

CONTAINER DETENTION: BACK ON THE AGENDA?



Introduction

Following the High Court of Australia decision in *Andrews v ANZ Banking Group Limited*¹ (*Andrews*), on 5 February 2014, Justice Gordon of the Federal Court of Australia delivered a judgment in *Paciocco v ANZ Banking Group Limited*² (*Paciocco*) which may have implications for the shipping industry with respect to container detention fees.

In September 2010, proceedings were issued in the Federal Court of Australia against the Australia and New Zealand Banking Group Limited (ANZ) - the first in a series of class actions to recoup bank fees that it charged their customers over the previous six years.

Over 43,000 customers joined in the class action against ANZ to recover various bank fees, alleging that they were unfair, unconscionable and penalties which were illegal because they exceeded the actual cost to the bank of customers overdrawing their accounts or being late on their repayments.

The fees included honour and dishonour fees on bank accounts, over the limit fees as well as late payment fees. Justice Gordon ruled that only late payment fees were illegal penalties and were, therefore, lawfully recoverable by the customers.

Law on penalties - is a breach necessary?

As reported in previous Briefings concerning container detention, a penalty is a fixed amount required to be paid for a breach of contract, which is not a genuine estimate of the actual loss arising from the breach.

The High Court in *Andrews*, however, took a broader approach on the issue of penalties and held that a fee could constitute a penalty not only if it is payable upon a breach of contract, but also if it is payable to secure an obligation or performance by the party subject to the fee.

1 [2012] CLR 205

2 [2014] FCA 35



When do late fees constitute a penalty?

In *Paciocco*, the Court held that the correct approach is to analyse the fee payable on breach of a term of the contract. One must then ask whether the stipulated fee is charged in order to secure the performance of a primary obligation. If so, is the fee a genuine pre-estimate of the damage suffered as a result of that party's non-performance and is it "extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved"?³ If the answer to that question is 'no', then the stipulated fee will not be enforceable against the party liable for the payment of that fee to the extent that it exceeds the amount of the damage suffered.

Adopting the High Court's approach, Justice Gordon in *Paciocco* held that the 'late fee' of AU\$35.00 charged to the customer was capable of being categorised as a penalty, because it was payable on breach and it was intended to scare the customer into paying their bill on time. In addition, Justice Gordon found the amount to be extravagant and unconscionable, as it was well in excess of the actual loss to the bank as a result of the customer's failure to pay on time. Although Justice Gordon conceded that the actual loss may be difficult, if not impossible, to quantify, she indicated that a degree of guesswork and speculation might still be necessary and appropriate. According to Justice Gordon, the actual cost to the bank would have been no more than AU\$3.00.

Fundamental to her decision, Justice Gordon held that the liability to pay late fees needed to be either:

1. Contingent upon a breach of contract and/or alternatively;
2. Collateral (or accessory) to a primary stipulation (e.g. to make payment by a particular date) in favour of ANZ.

That collateral obligation (to pay late fees), upon the failure of the primary stipulation (to pay by the due date), according to the Judge, imposed upon the customer an additional detriment which was both extravagant, exorbitant and unconscionable and intended to scare customers to meet their payment deadlines.

Can container detention charges constitute a penalty?

To date, cargo interests have been unsuccessful in their attempts to recover container detention charges. Several cases reported in previous circulars reinforced the view that detention charges are simply amounts agreed to be payable upon the happening of certain events, namely the retention of the container beyond the "free time".

However, if the principles in *Paciocco* are applied to container detention charges, the question must be asked whether they too could constitute a penalty, particularly if a breach of contract is no longer an essential element in determining whether a fee is, in essence, a penalty. The question becomes more important also given that there can be little dispute that the imposition of detention charges are intended to scare customers into returning containers prior to the expiry of the free time.

If the charges do amount to a penalty, it must then be asked whether the detention fee is so excessive compared to the actual loss suffered by the owner of the containers as a result of the customer failing to return the containers on time.

