

IN THE SUPREME COURT OF QUEENSLAND

No. 2775 of 1997

Brisbane

Before Mr Justice Muir

[In the Matter of Application by Suncorp-Metway Ltd]

IN THE MATTER OF the *Consumer Credit (Queensland) Code* 1994

and

IN THE MATTER OF An Application by SUNCORP-METWAY LIMITED
(ACN 010 831 722)

REASONS FOR JUDGMENT - MUIR J.

Judgment delivered 26 November 1998

CATCHWORDS:

CONSUMER CREDIT CODE - requirements of ss. 14(1), 15(E) of the Code and s.38 of the Regulations - construction of s.38(3) - penalties.

Counsel: Mr K.D. Dorney QC , with him Mr M.E. Eliadis, for the applicant

Mrs D.A. Mullins for the respondent

Solicitors: Clayton Utz for the applicant

Mr B.T. Dunphy, Crown Solicitor, for the respondent

Hearing 6 October 1998

date:

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1 The applicant, Suncorp-Metway Limited, makes application for -

- (a) a declaration as to whether or not it has contravened a "key requirement", within the meaning of s.100(1)(d) of the *Consumer Credit Code* ("the Code"), in connection with certain consumer credit contracts entered into between it and its customers; and
- (b) depending on the determination in relation to (a), an order, in accordance with Division 1 of Part 6 of the *Code*, requiring the applicant to pay an amount as a civil penalty.

2 The respondent Director-General, of the Department of Equity and Fair Trading, represented the public interest and the interests of debtors on the hearing of the application (s.111 of the *Code*).

Matters relevant to the possible contraventions

3 Section 14(1) of the *Code* provides that a credit provider must not enter into a credit contract unless the credit provider has first given the debtor a pre-contractual statement setting out the matters required by s.15 to be included in the contract document.

4 Section 15(E) requires the contract document to contain -

"The total amount of interest charges payable under the contract, if ascertainable (but only if the contract

would, on the assumptions in sections 158 and 160 be paid out within seven years of the date on which credit is first provided under the contract)."

By operation of s.14(1), the information in s.15(E) is required to be provided to the consumer prior to the entering into of a credit contract.

5 The application concerns 1,030 contracts entered into between 1 November 1996 and 25 February 1997 in which the "total amount of interest charges payable" was misstated in the pre-contractual statement in the manner set out below. 862 of the contracts involved an understatement of \$25 or less. In the majority of the remaining 168 contracts the interest was understated by approximately half the amount of the total interest charges payable. This application involves two types of contract: contracts for home loans and contracts for personal loans. Each of the personal loan documents contains a pre-contractual statement similar to the following -

" Pre-Contractual Statement - Relevant Financial Information - All the pre-contractual information required by law is contained in this Schedule and the offer of Loan

Disclosure Date	13-01-97
Funds available to the Borrower/s for Loan purposes specified in Item 1 of this Schedule	\$5,000.00
	Nil
Less	
	\$21.50
Borrower/s payment towards fees and charges	
	\$5,021.50
...	
Total Credit Fees and Charges financed by the Loan and payable at Settlement	
Amount of Credit	
Term of Loan	36
	Month/s
...	

Repayments

The method of calculating repayments is as follows:

Repayments will be calculated so that the loan will be repaid by the last day of the Term based on the following assumptions:

(a) Repayments include a component for principal and interest:

(b) Each month has the same number of days:

(c) Repayments will be due and interest debited on the same day each month: \$170.41

36

(d) The Loan is fully drawn down on the date of first advance. \$6,134.76

An estimate of the amount of Your repayment per calendar month.

Total number of repayments (estimate only).

Total amount of repayments (estimate only).

* Your first repayment is due on the Due Date. The Due Date is one month after the day any part of the Loan is drawn down. When the Loan is drawn down on the 29th, 30th or 31st of any month then the Due Date shall be deemed to fall on the first day of the next month.

Total Amount of Interest Charges Payable \$546.93

This is an estimate calculated using the tolerances permitted by law.

6 The Home loan contracts contain similar provisions save that the paragraph marked * in the Home loan pre-contractual statement provides -

"Metway will advise you of the Due Date of your first repayment. Subsequent repayments will be due on the same day of each consecutive calendar month."

The applicant's argument as to contravention

7 Section 15(E) requires the total amount of interest charges payable to be stated only "if ascertainable". Section 158(6) deems information, not actually ascertainable, to be ascertainable in certain circumstances. It provides -

"Information required to be disclosed for the purposes of this Code, which is not otherwise ascertainable, is taken to be ascertainable if it is ascertainable, as at the date the disclosure is made, on the basis of assumptions set out this section or in the regulations."

8 Section 38(2) of the Consumer Credit Regulations provides for disclosure for the purposes of the *Code* relating to repayments and interest charges to be made on the assumption that the amount of credit will be provided on certain specified dates. Section 38(3) provides that subs. (2) does not apply to -

"...

- (b) a credit contract **under which credit is provided progressively** and the dates on which the credit is to be provided are not ascertainable." (emphasis provided)

9 The subject contracts are ones under which "credit is provided progressively and the dates on which the credit is to be provided are not ascertainable".

