collieries and Ors* (1910) 11 CLR 738 at 747, and in the judgments in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 504 – 505 (Mason CJ and Toohey J) at 518 (Brennan J) and at 552 (McHugh J). The point of the references to civil procedures for penalties in each of those cases is inconsistent with the notion that these are criminal proceedings. Consistent with that view is the decision of the Full Court of Queensland in *Newstead Wharves & Stevedoring Co Pty Ltd v Chamberlain; Ex parte Chamberlain* [1954] St R Qd 331, where the court (at 340), distinguishing between proceedings for breaches of criminal offences and proceedings for a penalty "for an offence against the Act or

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3 *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd & Ors* (2001) 188 ALR 493

4 s 120 of the *Excise Act* is set out at ALR 496

the regulations …or for a breach or non observance of any term of an order or award", held that proceedings for a breach of an award did not constitute a criminal offence; and that:

> "The inference to be drawn from all this, is that where the Legislature intended an act or omission to be an offence, it said so clearly, either by making use of the Acts Interpretation Act or by a specific statement that the act or omission constituted an offence."

[45] As McPherson JA remarked during argument on the appeal, the Supreme Court of the United States in *Hudson v United States* 522 US 93 (1997) held that the imposition of a civil penalty, followed by prosecution for a criminal offence, did not contravene the double jeopardy clause of the United States Constitution. That court held that whether a particular punishment was criminal or civil was at least initially a matter of statutory construction, and relevant matters in deciding that included:[5]

- whether the sanction involved an affirmative disability or restraint (here it does not);
- whether it has historically been regarded as a punishment (here, it has not);
- whether it comes into play only on a finding of scienter (here, it does not);
- whether its operation would promote the traditional aims of punishment – retribution and deterrence (here it does, to an extent);
- whether the behaviour to which it applied was already a crime (here, yes, by reason of s 20);
- whether an alternative purpose to which it may rationally be connected is assignable for it (here, to prevent profit taking by conduct in contravention, and to discourage non-compliance);
- whether it appears excessive in relation to the alternative purpose assigned (here, no minimum penalty is provided).

[46] The US Supreme Court recognised that the imposition of money penalties would deter others from emulating the conduct of those so dealt with, a traditional goal of criminal punishment, but held the mere presence of that purpose was insufficient to render a sanction criminal, since deterrence "may serve civil as well as criminal goals". The judgment remarks that to hold that the mere presence of a deterrent purpose renders such sanctions as "criminal" for double jeopardy purposes would severely undermine the government's ability to engage in effective regulation; I respectfully agree.

Alleged irrelevance of the unjust conduct

[47] The terms of the Code considered as a whole, together with those citations from case authority, demonstrate that the appellants' academic argument about the proper onus of proof is erroneous. Turning to its argument that the demonstrated common course of outrageous interest rates, sham declarations, and threatened or actual violence, was irrelevant to a decision whether to impose a civil penalty and to its

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5 Citing from *Kennedy v Mendoza-Martinez* 372 US 144 (1963) at 168-169

quantum, the appellants' most persuasive point was the simple oddity of the notion that such conduct would lead to a civil penalty only where it was accompanied by proof of contravention of a key requirement of the Code. That argument has merit, but is answered by the provisions of s 102, which on their face do require that when contravention of key provisions is established, the court must have regard to the conduct of the credit provider (s 102(4)(a)), and to matters that the court considers relevant (s 102(4)(i)).

[48] The fact that s 102 makes no explicit reference to taking "unjust" conduct into account does not make such conduct irrelevant when it has occurred. The consistent contravention of the same key provisions repeatedly found contravened, and in which borrowers did not have the astonishingly high annual rate of interest spelled out in writing, occurred in circumstances where there was also evidence of frequent threats of violence and the provision of sham declarations; or else of avoiding even having written contracts. All constituent elements were inextricably mixed together in the appellants' lending practices. That conduct, so flamboyantly contemptuous of both the criminal and other statute law, and the private rights and personal safety of others, was made relevant by s 102(4)(a) and (i). Deterrence of such conduct is a relevant consideration, and as the learned judge described, the conduct had had a serious impact on the borrowers. The course of conduct established by the oral evidence, tape recordings, and the contracts themselves[6], was conduct from which a court acting responsibly in making orders should seek to deter others, by the impositions of civil penalties which upon payment will contribute to an important fund pursuant to s 106.

