FEDERAL COURT OF AUSTRALIA

Australian Securities & Investments Commission v Lightspeed Finance Pty Ltd [2022] FCA 469

File number:	QUD 114 of 2021
Judgment of:	**DERRINGTON J**
Date of judgment:	4 May 2022
Catchwords:	**CONSUMER LAW** – action by the Australian Securities and Investments Commission seeking orders in relation to company's failure to comply with a determination by the Australian Financial Complaints Authority – whether declarations should be made – whether penalties should be imposed – how penalty to be assessed – what amount of compensation should be payable under ss 178 and 179 of the *National Consumer Credit Protection Act 2009* (Cth)
Legislation:	*Corporations Act 2001* (Cth) *Federal Court of Australia Act 1976* (Cth) *National Consumer Credit Protection Act 2009* (Cth) *Corporations Regulations 2001* (Cth) *National Consumer Credit Protection Regulations 2010* (Cth)
Cases cited:	*Adler v Australian Securities and Investments Commission* (2003) 179 FLR 1 *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13 *Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd* (2007) 161 FCR 513 *Australian Securities and Investments Commission v ACN 092 879 733 Pty Ltd* [2012] FCA 923 *Australian Securities and Investments Commission v Financial Circle Pty Ltd* [2018] FCA 1644 *Australian Securities and Investments Commission v GoGetta Equipment Funding Pty Ltd* [2021] FCA 420 *Australian Securities and Investments Commission v Kobelt* [2017] FCA 387 *Australian Securities and Investments Commission v Loiterton* [2004] NSWSC 897 *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 326 ALR 476

	Commonwealth v Director, Fair Work Building Industry Inspectorate (2015) 258 CLR 482, 506 *LM Investment Management Ltd (receiver appointed) (in liq) v Drake* (2019) 350 FLR 17 *Trade Practices Commission v CSR Ltd* [1991] ATPR ¶41-076
Division:	General Division
Registry:	Queensland
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	81
Date of hearing:	21 April 2022
Counsel for the Applicant:	Mr M Steele
Solicitor for the Applicant:	ASIC
Counsel for the Respondents:	Mr J Mckay
Solicitor for the Respondents:	E C Lawyers

ORDERS

QUD 114 of 2021

BETWEEN:	**AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION** Applicant
AND:	**LIGHTSPEED FINANCE PTY LTD ACN 148 868 786** First Respondent
	MARK JAMES FITZPATRICK Second Respondent

ORDER MADE BY: **DERRINGTON J**

DATE OF ORDER: **21 APRIL 2022**

THE COURT DECLARES THAT:

1. Pursuant to s 166 of the *National Consumer Credit Protection Act 2009* (Cth) (Act), and s 21 of the *Federal Court of Australia Act 1976* (Cth), the first respondent breached s 47(1)(m) of the Act by failing to give effect to the determination of the Australian Financial Complaints Authority made on 12 July 2019 in respect of the first respondent being an obligation prescribed by regulation, namely Regulation 11A(2)(c) to the *National Consumer Credit Protection Regulations 2010* (Regulations).

2. Pursuant to s 166 of the Act, or s 21 of the *Federal Court of Australia Act 1976* (Cth), the second respondent was involved in the contravention by the first respondent of s 47(1)(m) of the Act, referred to in paragraph 1 and is taken, by reason of s 169(b) of the Act, to have contravened s 47(1)(m) of the Act in the way referred to in Order 1.

AND

ON THE UNDERTAKING OF THE SECOND RESPONDENT TO:

(a) grant a charge to Ms Nabilla El Ghalemi over the property at 14-18 Godwin Street Blairgowrie in Victoria, being Lot 789 on Plan of Subdivision 030062, Certificate of Title Volume 8753 Folio 241 (Property), for the payment of the compensation referred to in Order 5;

(b) not further encumber the Property so as to adversely affect Ms Nabilla El Ghalemi's rights under the said charge.

THE COURT ORDERS THAT:

3. Pursuant to ss 167(1) and 167(2) of the Act the first respondent pay to the Commonwealth a pecuniary penalty in the amount of $15,000 by reason of the first respondent's contravention referred to in Order 1, being a contravention of a civil penalty provision.

4. Pursuant to ss 167(1) and 167(2) of the Act the second respondent pay to the Commonwealth a pecuniary penalty in the amount of $5,000 by reason of the second respondent's contravention referred to in Order 2, being a contravention of a civil penalty provision.

5. Pursuant to ss 178 an 179 of the Act the first and second respondents pay compensation to Nabilla El Ghalemi in respect of the breach of s 47(1)(m) of the Act in the sum of $150,000, such sum to be payable within 150 days.

