IN THE COURT OF APPEAL [1995] QCA 299

SUPREME COURT OF QUEENSLAND

Brisbane

Before Fitzgerald P.
Pincus J.A.
Lee J.

[GMAC v. Morris, Costa and Lapham]

Appeal No. 150 of 1994

BETWEEN:

GENERAL MOTOR ACCEPTANCE CORPORATION AUSTRALIA Plaintiff

AND:

TERESA MARY MORRIS Defendant

Appeal No. 151 of 1994

BETWEEN:

GENERAL MOTORS ACCEPTANCE CORPORATION AUSTRALIA Plaintiff

AND:

MARIO RAYMOND COSTA Defendant

Appeal No. 152 of 1994

BETWEEN:

GENERAL MOTORS ACCEPTANCE CORPORATION AUSTRALIA Plaintiff

AND:

NORMAN JAMES LAPHAM Defendant

JOINT REASONS FOR JUDGMENT - FITZGERALD P. AND LEE J.

Judgment delivered 11/07/1995

The issues the subject of these cases stated and the circumstances which give rise to those issues are set out in the judgment of Pincus J.A.

The plaintiff, General Motors Acceptance Corporation Australia ("GMAC"), has entered into agreements with each of the defendants. In terms of the Credit Act 1987, GMAC is a "credit provider", each of the defendants is a "debtor", and each agreement is a regulated loan contract. The definition of "loan contract" in sub-s. 7(1), so far as presently material, includes a contract by which a credit provider provides credit to a debtor "by paying an amount to or in accordance with the instructions of" the debtor.

Sub-section 13(1) defines what is a "credit charge"; it is sufficient for present purposes to say that, broadly speaking, and subject to some presently immaterial exceptions, a "credit charge" is the difference between the total payable by the debtor to the credit provider under a loan contract and the "credit" provided to the debtor by the credit provider paying an amount or amounts to or in accordance with the instructions of the debtor.

Every loan contract is required to contain "a statement of the amount financed in accordance with Schedule 4 ...": sub-s. 38(1)(b). Subject to a presently immaterial qualification, the "amount financed" under a loan contract must not include "an

amount payable by the debtor to the credit provider in respect of a risk under a contract of insurance other than a risk specified in paragraph (b) of clause 1 of Schedule 4": sub-s. 38(2)(a). That restriction is bolstered by sub-s. 128(2), which, so far as presently material, prohibits a credit provider from requiring, as a condition of providing credit under a regulated loan contract, that the debtor enter into a contract of insurance other than those specified in that sub-section which, generally if not precisely, correspond with the contracts of insurance specified in sub-cl. 1(b) of Schedule 4. Clause 6 of Schedule 9 (in accordance with s. 20 of the Act) exempts certain regulated loan contracts from both sub-sec. 38(2) and s. 128, but it is not suggested that that exemption is presently material.

One evident purpose of the superficially simple provisions to which reference has been made is to provide appropriate information to debtors; another is to restrict the insurance payments which may be included in the "amount financed".

The definition of "amount financed" in sub-s. 7(1) of the Act, so far as presently material, provides (para. (c) of the definition) that the "amount financed" is "the sum of the amounts required to be stated in accordance with clause 1 of Schedule 4". Clause 1 of Schedule 4 sets out what a "statement of the amount financed shall state"; details are required of

both "the amount agreed under the contract to be lent ..." and "... separately such amounts as, under the contract, are payable by the debtor to the credit provider (otherwise than as part of the credit charge) whether or not the credit provider pays, or has paid, those amounts to another person ...": sub-cl. 1(a). There is a drafting aberration in that sub-clause; the first part is related to a payment (or payments) by the credit provider to or on the instructions of the debtor; the second part of sub-cl. 1(a) and sub-cll. 1(b) to (f) are concerned with amounts payable by the debtor to the credit provider (other than as credit charge). When sub-cl. 1(a) is set out in full, including its reference to sub-cll. (b) to (f), it is apparent that it should be read as though the words "amounts payable under the contract by the debtor to the credit provider in respect of" were inserted at the beginning, i.e, before the words "the amount agreed under the contract to be lent (other than amounts referred to in paragraphs (b) to (f)". Consistently with a legislative intent that a debtor should have information with respect to the total payable under the loan contract to the credit provider (other than as credit charge) and details of the composition of that amount, the concluding words of Schedule 4, cl. 1 provide that the "amount financed" is the "sum of the amounts referred to in the preceding paragraphs", i.e., (a) to (f).

The only references to insurance in Schedule 4 cl. 1 are in

sub-cl. 1(b). Its direct effect is to identify the contracts of insurance of which details must be given in the "statement of the amount financed". It is by sub-s. 38(2)(a) of the Act that the "amount financed" must not include an amount payable by the debtor to the credit provider in respect of any other insurance.

At least one of the amounts included in the "amount financed" under GMAC's loan contract with Mr Costa was payable by Mr Costa to GMAC in respect of a contract of insurance relating to a risk other than a risk specified in sub-cl. 1(b) of Schedule 4; the extended warranty insurance is plainly outside that sub-clause. The inclusion of the amount payable to GMAC by Mr Costa in respect of that insurance is a direct contravention of the Act, which makes it unnecessary to deal with other possible breaches of a less substantial nature related to misnomer or misdescription.

Reference is made in the judgment of Pincus J.A. to the various bases upon which GMAC sought to have the material statutory provisions read down, or at least differently from their literal meaning, but there is no justification for doing so. Whatever the reason for it, the legislative policy is quite clear: a separate loan may be arranged for any insurance premium (Schedule 9, cl. 6), but otherwise only those insurances specified in Schedule 4, sub-cl. 1(b) may be

included in the amount "payable by the debtor to the credit provider ... in respect of contracts of insurance ... in relation to the [loan] contract", or in the total "amount financed"; those risks can be added to by regulation (s. 171; Schedule 4, sub-cl. 1(b)(vii)), but there is no suggestion of any presently material addition. Whether or not insurance contracts with respect to other risks might have appropriately been included in sub-cl. 1(b) of Schedule 4 or sub-s. 128(2) is not to the point. Nor is there any hint in the legislative scheme that it is significant whether the credit provider has an interest in the insurance or it is the debtor, not the credit provider, which arranged or required the impermissible insurance, except to the extent of the additional penalties and payments which may be imposed on or ordered to be made by the credit provider under s. 128.

