

SUPREME COURT OF QUEENSLAND

CITATION: *AVCO Financial Services Ltd v The Chief Executive, Department of Tourism, Racing and Fair Trading* [2004] QSC 211

PARTIES: **AVCO FINANCIAL SERVICES LTD**
ACN 008 443 810
(applicant)

v

THE CHIEF EXECUTIVE, DEPARTMENT OF TOURISM, RACING AND FAIR TRADING
(respondent)

FILE NO/S: S 699/01

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court

DELIVERED ON: 16 July 2004

DELIVERED AT: Brisbane

HEARING DATE: 12 July 2004

JUDGE: Muir J

ORDER: **Notwithstanding that there have been contraventions of the *Credit Act 1987* in respect of the contracts the subject of the application, the debtors under such contracts remain liable to pay the applicant the whole of the credit charges provided for in such contracts.**

The applicant pay to the Department of Tourism, Racing and Fair Trading an amount of \$443,500.--, within 90 days of the date of this order, for payment by the Department into the Fund established and operated under section 52 of the *Consumer Credit (Queensland) Act 1994*.

The applicant pay the costs of the Department of Tourism, Racing and Fair Trading as agreed between them and in default of agreement as assessed on the standard basis. Such costs are to be paid within 60 days of their agreement or assessment as the case may be.

CATCHWORDS: CONSUMER CREDIT – CREDIT PROTECTION – REGULATED CONTRACTS AND REGULATED

MORTGAGES – NON-COMPLIANCE WITH ACT – PENALTIES – where the applicant contravened the *Credit Act* 1987 in respect of regulated loan contracts it had entered into – whether the debtor under each loan contract remains liable to pay the applicant the whole of the credit charges provided for in it – considerations relevant to the determination of penalty

Household Financial Services Ltd v Various Respondents
(1996) ASC 56-352

Consumer Credit (Queensland) Act 1994
Credit Act 1987

COUNSEL: J M Horton for the applicant
C Wilson for the respondent

SOLICITORS: Blake Dawson Waldron for the applicant
C W Lohe, Crown Solicitor for the respondent

- [1] The applicant AVCO Financial Services Ltd seeks an order under the *Credit Act* 1987 (“the Act”) that notwithstanding contraventions of the Act in respect of regulated loan contracts the subject of the application, the debtor under each such contract remains liable to pay the applicant the whole of the credit charges provided for in it. The respondent, the Chief Executive, Department of Tourism, Racing and Fair Trading appears on the hearing of the application and supports the making of the order sought by AVCO. Both AVCO and the respondent seek orders that AVCO pay the respondent’s costs and that AVCO pay the respondent \$443,500 to be paid into the fund established and operated under s 52 of the *Consumer Credit (Queensland) Act* 1994.

Introduction

- [2] AVCO, incorporated in the Australian Capital Territory on 6 November 1964, has since that date carried on business as a finance company in the Australian Capital Territory, Queensland, New South Wales, Victoria and Western Australia. On 30 June 1999 GE Capital Finance Australasia Pty Ltd purchased the issued shares in AVCO’s holding company. Prior to the share acquisition AVCO had engaged Blake Dawson Waldron, solicitors, to assist it in an investigation to determine whether there were any existing contraventions of the Act or any of its equivalents in other States and Territories, which might give rise to a forfeiture of credit charges under regulated loan contracts entered into by AVCO. It was contemplated that were any such breaches to be found, application would be made for orders reinstating the credit charges.
- [3] AVCO, at relevant times had entered into approximately a million fixed term loan contracts regulated by such credit Acts (“regulated loan contracts”). Of those contracts approximately 255,000 were likely to have been regulated by the Act, and approximately 45,000 were likely to have been affected by error.

- [4] In order to bring the investigative task within practically achievable bounds, AVCO's solicitors, in conjunction with Professor Layton of the School of Marketing of the University of New South Wales developed a sampling procedure thought reliable. It had as its basis a similar procedure devised by Professor Layton in the past and accepted by tribunals in previous re-instatement proceedings¹.
- [5] Professor Layton, employing random probability sampling methodology, selected a sample of 1,416 contracts. Those contracts were then reviewed by AVCO's solicitors to determine whether or not any of them involved civil penalty breaches. To that end, each of the sample contracts was carefully reviewed by reference to a pre-prepared procedure designed to reveal breaches of legislative requirements. The checking processes were audited for accuracy. As AVCO used standard form contracts at relevant times and also implemented uniform procedures for the completion of regulated contracts it is highly likely that civil penalty breaches detected in the sample contracts will be representative of the incidence of such breaches in the total body of regulated contracts.
- [6] The solicitors' review revealed the existence of a considerable number of different types of error. Set out below are tables extracted from Appendices to the Outline of Submissions of Mr Wilson who appeared for AVCO.