Alleged excessive amount of penalty

[49] The appellants argued that the penalties imposed in toto were excessive, and in part relied upon the argument that the learned judge had found that compliance with the Code by the appellants would have made no difference to the borrowers. As to that, that finding was not necessarily accurate, since stating the interest rate on a per annum basis may have caused some borrowers to think again. In any event, there is simply no reason for not giving desperate people such protection as the law provides. The Code looks at the conduct of lenders and regulates them, rather than borrowers.

[50] Allied to the complaint that the appellants' conduct in complying or not complying with the Code was irrelevant to the borrowers who were desperate and had nowhere else to go, is a complaint that the total effect of the penalties imposed was manifestly disproportionate to any proper objective of the Code. The appellants referred to the remarks in *Canham & Ors v Australian Guarantee Corporation Ltd & Anor* (1993) 31 NSWLR 246 at 254, where Kirby P (as he then was) wrote of comparable provisions in the *Credit Act* 1984 (NSW):

> "The ultimate theory behind the philosophy of truth in lending in our credit legislation is that disclosure of critical elements in the consumer contract will help to ensure honesty and integrity in the relationship (where one party is normally disadvantaged or even vulnerable); promote informed choices by consumers; and allow the market for financial services to operate effectively."

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6 See *Martin v Osborne* (1936) 55 CLR 367 at 376 and 386

The appellants' argument in essence was that the undesirable features of their admittedly deviant conduct had little to do with cloaking or withholding truth in lending. This was because the borrowers understood the brutal realities of the appellants' terms of lending, and went ahead in circumstances in which complete compliance in writing with the terms of the Code would have made no difference. The appellants submitted that other than encouraging truth in lending, the Code provisions were not concerned with regulating the conduct of lenders.

[51] Those submissions were really an argument that s 102 should be construed so as to make irrelevant the background of the appellants' regular conduct associated with its lending which was in breach of the criminal law, the consumer credit law and basic laws of contract. The actual force used on Mr Gilleland was prima facie a criminal offence, and the repeated threats implying personal injury on failure to pay on time, and regularly, an extortionate rate of interest, which threats the first appellant was tape recorded making, were at least arguably in breach of s 415(1)(b) of the *Criminal Code;* (threatening a detriment) particularly when made in circumstances where there was no written contract or when written contracts contravened the *Credit Code*. The appellants do not dispute that they repeatedly contravened that Code.

[52] As McPherson JA also remarked in argument, their conduct in disregarding the requirement that there be a written contract containing specific provisions, and in threatening recourse to assault rather than to the court on non-payment of interest, was in breach of the implied obligation on the appellants as a party to a contract (of lending) to do all that was reasonably necessary to secure performance of the contract and its benefit for the other party.[7] Section 102 commands a court considering the imposition of a civil penalty to consider the credit provider's conduct before and after a credit contract was entered into, and to consider whether contraventions of the requirement that that contract contain particular matters were deliberate. This makes relevant the appellants' "contract related" conduct, and here express terms required by the Code were repeatedly deliberately omitted, and borrowers were denied their benefit, often with accompanying threats.

[53] The appellants concede those arguments, but reply that the learned judge ought to have acted on the basis that it was not established, in respect of those borrowers who neither gave evidence nor provided an affidavit, that they had been subjected to threats of unlawful injury or detriment on non-performance of their oral agreement. With due respect, that argument simply denied the overwhelming effect of the admissible evidence in establishing a course of conduct routinely followed, and which could be presumed by the court to have been followed with the borrowers the subject of the application. Drawing that last inference is warranted by authority such as *Martin v Osborne* (supra).