Indeed, any attempt to avoid the natural meaning of the material provisions needs to ignore the dual statutory purpose, not only to ensure that appropriate information is given to debtors - which could have been achieved much more easily than the present sub-cl. 1(b) in Schedule 4 by that sub-clause simply requiring the specified details, together with the nature of the risk, in relation to any "contract of insurance ... entered into in relation to the [loan] contract" - but also to restrict the contracts of insurance with respect to which the amounts payable to the credit provider by the

debtor are permitted to be included in the "amount financed".

It seems to us obvious that it would be quite inappropriate for this Court to decide, at this point, that the identified breach of s. 38 is "minor" or "ought reasonably to be excused" within the meaning of s. 87A. To attempt to do so could only complicate the subsequent determination of any claim by GMAC under s. 86.

The only declaration which should be made at this time in relation to the loan contract between GMAC and Mr Costa is that that loan contract is not in accordance with s. 38 of the Credit Act 1987.

Mr Lapham

As appears from the reasons for judgment of Pincus J.A., it is clear that National Mutual is an insurer which should have been named. Hence, there is again a breach of s. 38 of the Act.

For the reasons given above in relation to Mr Costa, we would only make a declaration that the loan contract between GMAC and Mr Lapham is not in accordance with that section.

Ms Morris

Sub-clause 1(b)(iii) of Schedule 4 requires that a statement

of the "amount financed" include amounts payable by the debtor to the credit provider under the loan contract "in respect of insurance against sickness of, accidental injury to, or disability or death of the debtor or against unemployment of the debtor ...".

Section 124 of the Act provides that "regulations may require the use of specified descriptive terms in a regulated contract ...", and reg. 19(2) and the Fourth Schedule to the Credit Regulations 1988 require that, in a regulated loan contract the insurance specified in sub-cl. 1(b)(iii) of Schedule 4 "be described or referred to by the term "consumer credit insurance".

We cannot discern any basis for a conclusion that the material provisions in the regulations are invalid; in particular, there is no inconsistency between cl. 1 of Schedule 4, which specifies the contracts of insurance which must be included in a "statement of the amount financed" without stating how they are to be "described or referred to", and s. 124 and the regulations which prescribe how that is to be done. The provisions in question are not inconsistent, but complementary.

Their combined effect, in our opinion, is that a "statement of the amount financed" is not "in accordance with Schedule 4"

unless it describes or refers to insurance the subject of sub-cl. 1(b)(iii) in the prescribed manner. In consequence, a loan contract in which the incorrect term is used to describe or refer to such insurance does not comply with sub-s. 38(1)(b) of the Act.

We would again make a declaration that the loan contract between GMAC and Ms Morris is not in accordance with s. 38 of the Act, but no other order.

General

A number of arguments were adduced to the Court with respect to various legal doctrines, principles of statutory construction, etc. As is probably apparent, we have found none of them of assistance in relation to the points which we have decided.

If any order as to costs is sought, we would permit the parties to make written submissions within seven days of the delivery of judgment.

For the moment, the only order which should be made in each proceeding is a declaration that the loan contract between GMAC and the defendant in question is not in accordance with s. 38 of the Credit Act 1987.

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NORMAN JAMES LAPHAM — Defendant

Fitzgerald P.
Pincus J.A.
Lee J.

Judgment delivered 11/07/1995

Joint reasons for judgment of Fitzgerald P and Lee J; separate reasons for judgment of Pincus J.A. dissenting in part

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THE ORDERS ARE AS FOLLOWS:

1. IN RESPECT OF EACH PROCEEDING IT IS DECLARED THAT THE LOAN CONTRACT BETWEEN GENERAL MOTORS ACCEPTANCE CORPORATION AND THE DEFENDANT IN QUESTION IS NOT IN ACCORDANCE WITH SECTION 38 OF THE *CREDIT ACT* 1987.

2. IF ANY ORDER AS TO COSTS IS SOUGHT, THE PARTIES ARE TO MAKE WRITTEN SUBMISSIONS WITHIN SEVEN DAYS.

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CATCHWORDS: ***CREDIT ACT* 1987 - regulated loan contracts - errors in recording details of insurances in the loan contract - whether details of both compulsory and voluntary insurances required - whether insurer should have been named - whether amounts included in "amount financed" under GMAC's loan contract related to a risk other than one specified in sub-cl. 1(b) of Schedule 4 - whether breach "minor" or "ought reasonably to be excused" - whether "statement of the amount financed" is not "in accordance with Schedule 4" unless it describes or refers to insurance the subject of sub-cl. 1(b)(iii) in the prescribed manner.**
Ss. 13, 38, 44, 45, 86, 87, 87A, 124, Schedule 4 cl. 1 *Credit Act* 1987.
Reg. 19(2), item 6(h) in the Third Schedule *Credit Regulations* 1988.

Counsel: Mr R Menkel Q.C. with him Mr G Thompson for the plaintiff.
Mr D Jackson Q.C. for the defendants.

Solicitors: Blake Dawson Waldron for the plaintiff.
Phillips Fox for the respondent.

Hearing date: 31 October 1994.

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REASONS FOR JUDGMENT - PINCUS J.A.

Judgment delivered 11/07/1995

These are three special cases raising questions under the *Credit Act* 1987.

Each was stated in an action brought by General Motors Acceptance Corporation, Australia as plaintiff against a person indebted to it under a loan contract. The first special case which will be considered is that stated in Action no. 1393 of 1993, brought against Mr Mario Raymond Costa.