APPENDIX 1
SUMMARY OF "MINOR ERRORS" APPEARING IN SAMPLE CONTRACTS

"Minor errors" are described as those in respect of which, in previous cases, there has been no penalty.

Error Number (used in the Application)	Nature of Error	No of contracts clearly & possibly affected by the error	% of National Sample (or State sample where indicated) clearly & possibly affected by the error
4	No date of offer (breach of section 38(1)(a))	15	1.067%
10	CCI insurer inadequately named (breach of section 38(1)(b) and clause 1(b)(iii) of Schedule 4)	46	3.25%
15	Unemployment insurer inadequately named (breach of section 38(1)(b) and clause 1(b)(iii) of Schedule 4)	37	2.61%
19	Life insurer inadequately named (breach of section 38(1)(b) and clause 1(b)(iv) of Schedule 4)	17	1.20%
8	Inadequate statement of the prescribed term "consumer credit insurance" (breach of section 38(1)(b) and clause 1(b)(iii) of Schedule 4)	327	23.09%

¹ Eg in *Household Financial Services Ltd v Various Respondents* (1996) ASC 56-352

Error Number (used in the Application)	Nature of Error	No of contracts clearly & possibly affected by the error	% of National Sample (or State sample where indicated) clearly & possibly affected by the error
13	Inadequate statement of the prescribed term "unemployment insurance" (breach of section 38(1)(b) and clause 1(b)(iii) of Schedule 4)	18	1.27%
18	Inadequate statement of the prescribed term "life insurance".(breach of section 38(1)(b) and clause 1(b)(iv) of Schedule 4)	26	1.84%
	Overstating the discharge amount as a result of including credit charges that were not payable (because of the application of the civil penalty to the refinanced contract) (breach of section 38(1)(b) and clause 1(e) of Schedule 4)	Unknown	Unknown
40	Amount financed not disclosed (breach of section 38(1)(b) and clause 1 of Schedule 4)	1	0.07%
41	Amount financed overstated (breach of section 38(1)(b) and clause 1 of Schedule 4)	1	0.07%
42	Amount financed understated (breach of section 38(1)(b) and clause 1 of Schedule 4)	3	0.21%
43	The total of the amount financed and the credit charges was not disclosed (breach of section 38(1)(d))	1	0.07%
52	Inadequate commission disclosure relating to general insurance (breach of section 38(1)(h))	50	3.53%
54	Inadequate commission disclosure relating to general insurance (breach of section 38(1)(h))	57	4.02%

APPENDIX 2

SUMMARY OF "INSIGNIFICANT ERRORS" APPEARING IN SAMPLE CONTRACTS

"Insignificant errors" are defined as those which are not, or may not be, minor but which, in the Applicant's contention should not attract a penalty because they are insignificant and/or the errors have a low incidence (being about 5% of the sample or less).

Error Number (used in the Application)	Nature of Error	No of contracts clearly & possibly affected by the error	% of National Sample (or State sample where indicated) clearly & possibly affected by the error	Comment on classification as an "insignificant error"
1	Debtor has not signed the contract (breach of section 44(1)(b))	1	0.07%	Insignificant because the incidence is low.
2	Debtor's name not recorded (breach of section 44(1)(b))	1	0.07%	Insignificant because the incidence is low.