10 Terms of the "offer of loan" which, on acceptance, become part of the terms and conditions of loan provide, inter alia -

"This Offer of Loan may only be accepted by the Borrower signing and returning the Disbursement Authority and acknowledgement form to Metway and accessing or drawing down the whole or any part of the Loan.

The Loan will be disbursed by Metway in accordance with the schedule."

The words "credit is provided" in s.38(3)(b) must be interpreted as "is able to be provided". Credit is provided "progressively where it may be provided by more than one payment."

11 Alternatively, even if s.38(3) has no application, s.38(2) does not apply.

"The repayments for both personal and home loans are, by the relevant agreements, dependent on the stated 'method' of calculating the amount of the repayment rather than on a specific amount: see s. 15(F)(a)(i) of the Code. This has the consequence that, at the time of required disclosure under s.15 since no accessing or drawing down would have occurred at the time the written offer was proffered for acceptance, neither party would know when the first repayment was due under a personal loan (the due date being one month after the day any part of the loan is drawn down) and, therefore the interest charges could not be ascertainable. In the case of home loans the due date of the first repayment is that which the applicant 'will advise' to the debtor. The assumption mandated by Regulation 38(2) cannot affect 'interest charges' where there is no specified repayment amount (i.e. where there is merely a 'method' of calculating it). Thus, in applying Regulation 38(2) the 'amount of credit' is, by reason of s.4(2), the amount of the debt 'actually deferred', and since the contracts provide for the debtor to draw down part only if seen fit, it is just impossible for the assumption to be made under Regulation 38(2) so as to know what the specific amount of credit (namely, the amount of the debt 'actually' deferred) can be. Further, even if the assumption is made with respect to the whole of the amount that is agreed to be the subject of the loan, the fact that the first repayment has a 'due date' which is unascertainable for the purposes of the home loan, at least, must mean that Regulation 38(2) can have no application for such home loans."

Conclusions on the questions of construction

12 In the case of the Home loan contracts interest is to be "calculated on the Unpaid Daily Balance of the Loan. Interest accrues daily...". The loan must be repaid in full

by the last day of the "Term". The Term is specified in the schedule.

13 The contract of loan comes into existence only when the borrower signs and returns "the Disbursement Authority and Acknowledgement Form to Metway" **and** accesses or draws down on the whole or any part of the loan. Clause 4 provides that -

"The borrower will be advised in writing of the actual repayment amount and the Due Date of the first repayment after any part of the loan is dispersed.

The total number of repayments and the total amount of repayment (if applicable) referred to in the schedule may change depending on the number, date and amount of repayments made by the borrower."

If it was the case that under the terms of the Home loan contract, a loan could be drawn down by more than one payment, as payment of interest is calculated on the unpaid daily balance of the loan, the total amount of interest charges payable under the contract would not be ascertainable at the time the contract was made. As s.15 of the Code deals with matters to be contained in the contract it imposes obligations by reference to matters which can be ascertained from the contract and not by reference to events which may occur after the date of the contract. Consequently, it would make no difference for present purposes whether the borrower, after entering into the contract, exercised a right to draw down the loan by means of one payment only. What is relevant is whether the contract is so worded that on the date on which it is made, it is possible to ascertain the total amount of interest charges payable under the contract.

14 The Personal loan contract form differs from the home loan form in that it provides -

"Your first repayment is on the Due Date. The Due Date is one month after the day any part of the loan is drawn down."

Interest is calculated on the unpaid daily balance of the loan, as with the Home loan contract. The term of the loan is fixed and cl. 4 requires repayment by the last day of the Term. As with the Home loan contract, the Personal loan contract comes into existence on the accessing or drawing down the whole or any part of the loan. The first repayment is due on the Due Date which is "one month after the day **any part** of the loan is drawn down. I have referred to the provisions of the schedule in relation to repayments. It establishes a fixed date for the first repayment which date is able to be calculated at the date of the contract. However, it refers to "assumptions" as to matters such as the component for principal and interest, each month having the same number of days and the loan being fully drawn on the date of the first advance. Clause 4 stipulates that -

"The borrower will be advised in writing of the actual repayment amount and the Due Date of the first repayment after any part of the Loan is dispersed.

The total number of repayments and the total amount of repayments (if applicable) referred to in the Schedule may change depending on the number, date and amount of repayments made by the borrower."

15 One of the applicant's arguments appears to me to be based on a false premise. The premise is that at the time of making a Home loan or Personal loan contract, the contract is, necessarily, one involving progressive payments or progressive draw down of the loan moneys.

16 When the Personal loan contract is entered into upon drawing down the whole or part of the loan, if the whole of the loan is drawn down, it must follow that the contract is one under which no further loan moneys or credit is to be provided. It follows also that the total amount of interest charges payable under the contract is ascertainable. The words "accessing or drawing down the whole or any part of the Loan", whilst making it plain that the contract may be formed by drawing down part of the loan, cannot conceivably be viewed as a term of the contract permitting draw down by instalments where draw

down in full has taken place as part of the process of acceptance of the applicant's offer. Such words are merely part of the applicant's offer and are unable to constitute an operative provision of the contract. Even though, under cl. 4, the lender must advise the borrower of the repayment amount and date of the first repayment, those matters are to be calculated in the manner set out in the schedule and are thus capable of being ascertained.