[54] Once it is accepted that the learned judge determining the imposition of a civil penalty was entitled and obliged to have regard to (unjust) conduct in breach of the Code, of contract, and of the criminal law, it is difficult to challenge the penalties ultimately imposed. In *GE Capital Finance Australia v Various Debtors* [2000] ASC 155-036, Deputy President Coghlan of the Victorian Civil and Administrative Tribunal imposed an agreed civil penalty of $250,000.00 in a matter in which the

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[7] See the remarks of Mason J in *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 607

Consumer Credit Code (Vic) had been breached by GE Capital Finance Australia, in respect of some hundreds of thousands of its customers. There was no evidence before the Deputy President of any loss or other detriment suffered by any debtor as a result of the contraventions, and no evidence of any deliberate intent in relation to the breaches. The Deputy President was also satisfied that GE's conduct both before and after entering into the contracts demonstrated that it took reasonable steps to ensure compliance with the provisions of the Code, took its obligations under the Code seriously, and always sought to comply with them (these findings are at 200,307). Further, the Deputy President found (at paragraph 35.5) that the problem in that case arose when retailers, although trained, did not ensure all the contract formation steps were properly followed, and that GE worked conscientiously and thoroughly towards ensuring the complete elimination of the potential for the problem. The contrast of that result with the penalties imposed in the present case does not indicate that the latter were unjustified in their total effect.

Complaint of identical penalties

[55] The appellant submits in the alternative that the learned judge was in error in imposing the same penalty of $10,000.00 in each case, but that submission overlooks that relevantly identical conduct was found. With each borrower the same key provisions were contravened, and the other evidence entitled a finding that this undoubtedly occurred with the same extortionate interest rates and often with accompanying threats of unlawful conduct. There was actually no reason for distinguishing between the penalties to be imposed in any of the matters. That it was the same penalty was not inconsistent with the observation by the judges of the Appeal Division of the Supreme Court of Victoria in *Custom Credit Corporation Ltd v Gray* [1992] 1 VR 540 at 562, and relied on by the appellants. Those were that when a civil penalty was imposed the tribunal should tailor the penalty to fit the particular case, and that it should be duly proportionate to the relevant conduct of the credit provider and debtor, and to any consequent detriment sustained by the debtor.

Other allegedly irrelevant considerations

[56] The appellants further complained that the learned trial judge had taken other irrelevant matters into consideration when fixing the penalty, other than their "unjust" conduct. The oral argument of the appellant revealed some uncertainty as to which of the matters specified by the learned judge in paragraph [103] (i)-(v) of the reasons ought not to have been relied upon by the judge; but the appellants' arguments can probably fairly be summarised as being that the learned judge wrongly described the appellants as lending money to "criminal classes" of borrowers; and erred in making reference more than once in the judgment to publications in the United States describing the development of "loan shark" operations in that country, and their connection in it with organised crime. Those references were undoubtedly stimulated by the second appellant's name, but did not result in the learned judge taking irrelevant matters into account. The only point about which complaint could actually be made was the assumption apparently made by the learned judge, namely that the appellants' customers did include those who dealt in drugs and who prostituted their bodies, when the admissible evidence really established only that he had so described his clientele, to at least one other customer. However, that complaint leads nowhere.

[57] The first appellant's unguarded and recorded conversations included one in which, when explaining to a "Warren" that the business had a policy of wiping out all interest charges when "they go to prison", that this was because:

> "when they run away I get pissed off. When they go to prison they got no control over that."

The appellant also explained to Warren that those who went to prison were required to repay the principal, and that that was the reason that "we all turned up". He added:

> "yeah the only reason that four guys turned up because we thought he might have been living there."

The ex-prisoner apparently still owed the principal.

[58] That conversation demonstrates that the first appellant appeared to have surrounded himself with persons willing to engage in conduct threatening physical violence, and therefore unlawful, to obtain repayment; but at the same time was perhaps surprisingly protective of those borrowers who broke the law and were jailed. In those circumstances the learned judge was entitled to describe in his judgment an association of the appellants with criminal classes of people. The judge was not thereby shown to be in error in imposing any of the penalties he did.

[59] That is subject to the observations that it was conceded by the respondent that grounds three and four of the notice of appeal were made out, and that the Act had not applied to the borrowers Dean and Winton who were not ordinarily resident in Queensland; and that the judge had imposed penalties in respect of two other claims which had been abandoned. In the circumstances the orders imposing those four penalties should be set aside.

[60] I would order:

(a) that by consent the appeal be allowed to the extent of setting aside the orders imposed on 14 June 2002 by order 2(a)(vii) and (xii) and 2(b)(iv) and (xiii) of the orders made that day;

(b) that otherwise the appeal be dismissed with costs to be assessed on the standard basis.

[61] **WILSON J:** I have read the reasons for judgment of Jerrard JA. I agree with them, and with the orders His Honour proposes.