1. M R COSTA

The questions in this special case have to do with insurance policies connected with a loan contract entered into between the plaintiff and the defendant on 12 May 1992. Under that contract the plaintiff lent the defendant money to assist in the purchase of a motor vehicle. Apart from the loan, consisting in the difference between the price of the vehicle and the amount the defendant put towards its purchase, the loan contract required the defendant to pay the plaintiff sums in respect of four insurance policies; they were described in the contract as mortgaged property insurance, consumer credit insurance, unemployment insurance and extended warranty insurance. Of those four policies only the first, the mortgaged property insurance, was required of the defendant by the plaintiff; the others were policies which the defendant was free to enter into, or not, as he chose. It is convenient to call the first policy the mortgaged property insurance a "compulsory" insurance, and the other three "voluntary" insurances. Slips were made in recording the details of the insurances in the loan contract; it is the defendant's contention that, because of provisions in the Act, these slips prima facie remove his liability for the "credit charge" under the loan contract, that term being roughly equivalent to interest, as ordinarily understood. As to the voluntary insurances, the plaintiff says that the errors could not have the result of losing it the credit charge, because the Act did not require that details of those insurances be set out in the loan contract. The defendant says, on the other

hand, that the loan contract required that the details of all the insurances, including the voluntary insurances, be set out and it is that difference of view which is, perhaps, the principal question raised in this special case. It appears to be convenient to come to that question as directly as possible, that is, without first explaining the errors which give rise to the problem. But it is necessary to refer to some provisions of the Act, to show the setting in which the issue falls for decision.

Section 38(1)(b) of the Act requires that a loan contract include "a statement of the amount financed in accordance with Schedule 4..." and it is common ground that the present is a "loan contract" within the meaning of that section. Section 44(1) says that subject to ss. 86 and 87, where -

> " . . .
> (b) A loan contract is not in writing signed by the debtor or is not in accordance with section 38...
> . . .
> the debtor is not liable to pay to the credit provider the credit charge under the contract. ".

The defendant contends that the loan contract is not in accordance with s. 38 because, as has been explained above, certain insurance details are not included in the statement of the amount financed, although required to be included by the schedule mentioned in s. 38(1)(b) - i.e. Schedule 4.

Sections 86 and 87, referred to in s. 44, make provision for applications by a "credit provider", a term so defined as to include the plaintiff, to obtain relief from a court of appropriate jurisdiction against the consequence which prima facie follows from such contraventions as are here said to have been committed by the plaintiff. Under s. 86(2) the court may determine that the debtor is liable to pay the whole or part

of the credit charge, despite such contravention. Section 87 empowers courts to entertain s.86 applications relating to whole categories of contracts without necessarily identifying the particular debtors affected by such applications, and s. 87A is ancillary to s. 87. It is provided by s. 87A that a determination may be made under s. 86 that debtors under certain contracts affected by contraventions which are "minor errors", as defined, are required to pay the whole of the relevant credit charges. This group of provisions will be dealt with in more detail, below.

Clause 1 of Schedule 4, which is the schedule which sets out what a statement of the amount financed (in the loan contract) must contain, reads in part as follows :

> " 1. A statement of the amount financed shall state -
> (a) the amount agreed under the contract to be lent (other than amounts referred to in paragraphs (b) to (f));
> and shall include statements showing separately such amounts as, under the contract, are payable by the debtor to the credit provider (otherwise than as part of the credit charge) whether or not the credit provider pays, or has paid, those amounts to another person and are -
>
> (b) amounts payable in respect of contracts of insurance (if any), entered into in relation to the contract showing separately in respect of each such contract the name of the insurer and -
> (i) where there is a mortgage relating to the contract - amounts so payable in respect of insurance of property subject to the mortgage . . .
>
> . . .
>
> (vii) amounts so payable in respect of insurance against such other risks (if any) as are prescribed;
>
> or, where an amount is payable in respect of a contract of insurance entered into in relation to the contract relating to 1 or more of the risks referred to in the preceding subparagraphs - that amount and a statement of the risks to which the amount relates . . .
> . . .

> and shall state the amount financed, being the sum of the amounts referred to in the preceding paragraphs. "

Between para. (b)(i) and (vii), four other types of insurance are listed: against loss of the security interest in mortgaged goods; against sickness, unemployment and the like; life insurance; and loss of profits insurance. Paragraphs (c), (d), (e) and (f) set out some other amounts to be included in the statement, such as stamp duty, and the consideration for the discharge of a debtor's liability under a pre-existing contract.

Understanding of the Schedule is enhanced if one has regard to the definition of "credit charge" which is to be found in s. 13(1) of the Act. So far as relevant, the term means:

> " . . . the amount by which the amount payable under the contract by the debtor to the credit provider or a person on the debtor's behalf (not including amounts of deferral charges, default charges or enforcement expenses) exceeds the amount financed . . . "

To put this more broadly, the credit charge is the amount payable under the contract less the amount financed; so the amount financed is the amount payable less the credit charge. That equation may also be deduced from Schedule 4 itself, which says that the statement of the amount financed is to include amounts " . . . payable by the debtor to the credit provider (otherwise than as part of the credit charge) . . . ". In more familiar terms, with some loss of precision, the amount financed can be thought of as the principal, the credit charge as the interest; the amount payable is the total of those two sums. The amount financed - the principal - includes not only the loan, but other sums payable "under the contract . . . by the debtor to the credit provider".

One initially puzzling aspect of Schedule 4 is that it does not make it clear how sums advanced which do not fall into any of the specific categories in paras. (a) and (b) of cl. 1 are treated. But that problem is partially solved by s. 38(2)(a) which prevents the inclusion in the amount financed of:

> " an amount payable by the debtor to the credit provider in respect of a risk under a contract of insurance other than a risk specified in Schedule 4, section 1(b) . . . "

That provision, read with Schedule 4, may be thought to imply that there is in general nothing wrong with including, in the amount agreed to be lent stated under para. (a), sums payable by the debtor which do not fall within any of paras. (b) to (f), so long as such amounts do not relate to insurance contracts; but as it seems to me there is no need to pursue that aspect further. I note that none of the insurances in question here were included in the "amount agreed to be lent" specified in the loan contract.

The plaintiff seeks to derive some advantage from the limited nature of the list of insurances in para. (b) of cl. 1, pointing out that compulsory third party (personal injury) motor vehicle insurance is not covered by any of subparagraphs of para. (b); so, it is said, the list of types of insurances in Schedule 4 cannot have been intended to be comprehensive. In answer, the defendant asserts that subpara. (i) covers such insurance, pointing out that cl. 1(e)(ii) of Schedule 2 seems to assume that "insurance of property" can include insurance against personal injury to third parties. It is unnecessary to determine whether this is a good answer to the plaintiff's point, for even assuming it is not, the argument does not take the plaintiff far; one reason is that, as I have mentioned, the insurances in question are not included in the "amount agreed to be lent" stated in the contract.