Error Number (used in the Application)	Nature of Error	No of contracts clearly & possibly affected by the error	% of National Sample (or State sample where indicated) clearly & possibly affected by the error	Comment on classification as an "insignificant error"
3	Ineffective alteration or addition (breach of section 44(1)(b))	14	0.99%	Insignificant because the incidence is low. Also it is unclear if there were errors.
5	Incorrect inclusion of an amount referred to in clause 1(b) to 1(f) of Schedule 4 in the "amount agreed to be lent" (breach of section 38(1)(b)) and Schedule 4)	40	2.82%	Insignificant because the incidence is low.
6	Unauthorised insurance financed (breach of section 38(2)(a))	1	0.07%	Insignificant because the incidence is low.
9	Failure to state name of consumer credit insurer (breach of section 38(1)(b) and clause 1(b)(iii) of Schedule 4)	1	0.07%	Insignificant because the incidence is low.
14	Failure to state name of unemployment insurer (breach of section 38(1)(b) and clause 1(b)(iii) of Schedule 4)	3	0.21%	Insignificant because the incidence is low.
29	Inclusion of prescribed and non prescribed disbursements in the amount of legal fees (breach of section 38(1)(b) and clause 1(c) of Schedule 4)	12	0.85%	Insignificant because the incidence is low.
32	Misdescription of the prescribed mortgage registration fee (breach of section 38(1)(b) and clause 1(d) of Schedule 4)	7	0.49%	Insignificant because the incidence is low.
	Discharge amount in the "amount agreed to be lent" and therefore in the wrong place (breach of section 38(1)(b) and clause 1(a) and clause 1(e) of Schedule 4)	29	2.05%	Insignificant because the incidence is low.
44	APR not disclosed (breach of section 38(1)(e))	3	0.21%	Insignificant because the incidence is low.
45	No statement of person to whom or place where to make payment (breach of section 38(1)(f))	1	0.07%	Insignificant because the incidence is low.
46	Address for payment above but stated below (breach of section 38(1)(f))	129	9.11%	Insignificant as the debtor would not have suffered any loss as a result of the error and the information required was set out in the contract.
47	No statement of due date for first instalment (breach of section 38(1)(g))	9	0.64%	Insignificant because the incidence is low.
48	No statement of due date for subsequent instalment (breach of section 38(1)(g))	9	0.64%	Insignificant because the incidence is low.
49	Total of instalments overstated (breach of section 38(1)(g))	1	0.07%	Insignificant because the incidence is low.
50	Total of instalments understated (breach of section 38(1)(g))	2	0.14%	Insignificant because the incidence is low.
51	CCI insurance financed but no commission disclosure present (breach of section 38(1)(h))	3	0.21%	Insignificant because the incidence is low.
53	Life insurance financed but no commission disclosure present (breach of section 38(1)(h))	4	0.28%	Insignificant because the incidence is low.

Error Number (used in the Application)	Nature of Error	No of contracts clearly & possibly affected by the error	% of National Sample (or State sample where indicated) clearly & possibly affected by the error	Comment on classification as an "insignificant error"
55	Commission disclosure is inadequate as reference is made to insurer details "above" when the insurer details appear below and vice versa (breach of section 38(1)(h))	95	6.71%	Insignificant as the debtor would not have suffered any loss as a result of the error and the information required was set out in the contract.

Reasons for the breaches of the Act and other *Consumer Credit Code* provisions and AVCO's attempted compliance

- [7] The application extends, not only to those contracts containing any error detected in the sampling process but also to any contract which was entered into by way of re-financing a borrowing under a defective contract or one in a series of contracts which involved the re-financing of a borrowing under a defective contract. The applicant submits that any contravention of s 38 of the Act in respect of a re-financing contract was merely a consequence of the contravention of s 38 in respect of the earlier defective contract. It is thus submitted that no penalty additional to that which might be imposed in respect of the earlier contracts, is warranted.
- [8] In many cases it has not proved possible to identify the causes of the breaches beyond inadvertence on the part of employees coupled with the complexities and, at times, obscurity of relevant statutory requirements.
- [9] Prior to the coming into force of the Act in Queensland care was taken by AVCO to obtain legal advice, prepare procedural manuals for distribution to staff and to provide training on the Act's requirements to managers of Queensland branches. In 1989 and 1990 AVCO was actively engaged in: increasing the amount of *Credit Act* 1987 training given its staff; identifying and addressing problem areas in relation to compliance with the Act; reviewing and revising *Credit Act* 1987 documentation and establishing a *Credit Act* 1987 compliance department. Extensive recourse was had by AVCO throughout this period to legal advice and assistance in relation to its documentation and compliance matters generally. In particular, endeavours were made to improve documentation to limit the scope for human error.
- [10] The evidence suggests that AVCO, at all times, was conscious of its statutory obligations and was making honest and far from token attempts to achieve compliance. Wherever AVCO has discovered any systemic error it moved to address the problem and to make an appropriate application.
- [11] It is apparent however that these attempts at compliance were not always rewarded with success. As Mr Horton, who appears for the respondent, points out, some errors were systemic and arose from inadequate instructions in AVCO's manuals. Also, there is evidence that insufficient attention was given to the training of staff in the use of the manuals and in respect of the Act's requirements.

