FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Fast Access Finance Pty Ltd (No 2) [2017] FCA 243

File number:	QUD 489 of 2013
Judge:	**DOWSETT J**
Date of judgment:	10 March 2017
Catchwords:	**CONSUMER LAW** – consumer credit – contraventions of the *National Consumer Credit Protection Act 2009* (Cth) and the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (Cth) – prohibition on engaging in credit without an Australian credit licence – where the business model involved the purported sale and purchase of diamonds, designed so as to conceal the nature of the money-lending transactions – penalty imposed on the company that designed and developed the model – penalty imposed on two franchisees who implemented the model
Legislation:	*Crimes Act 1914* (Cth) s 4AA *Crimes and Other Legislation Amendment Act 1997* (Cth) Sch 1, item 9 *Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012* (Cth) Sch 3, Pt 2, item 7 *National Consumer Credit Protection Act 2009* (Cth) ss 5, 6(1), 29(1), 167 *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (Cth) items 4, 6 *National Credit Code* (Cth) s 204
Cases cited:	*Australian Securities and Investments Commission v Make it Mine Finance Pty Ltd (No 2)* [2015] FCA 1255 *Trade Practices Commission v CSR Ltd* (1991) ATPR ¶41-076
Date of hearing:	15 March 2016
Date of last submissions:	8 April 2016
Registry:	Queensland
Division:	General Division

National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Category:	Catchwords
Number of paragraphs:	28
Counsel for the Applicant:	Mr S Cleary
Solicitor for the Applicant:	Australian Securities and Investments Commission
Counsel for the Respondents:	Mr G Dietz
Solicitor for the Respondents:	Nyst Legal

REASONS FOR JUDGMENT

QUD 489 of 2013

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Applicant
AND:	**FAST ACCESS FINANCE PTY LTD ACN 078 233 084** First Respondent
	FAST ACCESS FINANCE (BEENLEIGH) PTY LTD ACN 095 585 292 Second Respondent
	FAST ACCESS FINANCE (BURLEIGH HEADS) PTY LTD ACN 104 904 225 Third Respondent
JUDGE:	**DOWSETT J**

THESE PROCEEDINGS

1 Following a six day trial, I found that the second and third respondents (respectively "FAF Beenleigh" and "FAF Burleigh Heads") had contravened s 29(1) of the *National Consumer Credit Protection Act 2009* (Cth) (the "Credit Protection Act") and items 4 and 6 of the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (Cth) (the "Transitional Act"). The applicant in these proceedings is the Australian Securities and Investments Commission ("ASIC"). The proscribed conduct was the engagement in credit activity without the relevant licence. I found that FAF Beenleigh had, on three occasions, infringed one or other of those provisions and that FAF Burleigh Heads had done so on 14 occasions. I also found that the first respondent ("FAF") had been knowingly concerned in all 17 infringements.

2 Details of the relevant misconduct appear in my published reasons. I do not propose to reproduce in these reasons, the content of those earlier reasons, save to the extent that such repetition is necessary. It is sufficient to say that FAF had developed a trading model (the "diamond model") and established a network of franchisees to utilize that model. FAF Beenleigh and FAF Burleigh Heads were two such franchisees. Franchisees made relatively small financial advances to needy borrowers. The diamond model was developed to avoid the effects of statutory provisions which came into effect at about the time that such model

was adopted. One aspect of the statutory regime was the prohibition of lending at interest rates in excess of 48%. The diamond model involved the purported sale of diamonds by the relevant franchisee to the customer at one price, and sale of those diamonds by the customer to another company associated with FAF, or persons controlling it, at half the purchase price, so that the customer received half of the amount of the incurred debt. The amount received in hand was the amount which the franchisee had agreed to provide, having regard to the customer's needs and capacity to repay. However the customer was bound to repay the full amount. ASIC submitted, and I found, that the transaction was a provision of credit at an interest rate well in excess of 48%.

3 The amounts advanced varied between $500 and $2,000. As far as this case goes, between August 2010 and October 2011, FAF Beenleigh made three advances to two customers. Between August 2010 and February 2012, FAF Burleigh Heads made 14 advances to four customers. I do not doubt that, as ASIC submits, there were many other infringements by both franchisees. ASIC submits that I should take into account, in fixing penalties, other infringements which, it alleges, occurred after 1 July 2010 when the relevant legislation came into force. ASIC asserts that it had chosen the 17 transactions to which I have referred as comprising "a manageable sample of transactions" entered into by the two franchisees. I shall deal with this submission at a later stage in these reasons.

LEGISLATIVE FRAMEWORK

4 The Credit Protection Act prohibits a person from engaging in a "credit activity" unless he, she or it holds a licence authorizing such engagement. The term "credit activity" is defined in s 6 of the Credit Protection Act. Section 6(1) effectively provides that a person engages in a credit activity if, "the person is a credit provider under a credit contract". Pursuant to s 5 of the Credit Protection Act the definition of "credit provider" is to be found in s 204 of the *National Credit Code* ("the Code") as follows:

> a person that provides credit, and includes a prospective credit provider.