Another contention for the plaintiff is that the words in cl. 1 "payable by the debtor to the credit provider . . . in respect of a risk under a contract of insurance" refer only to insurance provided or arranged by the credit provider; this was put more generally by saying that the words relate to insurance in which the credit provider has an interest. As the defendant contended, there is nothing in the language used in cl. 1 to justify that construction, nor is there any policy reason which might have induced the legislature to desire that restriction to be read in. For example, if the dealer from whom the defendant bought the motor vehicle in the present case had arranged an insurance, the premiums to be advanced by the plaintiff, recording details of that would be of no less value to the debtor than recording details of insurance arranged by the plaintiff itself.

Then it was argued that for various reasons the legislation should not be read as "intended to restrict the debtor's right to obtain finance for any insurance of his or her choice". Assuming that to be so, it throws no light on the question whether cl. 1 should be read down so as to restrict the insurances referred to in para. (b) to those arranged or provided by the credit provider. There is the intractable prohibition in s. 38(2)(a) against including, in the amount financed, amounts payable under contracts of insurance against risks other than those in para. 1(b) of Cl. 1 of Schedule 4. And however one reads cl. 1, this may give rise to inconvenience; parties might well, were it not for the restriction in s. 38(2)(a), agree to include in the cl. 1 statement, sums advanced to pay premiums in respect of insurances other than those set out in para. 1(b).

It is also submitted on behalf of the plaintiff, as an alternative to the contention that cl. 1(b) should be treated as relating only to insurances provided or arranged by the credit provider, that the paragraph should be read down so as to confine its application to those insurances which were required by the credit provider - compulsory insurances, as opposed to voluntary insurances; this appeared to be the plaintiff's main contention. It will be recalled that the special case discloses that the defendant took out three voluntary insurances and one compulsory one. The only wording in cl. 1 which gives faint support to this contention is the phrase "entered into in relation to the contract" in the introductory part of para. 1(b) of Schedule 4. The expression "in relation to" is capable of a wide meaning; its intended effect in this context is not at all clear. To take sickness insurance as an example, a debtor buying a motor vehicle, as this defendant did, might think it prudent to take out such insurance to cover himself or herself against the risk that sickness might prevent him paying his instalments; he or she might also be then prompted to think that it would be wise to take out sickness insurance anyway, for broader purposes than those associated with the loan contract. So a sickness insurance contract having a long term, and in a larger sum than necessary to provide for the instalments under the loan contract, might come about; there would be room for argument whether such an insurance would be one entered into "in relation to the contract". But to derive advantage from that expression the plaintiff has to narrow its meaning down to such an extent as to amount to redrafting - e.g. "entered into to comply with an obligation created by the contract". If that were accepted and there were no insurance of that kind - i.e. no compulsory insurance - then the separate amounts payable in respect of contracts of insurance of the specific types mentioned in cl. 1(b) would not have to be set out; they would be included,

undissected, as part of the amount agreed to be lent referred to in cl. (a).

Why the legislature could have intended such an odd result remains unexplained. The purpose of cl. 1 surely is to enable the debtor to have a record of the elements of which the amount to be repaid is made up - so much lent, so much for mortgage insurance, so much for stamp duty and so forth; see Custom Credit Corp. Ltd. v. Gray (1992) 1 V.R. 540 at 553. If the amount financed does not include voluntary insurance policies whose premiums are advanced under the contract, then the statement of the amount financed becomes much less useful.

In support of the plaintiff's various contentions, its counsel relied in particular on reasoning in Avco Financial Services Ltd v. Abschinski (1994) 2 V.R. 659. One of the issues in that case was whether the inclusion of a valuation fee as part of the "amount financed" in a loan contract constituted a breach of s. 75 of the *Victorian Credit Act* 1984, a provision which is in substance the same as our s. 76; no such problem arises here. Another issue in the Avco case was whether the inclusion of the valuation fee in the amount financed accorded with the requirements of cl. 1 of Schedule 4 of the Victorian Act, whose terms are in no relevant respect different from those of cl. 1 of Schedule 4 in our Act.

On that point the Court, by a majority, held in favour of Avco, on the basis that cl. 1 of Schedule 4 does not imply that no amounts other than those falling within the specific descriptions in paras. (b) to (f) are to be included in the statement of the amount financed. That problem, referred to above, is not one which needs decision

for the purposes of this case, but some of the remarks of Ormiston J, who with Fullagar J formed the majority, were said by counsel for the plaintiff to assist their contentions. Referring to the language of paras. (b) to (f), Ormiston J remarked:

> " Each of the amounts there described must be 'amounts as, under the contract, are payable by a debtor to the credit provider . . . whether or not the credit provider pays, or has paid, those amounts to another person . . . '. Thus they are confined to amounts which are payable 'under the contract' and which are payable 'by a debtor to the credit provider'. The language excludes payments agreed to be paid by reason of any separate agreement or arrangement and so, in the circumstances described by the appellant's witnesses, it would not have comprehended payments to valuers such as Blackburn & Lockwood which were paid to those valuers before the loan contract was entered into and which were not the subject of that contract. ". (697)

If this is authority for the view that no sum paid to a third party (such as the valuers in Avco) is to be included in paras. (b) to (f) unless the loan contract requires that the sum in question be paid to the third party, then I cannot agree. Stamp duty, one of the items in para. (c), would be paid by the credit provider to the Government, but not under the contract. The judgment under discussion notices this point and then goes on :

> " The obligation to pay 'to the credit provider' referred to in the covering words therefore contemplates an obligation *under the contract* to reimburse the credit provider who is explicitly or implicitly requested or directed by the debtor to pay those amounts, whether they be insurance premiums, legal fees, stamp duty or the like, to the third party entitled to be so paid." . ("reimburse" emphasised by me) (697-698)

I respectfully agree.