Consultations with regulators and consumer advocates.

- [12] Since undertaking its review process, AVCO has kept the appropriate governmental authorities in relevant States and Territories advised of the nature and intent of its review process as well as providing details of the methodology used. It has consulted with such agencies, including the respondent, in relation to those matters and also in respect of advertising procedures. As part of the process of consultation and review, it prepared and settled with the agencies a compendious agreed statement of facts with a view to its comprising the principal body of evidence to be placed before the relevant court or tribunal on the hearing of applications such as this. There is no reason to doubt the document's accuracy.
- [13] The consultative process also concerned the question of an appropriate "national penalty" and an apportionment of that penalty between the five States and Territories involved. Eventually the parties to the negotiations agreed on an overall "notional" penalty to be divided between the States and Territories in which relevant breaches occurred by reference to the number of relevant contracts entered into in each State or Territory and the proportion of those contracts affected by error.
- [14] The parties acknowledge that the agreement reached between AVCO on the one hand and the agencies on the other, cannot be binding on me. The Act vests in the Court the power, and obligation, to make determinations under ss 86, 87, 87A and 87B of the Act. No order under s 87B may be made unless the Court is satisfied that –
- (a) the contravention and relevant circumstances mentioned in section 86(2) are serious enough to justify the penalising of the applicant credit provider; and
 - (b) it would be unreasonable to require the credit provider to adjust the debtors' accounts, or to refund amounts to the debtors, to give effect to reduction in liability which would have ensued from a reduction in credit charges.

Other relevant considerations

- [15] Although the application has been advertised, no borrower from AVCO has sought to appear or to claim that he or she has suffered loss or damage as a result of any contravention of the Act. The evidence does not, in any event, show that the subject breaches have given rise to any loss or damage on the part of borrowers. Nor does the evidence disclose that the applicant has profited from any over-statement of prescribed charges, legal fees or stamp duties.
- [16] Many of the errors under consideration are minor but some are not. Included in the latter category are: failure to state the amount agreed to be lent (error 5); failure to disclose the correct amount financed (errors 40, 41 and 44); failure to disclose total amount of credit charges (error 43) and failure to correctly state instalments (errors 49 and 50). The nature and extent of those errors is such that affected debtors will have been denied some of the benefits the Act set out to achieve.

- [17] I accept Mr Horton's submission, from which there was no demur by Mr Wilson, that the numbers and aggregate effect of the errors renders it inappropriate to excuse the breaches of the Act without imposition of penalty. In so concluding I have had regard to the requirements of s 86 of the Act. However, on the basis of the considerations already discussed, it would be unreasonable to require AVCO to adjust the debtors' amounts or to make refunds to debtors.
- [18] In discussing the quantum of the payment to be ordered under s 87B the matters just discussed are relevant. Also of particular relevance is the fact that AVCO took the initiative, moved to identify breaches and made application in respect of them. Were it not for this conduct many, if not most, of the breaches may never have been discovered. It is important, in order to encourage candour on the part of credit providers, that such conduct be given proper recognition in the determination of penalties. Similarly, co-operation with relevant authorities merits recognition.
- [19] It is appropriate also that I take into account the very substantial costs incurred by AVCO in investigating the subject breaches, liaising with the respondent and in bringing this application.
- [20] In any hearing such as this, due consideration must be given to the parties' submissions on penalty. Where the submissions are based on an agreement negotiated at arms length after careful analysis of relevant facts and principles they deserve additional weight. In this case, agreement has particular cogency as it is derived from the broader agreement to which I referred earlier and is consistent with the penalties imposed by the courts and tribunals in New South Wales, Victoria and Western Australia.
- [21] For the above reasons it is ordered that:
1. Notwithstanding that there have been contraventions of the *Credit Act 1987* in respect of the contracts the subject of the application, the debtors under such contracts remain liable to pay the applicant the whole of the credit charges provided for in such contracts.
 2. The applicant pay to the Department of Tourism, Racing and Fair Trading an amount of \$443,500.--, within 90 days of the date of this order, for payment by the Department into the Fund established and operated under section 52 of the *Consumer Credit (Queensland) Act 1994*.
 3. The applicant pay the costs of the Department of Tourism, Racing and Fair Trading as agreed between them and in default of agreement as assessed on the standard basis. Such costs are to be paid within 60 days of their agreement or assessment as the case may be.