5 Section 29(1) of the Credit Protection Act provides:

> A person must not engage in a credit activity if the person does not hold a licence authorising the person to engage in the credit activity.

6 Item 4(1) of Sch 2 of the Transitional Act provides:

A person must not engage in a credit activity unless:

(a) the person is registered to engage in the credit activity; or

(b) the person holds a licence authorising the person to engage in the credit activity.

7 Item 6(1) of Sch 2 of the Transitional Act provides:

A person must not engage in a credit activity unless:

(a) the person:

(i) is registered to engage in the credit activity; and

(ii) has applied for a licence authorising the person to engage in the credit activity in accordance with section 36 of the National Credit Act; or

(b) the person holds a licence authorising the person to engage in the credit activity.

THE CONTRAVENTIONS

8 I have previously made declarations that:

- FAF Beenleigh contravened:
  - (i) Item 4 of Sch 2 of the Transitional Act in relation to 1 contract;
  - (ii) Item 6 of Sch 2 of the Transitional Act in relation to 1 contract; and
  - (iii) Section 29(1) of the Credit Protection Act in relation to 1 contract;
- FAF Burleigh Heads contravened:
  - (i) Item 4 of Sch 2 of the Transitional Act by entering into 2 credit contracts;
  - (ii) Item 6 of Sch 2 of the Transitional Act by entering into 7 credit contracts; and
  - (iii) Section 29(1) of the Credit Protection Act by entering into 5 credit contracts; and
- FAF, by virtue of its being involved in each of the contraventions by the second and third respondents, contravened:
  - (i) Item 4 of Sch 2 of the Transitional Act on 3 occasions;
  - (ii) Item 6 of Sch 2 of the Transitional Act on 8 occasions; and
  - (iii) Section 29(1) of the Credit Protection Act on 6 occasions.

MAXIMUM PENALTY

9 Each of the proven contraventions carries a maximum civil penalty of 2,000 penalty units. A "penalty unit" is defined in s 4AA of the *Crimes Act 1914* (Cth) and is ascribed a dollar value. That value is varied from time to time. With effect from 28 December 2012, the value of the penalty unit increased from $110 to $170: see *Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012* (Cth) Sch 3, Pt 2, item 7. Prior to that amendment, the value of a penalty unit had not changed since 1997: see *Crimes and Other Legislation Amendment Act 1997* (Cth) Sch 1, item 9. All of the respondents' contraventions occurred before 28 December 2012.

10 Section 167 of the Credit Protection Act provides:

> (1) Within 6 years of a person contravening a civil penalty provision, ASIC may apply to the court for an order that the person pay the Commonwealth a pecuniary penalty.
>
> ...
>
> (2) If a declaration has been made under section 166 that the person has contravened the provision, the court may order the person to pay to the Commonwealth a pecuniary penalty that the court considers is appropriate (but not more than the amount specified in subsection (3)).
>
> ...
>
> (3) The pecuniary penalty must not be more than:
>
> (a) if the person is a natural person -- the maximum number of penalty units referred to in the civil penalty provision; or
>
> (b) if the person is a body corporate, a partnership or multiple trustees -- 5 times the maximum number of penalty units referred to in the civil penalty provision.
>
> ...
>
> (4) The pecuniary penalty may be recovered as a debt due to the Commonwealth.

11 As the respondents are corporations, the maximum penalty for each contravention is $1.1 million.

THE PURPOSE TO BE SERVED

12 Penalty regimes attached to regulatory systems are generally designed to deter the proscribed conduct and to express the community's disapproval of the breach of its law. Where misconduct is for financial gain, the penalty must be sufficiently high so that its incurrence

will not be accepted as a mere cost of doing business. Conversely, penalties must not be oppressive. Any penalty must not involve double punishment.

13 The legislation creates a licensing system which imposes obligations on licence holders in order to protect consumers from unfair credit practices. As I have said, the diamond model, as implemented by the respondents, was specifically designed to circumvent that system. The protection of consumers from the unfair practices of consumer credit providers is a matter of significant public interest. Unfortunately, many people find themselves in positions in which they need relatively small amounts of money, but are unable to borrow from traditional lenders. The fact that there are many people in that situation has led to there being lenders who are willing to lend small amounts, with limited or no security for repayment, but at very high rates of interest, no doubt, at least to some extent, reflecting the risk involved in such transactions.