Effect of *Paciocco* decision

In the NSW District Court case of *Cosco Container Lines v Unity International Cargo [2012]*, Judge Rolfe held that an agreement by Cosco to provide containers to Unity gave rise to a separate obligation which was not contingent on any breach and, as a result, the detention charges did not operate as a penalty.

The *Cosco* decision is consistent with the views of Justice Gordon in *Paciocco* in relation to the honour, dishonour, non-payment and over limit fees which were found not to be penalties as the liability to pay them were not contingent upon a breach of contract nor collateral to a primary stipulation in favour of ANZ. The liability to pay the charges arose in circumstances where the customer was entitled to initiate such a transaction and the fees were payable in respect of the Bank's consideration of and decision in respect of the request for a further advance. The same is true in relation to container detention where the customer elects to retain the use of the container beyond the free time and to pay charges to the container operator for the on-going use of their container.

³ *Dunlop Pneumatic Tyre Company Limited v New Garage and Motor Company Limited [1915] AC 79*



Late payment fees - ramifications for container detention

In relation to the late payment fees charged by the ANZ Bank, Justice Gordon in *Paciocco* held that they did constitute a penalty and, therefore, it is necessary to consider whether container detention fees, which arise from the late return of the containers, might now be considered a penalty also.

Ordinarily, when a customer receives a container for the packing and carriage of their cargo, they are entitled to the use of the container for as long as they wish and there is no stipulation that the container must be returned by any particular date. Once the period of free time has expired, the customer can return the container at that time or, alternatively, continue to utilise it to meet their own needs. By doing so, however, the customer accepts that there will be a daily charge applicable which is simply recognition of the fact that the parties have agreed that the customer can hire the containers at the agreed contractual rate until their return.

Thus, unlike the position in relation to ANZ's late payment fees, it would seem clear that the container detention charges are not in any way contingent upon a breach of contract and, as a result, this limb of Justice Gordon's decision in *Paciocco* would not apply.

It is arguable also that Justice Gordon's second limb, regarding a collateral requirement to pay late fees following the failure to make a payment by a due date, would also not be applicable. In the context of container detention, there is no failure of any primary

stipulation to pay any amount by a due date and, as a result, it does not give rise to any collateral obligation to pay late fees if the container is not returned. Instead, the liability to pay detention charges simply arises in circumstances where the customer is entitled to retain the container in their possession and the charges are to compensate the "carrier" for the loss of their own use of their container.

It would seem to follow, therefore, that the decision in *Paciocco* should not have any impact on the right of a "carrier" to recover container detention fees for the late return of containers.

Summary and recommendations

It is noted, however, that the decision in *Paciocco* has already opened the door for class actions against other Australian banks, several of which are already on foot. Its reach is also expected to extend to sectors beyond banking, namely to utilities including electricity and telecommunications.

Fortunately, the decision of Justice Gordon does not conflict with the earlier decisions regarding container detention. As a result, unless there has been a breach of contract or a failure to make a payment by a due date, which gives rise to an additional excessive cost, it remains open for parties to agree the terms of any arrangement regarding the on-going hire and use of containers without the risk of the detention charges being held to be a penalty.

Nevertheless, there is clearly going to be an increasing focus on the validity and reasonableness of bank charges of the type considered in *Paciocco*

in the future. As a result, it may be prudent for shipping companies also to review their container detention policies and either to:

1. Seek to ensure that the charges payable represent the greatest loss that could conceivably be proved to have resulted from the late return of a container; or
2. At the least, to adopt a contractual fixed daily fee for the hire and use of a container beyond the "free time".

Such an approach would be consistent with the present trends being followed by container operators and shipping companies and also the comments of various Judges regarding the importance of maintaining a distinction between a charge that is "extravagant and unconscionable" in amount and one which is a "genuine covenanted pre-estimate of damage".

In the interim, it is doubtful whether the recently announced appeal of Justice Gordon's decision in *Paciocco* to the Full Federal Court will have any impact on the existing rights of carriers and container operators to collect container detention charges.



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