17 The Home loan contract is a little different. As the first repayment occurs on a date to be stipulated by the applicant after the contract date, I think it probable that the total amount of interest charges payable under that form of contract will not be ascertainable for the purposes of s. 15(E) of the *Code*, even though it may well be implicit that all payments other than the first and/or last must be calculated on the same basis. Although I do not have much doubt on the point, I express my view provisionally because the argument before me did not focus on the question of whether, having regard to the wording of the form of contract, mathematical certainty was possible.

18 For present purposes, it only becomes necessary to consider s.38(2) of the Regulations in relation to the Home loan contracts and the Personal loan contracts in respect of which the loans are not drawn down fully at the time the contract is made.

19 That section enables disclosures for the purposes of the *Code* relating to interest charges to be made on certain stated assumptions as to when the amount of credit will be provided. Section 38(2), by operation of s.38(3), does not apply where credit "is provided progressively". It is common ground between the parties that, as the section looks to matters required to be done or provided for in the contract, such matters must be ascertainable at the date of the contract and consequently such words do not refer to matters which occur subsequent to the date of the contract in the carrying out of its terms. The applicant contends that "is provided" should be read as meaning "is able to be

provided". Its other possible meaning is "is required to be provided". Whichever construction is correct, for the reasons earlier given, it will always be possible to determine, at the time the contract is entered into, whether credit "is able to be provided progressively" or whether credit "is required to be provided progressively". The contract has to be construed as a whole and, as I have implied, it does not make a great deal of sense to conclude, in respect of a contract formed upon the drawing down of the whole of the loan, that it is a contract under which credit "is able to be provided progressively".

20 I accept the applicant's submission that a subject contract meets the description of a credit contract under which credit is to be provided progressively if the dates on which the credit is to be provided are not ascertainable, if at the time the contract was entered into all loan moneys had not been drawn down. In *Bryston Property Co Ltd v Edwards* [1944] 1 KB 32 (C.A.) the Court concluded that "progressive rent" was a "comprehensive phrase" and that there was no requirement "that there must be at least two steps of progression". Assuming that the legislature had in mind the drawing down of credit in instalments or by "progressive payments" so as to pay, for example, a builder's progress payment claims or periodic instalments on the purchase price of a car, I can see no reason why the legislative object would be better achieved by excluding a contract involving two payments of loan moneys from the scope of the section whilst including one which provided for three or more. The applicant's preferred construction, in my view, accords with the meaning of the words "is able to be provided progressively" in every day speech.

21 As the applicant pinned its hopes on the merits of its construction point, it did not lead evidence with a view to showing which loans were fully drawn down on the making of the contract and which loans were not. I suspect, particularly in relation to the Personal loans, that there would be relatively few which were not fully drawn from

inception. Mrs Mullins, who appeared for the respondent, pointed out that there were only 11 Home loans in all.

22 Having regard to my conclusions, it is inappropriate, and in fact impossible, for me on the available evidence to make declarations as to which Personal loan contracts involve contraventions and which do not. If my conclusions in relation to the question of penalty had been different, it may have been necessary for me to invite further submissions from the parties and to permit the applicant to adduce further evidence with a view to identifying the contracts which involved a contravention. I would also have been inclined to invite the construction of the Home loan contracts.

Civil penalty

23 The maximum penalty fixed by s. 105(1) of the Code is \$500,000. That is an indication of the attitude of the legislature towards breaches of the Code. Sections 102(3) and (4) of the Code contain matters to which the court must have regard "in considering the imposition of a civil penalty". I have had regard to those matters. In this case -

- (a) the applicant endeavoured to implement systems which would ensure compliance with requirements of the Code;
- (b) the contraventions were inadvertent;
- (c) no debtor suffered loss or detriment as a result of the contraventions; and
- (d) after the applicant became aware of the contraventions it acted promptly to remedy the problem and took timely and appropriate steps towards having the legality and consequences of its actions dealt with by the Court.

24 The respondent submits that -

"In the circumstances, the respondent considers that a civil penalty at the lower end of the possible range is appropriate. It suggests that the amount between \$2,000 and \$5,000 would be appropriate."

It is submitted that a fine should be imposed, having regard to the aspect of deterrence both in relation to the applicant and other members of the finance industry. I regard it as extremely significant that the applicant has incurred costs in excess of \$100,000 in relation to this application. That figure does not have regard to the time lost by employees of the applicant engaged in providing materials to legal advisers and other consultants. I cannot see that the addition of a modest fine to the large expenditure in time, effort and money by the applicant would serve a useful purpose. Indeed, in my view, it would fail to give appropriate recognition to the responsible manner in which the applicant has conducted itself and to the losses incurred by it in so doing. I mention that I have considered the question of penalty on the premise that there was an infringement of a "key requirement" of the Code in respect of the great bulk of the Personal loan contracts.