There is another passage in these reasons which is relied on by the plaintiff; I will quote only a part:

> " It is sufficient to say at this stage that paras *(b)* to *(f)* in Sch. 4 concentrate upon sums payable to the credit provider because they are treated as having been, or will have been, lent by the credit provider in order to satisfy some obligation of the debtor. If there is no obligation

> 'under the [loan] contract' imposed on the debtor then the amounts paid of that kind do not come within the schedule because they do not satisfy the requirements of the covering words." . (698)

The words "concentrate upon" indicate that it was not intended to explain the content of paras. (b) to (f) exhaustively, but I do not, with respect, agree with this passage if it means that sums paid to a third party are not to be mentioned in paras. (b) to (f) unless paid pursuant to an obligation which the loan contract imposes on the debtor.

The statutory language of cl. 1 of Schedule 4 being discussed in these reasons is ill chosen; that the language has this characteristic is relevant to the proper approach to its construction, in that one cannot assume that any solution is to be found which will neatly satisfy all the expressions used.

The inherent ambiguity of the expression "amounts . . . under the contract . . . payable by the debtor to the credit provider" has confused the drafter; the ambiguity is that these words could refer, in relation to an insurance premium, to a sum payable to discharge the obligation falling on the debtor to repay to the credit provider an amount advanced in respect of a premium or, on the other hand, to a sum payable by the debtor to the credit provider to enable the latter to pay a premium. I am of opinion that the former meaning was intended.

But the drafter, when writing the next part of the clause beginning "whether or not", appears to have had in mind the second sense of "payable by the debtor to the credit provider" - i.e. the initial payment out to discharge an obligation to a third party, rather than the debtor's reimbursement obligation. I read the language from "such amounts as" to "another person" as if it said:

> " such amounts as, under the contract, are payable by the debtor to the credit provider (otherwise than as part of the credit charge) including but not limited to sums payable to reimburse the credit provider in respect of amounts the credit provider has paid to another person. ".

My conclusion is that the argument that only policies provided or arranged by the credit provider are caught by para. (b), as well as the alternative argument that only policies required by the credit provider - compulsory policies - are so caught, must fail.

Contraventions

The special case, by questions 2, 3 and 4, invites the Court to decide a group of questions which will be dealt with under the above heading, "Contraventions". To summarise, question 2 asks whether the loan contract between the plaintiff and the defendant complies with cl. 1 of Schedule 4; question 3 asks whether certain doctrines said to have been evolved under the general law can be applied in favour of the plaintiff, in answering question 2; question 4 asks whether, if the contract does not comply with cl. 1 of Schedule 4, the relevant failure is a "minor error" under s. 87A of the Act.

Although there is no question specifically covering the point, the plaintiff's outline of argument contends that another problem which may arise under a s. 87A application should be dealt with, namely whether any relevant contraventions or failures "ought reasonably to be excused" under s. 87A(2)(b). That part of the argument was not, I think, pressed before us, but its having been raised points to a difficulty about this group of questions, 2, 3 and 4: they invite the Court to decide only some of the matters which would fall for decision under a s. 87A application, leaving the rest of

them for later determination. Such a course is not necessarily objectionable, if it seems likely to produce a just and convenient result.

The plaintiff sued for declarations to the general effect that the contract between the plaintiff and defendant complies with s. 38 of the Act, and alternatively (claim no. 4) "**. . .**a declaration that any such non-compliance is a 'minor error' within the meaning of s. 87A of the *Credit Act*". During argument, attention was drawn to the fact that the claim made in the action does not appear to be of the kind contemplated by s. 87A; it was contended for the plaintiff that despite that the Court should deal with the "minor error" point.

Sections 86 and 87 are provisions to which s. 87A is ancillary; all three have been to some extent explained above. Under s. 86 a credit provider such as the plaintiff could have sued for relief against the prima facie consequence which s. 44(1) attaches to a failure to include in the loan contract a statement of the amount financed in accordance with Schedule 4. As previously mentioned, the Court has power under s. 86 to determine "that the debtor is liable to pay the whole or such part of the credit charge under the contract as it determines" and s.87 allows an application of that kind to be made in relation to classes of contracts without necessarily identifying the debtors affected by the application; there is provision for notice of the application to be given by newspaper advertisement. Section 87A allows a s. 87 application to be made by serving notice of the application on an official, the registrar. Section 87A gives power to the Court to make a determination in favour of the credit provider under s. 86, requiring the whole of the credit charges to be paid, if it is -

" **. . .** satisfied that all the contraventions or failures to which the

> application relates are minor errors and ought reasonably to be excused . . . " .

The expression "minor error" is defined to mean -

> " . . . a contravention or failure to comply with this Act which is unlikely to disadvantage the debtors concerned in any significant respect." .

If the Court is not satisfied that the contraventions are "minor errors and ought reasonably to be excused" then the Court must -

> " . . . direct that notice of the application be given to the debtors concerned, either personally or in accordance with section 87." .

The definition of "minor error" in s. 87A is expressed to apply only to s. 87A itself. Unless the Court is satisfied, not only that the contraventions are minor errors, but also that they ought reasonably to be excused, then it has to proceed as set out in s. 87A(2)(c), by giving notice to the debtors; and the implication appears to be that the matter then goes ahead under s. 87, not s. 87A. This implication arises from the circumstance that the only power the Court has to make a determination under s. 87A is dependent upon its being satisfied that the contraventions are minor errors and ought reasonably to be excused. If it is not so satisfied, then all the Court can do is to direct the giving of notice of the application, which must I think be pursued under s. 87. Once that happens the definition of "minor error" in s. 87A becomes irrelevant and the Court's power to grant the contravening credit provider relief depends entirely upon the terms of s. 86(2), which requires the Court to consider -

> " . . . the relevant circumstances, including the conduct of the credit provider and the debtor and the loss or damage (if any) suffered by the debtor . . . " .

The action which has given rise to the special case is not brought under any of these provisions, all of which contemplate an application "for an order increasing the liability of the debtor to the credit provider". And the case is not one in which the parties are agreed - if such an agreement were possible - that the Court should treat the matter as if an application for that relief had been made. Counsel for the defendant indicated that he had no objection to the matter presently being considered being linked with one or more of the other special cases before the Court, to overcome the difficulty that s. 87A, which is the only provision that makes the definition of "minor error" relevant, contemplates an application relating to more than one contract. But that concession does not help much, for s. 87A relief is only intended for cases in which a whole class of contracts is in issue; that may be deduced from the fact that the Court is empowered to grant relief in favour of the credit provider without giving any notice to the debtors concerned.