14 One might say that the provision of such loans simply meets a need, and that the market will control interest rates. However these borrowers are frequently desperate to obtain finance, rarely have the benefit of appropriate advice and often have neither the time nor the resources to explore alternative borrowing options. Thus they are at risk of exploitation at the hands of lenders, a phenomenon which, for centuries, has been known and discouraged in our civilization. The risk and reality of such exploitation has led to government intervention to, in effect, protect such borrowers from themselves, as well as from the depredations of some lenders. The victims of usury will only rarely complain to the authorities about such exploitation. Hence, the risk of being detected in proscribed conduct may be quite low. Any penalty imposed for such misconduct must reflect these considerations.

CAPACITY TO PAY

15 A contravener's capacity to pay any penalty must always be a relevant, but not necessarily decisive consideration. To impose a penalty which the wrong-doer does not pay, because it cannot pay, will lead to a perception that the system does not really work. Further, non-compliance with a court order may tend to undermine public respect for all such orders, and for the courts and the judicial system generally. However one must keep in mind the level of penalty needed in order that the risk of its incurrence will amount to an adequate deterrent. The need for equivalent treatment for equivalent misconduct may also make it difficult to tailor each penalty to the financial capacity of the wrong-doer in question.

16 Mr Robert Legat has sworn that FAF has no assets capable of being realized. However that says little about its capacity to pay. In this respect, Mr Legat's affidavit is somewhat evasive. It seems unlikely that either FAF Beenleigh or FAF Burleigh Heads will be able to pay anything more than small amounts. I have previously made orders for the payment of compensation to the borrowers, such compensation being calculated by reference to the amount by which, in each transaction, interest charged exceeded the amount calculated using the permissible rate. It seems unlikely that those amounts will be paid.

RELATIVE SERIOUSNESS

17 FAF designed and developed the diamond model. Such development was prompted by the fact that impending legislation was likely to hamper its capacity to profit from its existing money lending operations. I doubt whether those who controlled FAF really believed that they had devised a lawful scheme which would not engage such legislation. The idea of selling diamonds to people who came looking for small loans, and expecting to pay high interest rates, borders on the ridiculous. On 25 October 2011 the Queensland Civil and Administrative Tribunal ("QCAT") held, in proceedings to which FAF or some associated entity was a party, that the diamond model was highly unlikely, improbable and implausible "so as to constitute a complete fiction". However the model continued in use until April 2012. The QCAT decision must have caused those involved in FAF's operation to doubt the appropriateness of the diamond model, notwithstanding the fact that an appeal was launched. Further, the proceedings leading up to that decision would surely have caused such concern. FAF had "in-house" legal and accounting expertize. It is difficult to imagine that such combined expertize would not have led to doubts concerning the model.

18 On the most favourable view of the matter for FAF, its controlling officers must have had at least a strong suspicion that the diamond model was contrary to the relevant legislation. The ridiculousness to which I have referred must also have been evident to those controlling FAF Beenleigh and FAF Burleigh Heads. However it is possible that they simply assumed that FAF was reputable and understood the relevant law. As between FAF Beenleigh and FAF Burleigh Heads, any difference in penalty should reflect the small number of transactions which have been proven against FAF Beenleigh as compared to the number proven against FAF Burleigh Heads. FAF was the designer of the diamond model and encouraged its use by its franchisees. It must be seen as being more culpable for each of the contraventions in which it was involved, than was either FAF Beenleigh or FAF Burleigh Heads.

OTHER RELEVANT CONSIDERATIONS

19 ASIC submitted that the matters to be taken into account by a court in assessing penalty were those identified by French J, as his Honour then was, in *Trade Practices Commission v CSR Ltd* (1991) ATPR ¶41-076. Relevantly, those factors are:

- the size of the contravening company;
- the degree of power of the contravener, as evidenced by its market share and ease of entry into the market;
- the deliberateness of the contravention and the period over which it extended;
- whether the contravention arose out of the conduct of senior management of the contravener or at a lower level;
- whether the contravener has a corporate culture conducive to compliance with the relevant legislation as evidenced by educational programmes and disciplinary or other corrective measures in response to an acknowledged contravention; and
- whether the contravener has shown a disposition to cooperate with the authorities responsible for the enforcement of the legislation.

20 Whilst such considerations were no doubt relevant in a case against CSR Ltd, they can have little relevance in cases of this kind, involving these respondents. The considerations listed by ASIC at para 40 of its submissions are more relevant. They are:

(a) the nature and extent of the contravening conduct;

(b) the amount of loss or damage caused;

(c) the circumstances in which the conduct took place;

(d) the size of the contravening company;

(e) the deliberateness of the contravention and the period over which it extended;

(f) whether the contravention arose out of the conduct of senior management or at a lower level;

(g) whether the company has a corporate culture conducive to compliance with the Act, as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention;

(h) whether the company has shown a disposition to co-operate with the regulator;

(i) similar conduct by the company in the past;

(j) the financial position of the company; and

(k) the deterrent effect of the penalty.

