Bank class action: "expert" media comments astray, and implications for service contracts

We outline the litigation issues and then address why suppliers may need to address pricing of services due to new law.

March 2013

It's been fascinating watching "experts" comment in the media this week about the proposed class action against banks, sometimes saying a claim doesn't have legs, and that only the lawyers and litigation funders win. Even Consumer NZ questions the litigation, saying: *"The Commerce Commission hasn't seen fit to take a case and I guess that should raise some concerns"*. The organisation most directly interested in advocating for consumers gets it wrong: the Commerce Commission has no jurisdiction in relation to this class action, as it is a contract claim, not a statutory claim over which it has jurisdiction[1].

One of the few commentators to talk sensibly about this was class action specialist, lawyer, Grant Cameron, when he addressed the practical challenges of class actions in New Zealand.

It's not at all surprising that a class action is proposed here: the highest court in Australia has made a ground-changing decision in favour of the class action complainants in Australia, to depart from long-standing law, in a way that is just as applicable in New Zealand. We've summarised that change at *http://www.wigleylaw.com/assets/Uploads/Early-Termination-Charges-major-developments.pdf*. As those claimants won the appeal, the case now goes to trial to decide whether the banks are liable, based on the new law set out in the appeal judgment, and, if yes, for how much they are liable. The litigation funders and the lawyers have a lot at stake and they'll have decided that they're not flogging a dead Phar Lap. Their business case must include the intention of funds going to claimants: anything else would see a short lived one-trick show pony business.

What would be surprising would be if a claim was not brought in NZ given what is happening in Australia.

Pricing in supply contracts

For years, there's been clear law that a liquidated damages clause or something similar such as a rebate payable on a service level agreement breach must be a genuine pre-estimate of damages that would have been awarded where there is breach, in the absence of that clause. If it isn't a genuine pre-estimate of damages, it's not enforceable (as it is a penalty).

But sometimes payments are due under contracts which are payable under a primary obligation, instead of for breach of a primary obligation. In the article referred to above, the example we use is the early termination charge when a mobile services contract is ended early by the customer. There's no breach as the contract provides the right to do this. But the effect is similar to an LD clause where there is a breach, according to the new Australian case. That reverses the prior understanding of the law as to penalties.

What the High Court of Australia has said is that the penalty rules can apply to such payments too. Although yet to be finally decided at trial, that might include certain bank fees such as transaction and dishonour charges. Plenty of other supply contracts have provisions that may fit.

In our article we outline some of the issues to consider, including a possible distinction between core prices for supplies and collateral pricing (the regime may apply to the latter but not the former).

1. Maybe there is a different kind of action under the Consumer Guarantees Act over which the Commission has jurisdiction, but that would need checking, and is quite different in nature.

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