The Court is being asked to decide, then, in proceedings not brought under s. 87A, the "minor error" point, which ordinarily would be decided on an application relating to a class of contracts. Accepting that the Court has jurisdiction to give a declaration relating to a s. 87A point in proceedings such as these, there remains a question whether that is a proper and convenient course.

The three alleged contraventions all relate to the name of the company with which a particular sort of insurance was taken out:

"AMP United" instead of "AMP United Insurances Ltd"

"Swann Insurance" instead of "Swann Insurance (Aust.) Pty Ltd"

"Holdenwise Wty" instead of "Hogg Robinson Marketing Services Limited"

What the schedule requires is that the name of the insurer be set out. Plainly, "Holdenwise Wty" is not a compliance with that requirement. But more difficult problems arise with respect to the "AMP United" and "Swann Insurance" names. It was argued for the plaintiff that before one comes to the question of whether there is a "minor error" for the purposes of s. 87A, it is necessary to consider whether the maxim de minimis non curat lex should be applied in favour of the plaintiff, and whether a doctrine described as one of substantial compliance should be so applied. The notion that, in requiring that entities' names be given, a statute does not necessarily require that the names used be absolutely accurate has some attraction if one believes the legislature intended the Act to deal with matters of consequence, rather than mere technicalities and trivia. Some encouragement to adopt this approach is provided by the decision of Gibbs J in Equipment Investments Pty Ltd v. M J Dowthwaite & Co. Pty Ltd (1969) 16 F.L.R. 23 at 30 et seq; it was argued before us that this decision is of limited help because it was based upon the provisions of the *Hire Purchase Act* 1960 (NSW) and, further, was concerned with a rather different problem, namely departure from a statutory form. These are valid points, which make the specific doctrine applied in that case, depending upon the notion of "substantial compliance", difficult to apply here. In Custom Credit Corporation Ltd v. Lynch (1993) 2 V.R. 469 the Victorian Supreme Court (Appeal Division) held that giving a date as 8 May instead of 6 May involved a non-compliance with s. 36(1)(a) of the *Credit Act* 1984 (our s. 37(1)(a)) which required that the contract include the date on which an offer to enter into it was signed by the debtor. Marks J said that "strict compliance" with the section was required, and Ormiston J (at 491) expressed himself similarly. The problem here is not of the same kind: It is not a proper use of language to say that the date of a

certain event is stated if the date given is two days out, but it may be a proper use of language to say that the name of Australia's biggest company is "BHP", although the full name of that company is a rather more elaborate one. So calling Britain's war-time prime minister "Winston Churchill" sufficiently names him, although not in the fullest possible way. I note that a question of wrong names was considered in Re Avco Financial Services Limited (1993) A.S.C. 56-251 where it was held that the name "Hallmark Insurance" sufficiently identified the person to whom a commission was payable for the purposes of s. 38(1)(h) of the Act; in fact a commission was payable to two companies, Hallmark General Insurance Co Ltd and Hallmark Life Insurance Company Ltd. I am respectfully of opinion that it is not easy to support the view that a name apparently intended to refer to one insurer may name two insurers.

A breach of s. 44 with respect to a loan contract that is in writing, but does not otherwise comply with the section, is also a breach under s. 45. In a prosecution for breach of s. 45 the court may dismiss the charge if there has been a contravention which was "unlikely to deceive or operate to the disadvantage of a party to the relevant contract". Like the definition of "minor error" in s. 87A, the provisions of s. 89 might be argued to support the view that any departure from the strict requirements of s. 44, however trifling, is a contravention of the Act and the question whether it has adverse consequences for the credit provider is to be determined under provisions such as ss. 86, 87, 87A and 89. The argument loses some force when one considers that there is no general provision, corresponding to s. 89, saving a credit provider from civil consequences. The definition of "minor error" is as has been pointed out applicable only to s. 87A; in general, applications under s. 86 are to be determined without regard to it.

The defendant's contention that Schedule 4 requires "strict compliance" is I think intended to leave absolutely no room for error, however trivial. In the copy of the Swann Insurance policy which is in the record the name of the company is given as "Swann Insurance (Aust.) Pty. Ltd.", but in the agreed facts the name is given without a full stop after either "Pty" or "Ltd". Presumably, if the argument for the defendant is right, then the special case does not state the name of the insurer. Again, the special case gives the name of the AMP company as "AMP United Insurances Ltd", whereas the policy document in the record gives the name as "AMP United Insurances Limited", and a similar question arises. A name of an insurer in the Schedule 4 statement should I think be taken to comply with the statute if it is such that a reader of the statement may by reference to it positively identify the company providing the insurance; that requires, at least, that there be no room for confusion between the company whose name that given in the statement most closely resembles and any other company.

But the names of companies are often quite similar to one another. There is nothing in the special case to say whether or not there are AMP companies, other than AMP United Insurances Limited, whose names are close enough to create some uncertainty in the mind of a person who becomes aware of the names of various AMP companies and has to pick the one named by the words "AMP United". A similar consideration applies to the name "Swann Insurance"; for all one knows from the facts given, there may be a number of companies whose names begin with those words. The question whether the names used are close enough to the proper names to pass muster is one which it is tempting to answer now, rather than putting the parties

to more trouble and expense; but it is undesirable that the answers given be based on wrong assumptions, however apparently plausible, as to the facts.

In favour of the plaintiff, it may be said that the facts in the special case should be assumed to be comprehensive - i.e. to contain all matters which could assist the plaintiff or the defendant with respect to any of the issues raised. As against that, the possibility arises that the parties have not thought to investigate the question of confusion between, for example, Swann Insurance (Aust.) Pty Ltd and some other company whose name begins with the words "Swann Insurance". (I note that, with respect to another factual question raised by the plaintiff, namely whether the plaintiff had any role in setting up the insurance arrangements between the insurers and the dealer, the defendant contended that the facts in the stated case are not necessarily complete: see para. 5.3 of the defendants' outline.) Another troubling point is that the question whether there has been a contravention is not relevant merely for the purposes of s. 44 of the Act; it may have consequences from the point of view of criminal law. A finding by this Court that there has been no contravention in a particular respect could conceivably be contradicted by a factual conclusion reached in criminal proceedings. On the whole, the proper course appears to be to decline to decide whether (apart from the use of the words "Holdenwise Wty", which is plainly a breach of s. 38 of the Act), the insurers' names used constitute contraventions; it is important that the answers given be correct in fact, apart from being correct on the facts presented.