21 Again, not all of these considerations are relevant for present purposes.

22 The diamond model was designed to conceal the true nature of money-lending transactions. The underlying reason for such concealment was to circumvent the limit upon the rate of interest which was 48%. The respondents accept that in the case of each respondent, senior management made the decision to employ the diamond model. However that proposition means little in this case. FAF seems to have been little more than an incorporated partnership. FAF Beenleigh and FAF Burleigh Heads were effectively the vehicles by which sole traders conducted their businesses. FAF went to some trouble in setting up and operating the model and, I infer, in developing and maintaining its network of franchisees. To some extent, FAF was exploiting its franchisees. Nonetheless, FAF Beenleigh and FAF Burleigh Heads were, in turn, quite happy to exploit their customers.

23 Although the excessive interest paid by each customer may not have been large in absolute terms and by some standards, it was no doubt substantial for the customer in question. Such customers have little chance of recovering anything from any of the respondents. The most heinous aspect of the case is the deliberate and pre-meditated exploitation of these vulnerable people.

24 There has been, as far as I can see, little or no cooperation with ASIC. It is said that at an early stage the respondents offered to cooperate but were "rebuffed". Hence it is not easy to assess whether they would have offered any meaningful cooperation during the investigation, had the offer been accepted. However they persisted in defending these proceedings with, in my view, virtually no prospect of ultimate success. Such persistence led inevitably to the calling of numerous borrowers as witnesses, and their cross-examination and the expenditure of substantial amounts of money in the conduct of the proceedings. The respondents seek to attribute the blame to ASIC in that it persisted in pursuing a claim of "sham". However that aspect of the case was little more than an alternative way of casting the case.

OTHER MISCONDUCT

25 ASIC suggested that it had, in some way, laid a basis for my fixing penalty, taking into account other similar incidents of misconduct by FAF Beenleigh and FAF Burleigh Heads, to which misconduct FAF was a party. ASIC suggested that it had, in the course of case

management, suggested such an approach. I certainly was not aware of any suggestion to that effect. The transcripts of two earlier directions hearings reveal no such indication. My own understanding was that ASIC was using these proceedings to explore the operation of the legislation in question. The respondents certainly do not accept ASIC's proposition. I see no basis upon which I can, in this case, deal with any of the respondents upon the basis that it engaged in misconduct other than that proven in these proceedings, or found proven in other proceedings. Such a course may be possible in some circumstances, but it could only be done by consent. The respondents have not consented.

26 My attention has been drawn to the decision of Beach J in *Australian Securities and Investments Commission v Make it Mine Finance Pty Ltd (No 2)* [2015] FCA 1255. His Honour was dealing with a finance company which had committed a large number of contraventions of various provisions of the Transitional Act and the Credit Protection Act. The overall misconduct involved many thousands of transactions, including 3,614 incidents of unlicensed credit activity. Clearly, the circumstances of that case were much more serious than are the circumstances of the present case. His Honour adopted a notional maximum penalty for all infringements of $1.1 million. I do not consider, that in the present case, such amount could possibly be adopted as the relevant maximum penalty for any respondent, given the small number of contraventions. Beach J imposed a total penalty of $250,000 for all of the unlicensed conduct contraventions. That figure no doubt reflected an assessment of the totality of the company's culpable conduct. It could hardly be suggested that in the present case, a penalty of less than $100 per unlicensed engagement would be a sufficient penalty to achieve the purposes to which I have referred, particularly that of deterrence.

27 The awards of compensation demonstrate that the excess interest charged in each case was between about $500 and about $2,000. In order to deter such conduct it would be necessary, as against a natural person, that the appropriate penalty for one contravention be several times greater than the excess interest charged. That suggests a penalty for one infringement of about $6,000 and an overall penalty for three offences of say, $20,000. As the maximum penalty for a corporation is five times higher than that for a natural person, the penalty for FAF Beenleigh must be considerably higher than $20,000. On the other hand, there is room for some adjustment to reflect the overall culpability of the conduct in question. I impose on FAF Beenleigh a penalty of $80,000. In the case of FAF Burleigh heads, I shall adopt the same approach, here reflecting the higher number of contraventions. I impose a penalty of $250,000. The penalty for FAF must reflect its involvement in the 17 contraventions, by

encouraging and supporting them. That penalty must also take into account FAF's decision to design and market the diamond model. I impose an overall penalty of $400,000 on FAF. If any of these companies were a going concern, with ongoing employees and legitimate business prospects, I may have considered reducing the relevant penalty in order to increase the prospects of its continuing to trade. However there are no such prospects in this case.

28 I shall hear submissions as to formal orders, including times for payment and any outstanding questions as to costs.

I certify that the preceding twenty-eight (28) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Dowsett.

Associate: 

Dated: 10 March 2017