There remains the question whether the use of the words "Holdenwise Wty", in breach of s. 38 was a "minor error" within the meaning of s. 87A. Since this matter

was argued this Court has given a decision with respect to the effect of the definition of "minor error", in National Australia Bank v. Department of Queensland Emergency Services (unreported, 30/5/1995). In my opinion the Court should not decide whether or not the use of the expression "Holdenwise Wty" was a "minor error" within the definition as so explained. The function of s. 87A is to provide a means of dealing with certain of the applications made under s. 87, dealing with classes of contracts. On the face of it the words "Holdenwise Wty" are too different from the proper name for their use to be regarded as a "minor error", but the definition is an artificial one; if, as here, an entirely wrong name is given the Court may yet decide on the facts presented that the error is "unlikely to disadvantage the debtors concerned in any significant respect".

The word "unlikely" in the definition is appropriate because of the context in which the question arises in a s. 87A application - i.e. with respect to a group of debtors, none of whom is present or represented; without knowing the facts of each individual case, the Court proceeds on the basis that there is no likelihood of disadvantage from the mistake. But there is nothing in the special case to enable the Court to reach a conclusion one way or the other, on the question whether this error is unlikely to disadvantage any debtors concerned in a significant respect. We are told what in fact happened: the insurance was placed by Hogg Robinson Marketing Services Ltd with Switzerland General Insurance Co Ltd. We do not know whether, for example, the use of the words "Holdenwise Wty" might convey to a purchaser of a car that some company closely connected with the plaintiff was making itself responsible for this (fairly expensive) insurance, and cause a debtor disadvantage in that sense.

It follows that the questions in the special case should be answered as follows:

1. Are any (and, if so, which) of the amounts referred to in clause 1(a), (b), (d) and (e) of the Loan Contract, for the purposes of clause 1 of Schedule 4 to the Credit Act amounts which under the Loan Contract:

   (a) are payable by the debtor to the credit provider (otherwise than as part of the credit charge) whether or not the credit provider pays, or has paid, those amounts to another person; and

   (b) are so payable in respect of contracts of insurance entered into in relation to the Loan Contract?

   Answer: All of the amounts referred to in cl. 1(a)(b)(d) and (e) of the Loan Contract fulfil the descriptions in each of parts (a) and (b) of this question.

2. (a) Does the manner in which the amounts are stated in the Loan Contract satisfy the requirements of clause 1 of Schedule 4 to the Credit Act?

   (b) Do the descriptions in clause 1(a), (b), (d) and (d) of the Loan Contract of AMP United", "Swann Insurance" and "Holdenwise Wty" respectively, sufficiently describe the "Insurer" for the purposes of paragraph (b) of clause 1 of Schedule 4 to the Credit Act?

Answer: (a) Unnecessary to answer, as no issue was raised.

(b) The description "Holdenwise Wty" does not sufficiently describe the insurer for the purposes of para. (b) of cl. 1 of Schedule 4 to the *Credit Act*; no answer is given to the rest of this question.

No answer is given to question 3 or to question 4.

N.J. LAPHAM

Only one issue additional to those already dealt with is raised by the special case in Action No. 155 of 1993 brought against Mr N J Lapham. Question 2(b) raises a new issue and this was the only one argued with respect to Mr Lapham's special case; it is whether the description of "insurer" in cl. 1(c) of the loan contract as Swann Insurance (Aust.) Pty Ltd sufficiently describes the "insurer" for the purposes of cl. 1(b) of Schedule 4.

The facts necessary to answer this question are not set out in the special case, but the parties agreed to place before the Court documents which make an answer possible. Clause 1(c) of the contract indicates that a sum of $58 is included in the amount financed, being a life insurance premium; the paragraph includes the words "company Swann Insurance (Aust.) Pty. Ltd.", which I will call "Swann". The defendant's contention is that the debtor's rights under the relevant policy are against

not only Swann Insurance (Aust.) Pty Ltd, but also against the National Mutual Life Association of Australia Ltd. ("National Mutual") and that both companies should have been named, in order to comply with the requirement in cl. 1(b) of Schedule 4 that the "name of the insurer" be included in the statement of the amount financed. The latter name is set out in a document which is in the special case, namely an insurance proposal, but it seems clear that that document is not part of the statement of the amount financed.

The special case says that a policy was issued in respect of the relevant risk and a copy of it is annexed. One may be pardoned for expressing surprise that the policy makes the insurer's liability under it dependent upon the "Insured Person(s)" observing all the provisions contained in the Finance Agreement; presumably the intention is that if the defendant misses an instalment the policy is worthless; but that provision need not be further considered. The policy included in the special case is subject to the terms and conditions of a group life policy which, together with an associated trust deed, has been provided to the Court. The substantial effect of these documents, and particularly the trust deed, is that in the present case it is the plaintiff and not the defendant which has an entitlement to payment under the policy. That is so because cl. 3(d) makes the plaintiff a "co-beneficiary" with the defendant. The effect of that is stated in two, mutually inconsistent, provisions. Clause 4(b) has the effect that moneys payable under the policy are to be paid to the plaintiff unless the plaintiff "otherwise directs in writing". And cl. 5(d) has the same effect, but without the qualification as to a direction in writing. The amount due under the policy is to be paid by National Mutual to Swann, under cl. 8 of the group policy, and under cl. 3 benefits payable under the policy are held in trust under the conditions of the trust deed.

Clause 5(c) of the trust deed "irrevocably" authorises Swann to pay the amount of any claim "to the Financier to whom the Customer was indebted" - i.e. to the plaintiff.

The result is that a claim is to be paid by National Mutual to Swann and by Swann to the plaintiff - unless, perhaps, the plaintiff directs that it be paid wholly or in part to the defendant's executor or administrator. In substance Swann's role is that of trustee for the plaintiff's rights under the policy. It does not itself assume any insured risk; it is a mere conduit, so far as claims under the policy are concerned, for the money coming from National Mutual, and all claims are made "to National Mutual through [Swann] under cl. 5(a) of the trust deed.

In these circumstances it seems clear that National Mutual is an insurer. I think that Swann is not an insurer, but rather a trustee of rights held, in substance being rights vested in the plaintiff, against National Mutual; but it is unnecessary to reach a conclusion on the latter point. It follows that, whether or not Swann should have been named as insurer, National Mutual certainly should have been, and therefore the name of the insurer was not given, in breach of cl. 1 of the Schedule and therefore in breach of s. 38(1)(b).

Here there can be no question of treating these provisions as having been complied with on the basis discussed in relation to Mr Costa's case - i.e. on the basis that the name given sufficiently identified the true insurer; the question of "substantial compliance" and the maxim de minimis non curat lex plainly have no application here.

But the question remains whether the Court should decide that the error was a "minor error" under s. 87(1). As a matter of commonsense, it is scarcely conceivable, let alone likely, that being told that Swann rather than National Mutual was the insurer could have disadvantaged this particular, or indeed any other, debtor. The difficulty in the way of answering the relevant question is that the definition of "minor error" refers to "debtors" and that is so because the section is intended to deal with an application relating to a defined class or group of debtors.

Nevertheless, there appears to be a high degree of improbability that any further or more detailed facts could be placed before the Court of such a kind as to justify a conclusion that the error in the name of the insurer was likely to disadvantage debtors. The circumstance that the present are not ss. 87A proceedings does not deprive the Court of jurisdiction to decide this point, although it is a reason against exercising the discretion to do so. Where the error is that, instead of naming the well-known company or group which is the true insurer, the statement referred to a rather obscure company as insurer, it appears to me that it would be excessively pedantic to decline to say that this was a minor error within the definition.

It is desirable to answer only those questions posed in this special case to which argument specifically relating to Mr Lapham's facts (rather than to those concerning Mr Costa) was addressed to the Court. Accordingly, the questions answered should be Nos. 2(b) and 4.

2. (a) Does the manner in which the amounts are stated in the

Loan Contract satisfy the requirements of clause 1 of Schedule 4 to the Credit Act?

Answer: No.

4. If the Loan Contract fails to comply with paragraph (b) of clause 1 of Schedule 4 to the Credit Act in any of the respects raised in questions 1 to 3 above, is that failure to comply a minor error within the meaning of Section 87A of the Credit Act?

Answer: As to the non-compliance referred in 2(b), that failure to comply is a minor error within the meaning of s. 87A of the *Credit Act*.

2. T M MORRIS

Here the special case is concerned with only two points.

The first is that the loan contract between the plaintiff and the defendant referred to "transaction stamp duty...$2.55", whereas according to the defendant it should have said "contract stamp duty $2.55". One may be pardoned for querying whether those who, presumably at public expense, are concerned to protect debtors against malpractice by parties such as the plaintiff could not occupy their time better than by raising such a trivial objection. It could not possibly make a difference to a debtor whether the duty in question is called "transaction duty" or "contract duty" and the former is a proper description of the nature of the duty. It does not appear to be

appropriate to deal further with this topic.

The second point raised is that the loan contract refers to "disability" insurance, whereas it is said the *Credit Regulations* 1988 required the use of the description "consumer credit insurance": see Regulation 19(2) and the item 6(h) in the Third Schedule. The two descriptions are, at least to the person unfamiliar with the Regulations, likely to convey different meanings.

The plaintiff argues that the regulation is, in the relevant respect, ultra vires because it is inconsistent with the requirements of Schedule 4. The relevant regulation depends for its validity on s. 124 of the Act which reads in part as follows:

> "The regulations may require the use of specified descriptive terms in a regulated contract . . . " .

The contract in question is a "regulated contract"; the argument must be that a regulation under s. 124 cannot override the descriptions authorised by Schedule 4. In my opinion the argument fails. The apparent purpose of s. 124 is to enable standard brief descriptions to be used, in lieu of the longer expressions such as those set out in cl. 1(b)(iii) in Schedule 4, viz:

> "Amounts so payable in respect of insurance against sickness of, accidental injury to, or disability or death of the debtor or against unemployment of the debtor . . . " .

Although the term used by the plaintiff would be more inclined to convey the true nature of the insurance to one's mind than that set out in the regulation, in my view there is a breach of the regulation in this respect.

The next question is whether a breach of the regulation is also a breach of

s. 38(1)(b) of the Act. That requires that the loan contract include "a statement of the amount financed in accordance with Schedule 4 and failure to comply with that provision brings about the consequence specified in s. 44 - i.e. that subject to ss. 86 and 87 the debtor is not liable to pay the credit charge. I can find nothing in the Act which produces the result that a breach of a regulation made under s. 124 is deemed also to be a breach of the requirements of s. 38. I note that, as the plaintiff's argument points out, s. 171(1)(e) limits the penalties for breaches of the regulations to 10 penalty units: cf. the general penalty in s. 163(2): 20 penalty units. Neither the plaintiff's counsel nor the defendant's counsel was able to suggest any basis on which it could be held that a breach of the regulation in question is also a breach of s. 38 and the proper conclusion is that it is not.

The answers to the questions should be as follows:

1. Does the description of consumer credit insurance as "disability" in the Loan Contract constitute:

   (a) a failure to use an expression prescribed by Regulation 19;

   (b) a contravention of Regulation 19,

   of the Credit Regulations 1988 of Queensland?

   Answer: (a) Yes.

   (b) Yes.

2. Does the description of stamp duty relating to the Loan Contract as "transaction stamp duty" in the Loan Contract constitute:

   (a) a failure to use an expression prescribed by Regulation 19;

(b) a contravention of Regulation 19,

of the Credit Regulations?

Answer: (a) Yes.

(b) Yes.

3. Does that failure to use an expression prescribed by Regulation 19 of the Credit Regulations or the contravention of that regulation result in the Loan Contract not being in accordance with Section 38 of the Credit Act?

Answer: No.

Questions 4 and 5: unnecessary to answer.