6. The first and second respondents pay costs of the applicant in the amount of $50,000.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

DERRINGTON J:

Introduction

1 By an Originating Application filed on 12 April 2021, the Australian Securities and Investments Commission (ASIC) seeks orders against the company, Lightspeed Finance Pty Ltd (Lightspeed), the first respondent, and its director, Mr Mark James Fitzpatrick (Mr Fitzpatrick), the second respondent, in relation to alleged breaches of the *National Consumer Credit Protection Act 2009* (Cth) (NCCP Act). In particular, ASIC alleged that Lightspeed breached s 47(1)(m) of the NCCP Act by failing to give effect to a determination of the Australian Financial Complaints Authority made on 12 July 2019, and it seeks a declaration to that effect. It also seeks orders that Lightspeed pay compensation to certain third parties in respect of its breach and that it pay a pecuniary penalty as well. ASIC further seeks similar declarations, the payment of a penalty, and orders for compensation by Mr Fitzpatrick on the basis that he was involved in Lightspeed's contraventions.

2 Prior to the commencement of the hearing, both Lightspeed and Mr Fitzpatrick admitted their responsibility in relation to the breaches of the s 47(1)(m) of the NCCP Act and agreed to the making of declarations and the payment of penalties. The parties have made joint submissions about these matters and seek the making of orders subject, of course, to acceptance by the Court.

3 When the matter was called on for hearing the parties asked that it be stood down while further discussions occurred in relation to the outstanding issues. Ultimately, the parties provisionally agreed upon the quantum of the compensation which should be paid by Lightspeed and Mr Fitzpatrick in relation to the damage suffered by a third party, Ms El Ghalemi. After a brief hearing the orders appearing at the commencement of these reasons were made. These are the reasons for those orders.

Background

4 The parties have reached agreement as to the underlying factual circumstances of this matter and they are set out in a Statement of Agreed Facts dated 31 January 2022. Those facts are set out *verbatim* in paragraphs [5] – [33] as follows:

5 From 7 February 2017 to the date of this Statement of Agreed Facts Lightspeed Finance Pty Ltd ("**Lightspeed**") was:

(a) a company limited by shares registered or taken to be registered under the provisions of the *Corporations Act 2001* (Cth); and

(b) A holder of an Australian credit licence ("**credit licence**") number 433524 permitting Lightspeed to engage in credit activities other than as a credit provider;

6 At all material times Lightspeed was member of an external dispute resolution scheme, being either the Financial Ombudsmen Service ("**FOS**") or the Australian Financial Complaints Authority ("**AFCA**").

7 From 17 December 2018 to the date of this Statement of Agreed Facts Mark James Fitzpatrick ("**Mr Fitzpatrick**") was the sole director of Lightspeed and responsible manager of its credit licence.

8 On 1 November 2018, AFCA replaced the Financial Ombudsman Service (FOS) as an approved external dispute resolutions scheme. AFCA took over any complaints that were on foot with FOS at the time but continued to deal with those complaints pursuant to the FOS terms of reference.

The Loan

9 Between January and March 2017 the first respondent facilitated the provision of credit in an amount of $90,000 (**Loan**) by Mr Stephen Broomhall to Mr Christopher Nelson Birnie (**Mr Birnie**) and Ms Nabilla El Ghalemi (**Ms El Ghalemi**), secured by a mortgage (**Mortgage**) over property owned by Ms El Ghalemi at 104 Todd Street, Torbanlea in Queensland (**Property**).

10 Mr Birnie and Ms El Ghalemi were unemployed at the time.

11 On 7 February 2017 Mr Birnie signed a Mandate to Act with Lightspeed. The mandate provided that Lightspeed would:

(a) assess Mr Birnie's information; and

(b) seek approval from a lender for a loan to Mr Birnie.

12 The mandate included a conditional offer of finance for $90,000 and was to be secured against the Property.

13 Mr Birnie on two occasions made declarations in writing, provided to the first respondent, that the purpose of the loan was "predominantly for business purposes":

(a) on 29 January 2017 in the application for finance;

(b) on 21 February 2017 in a declaration attached to the legal documentation.

14 The due diligence report prepared by Lightspeed on 6 February 2017 included the following comment:

> Clients looking at financing the completion works of their home, which is currently at lock up stage, tradesman invoices are on hand and will be paid at disbursements to complete the works

15 Lightspeed arranged finance for Mr Birnie with Mr Broomhall.

16 Mr Birnie entered into a contract with Mr Broomhall on 21 February 2017 for a loan of $90,000. The contract included the following terms:

(a) $90,000 repayable to Mr Broomhall within 3 months;

(b) 30% annual discount interest;

(c) 72% annual interest;

(d) $3,150 establishment fee; and

(e) $1,200 discharge of mortgage fee.

17 Mr Broomhall took a mortgage over the Property.

18 The loan was disbursed as follows:

(a) $9,900 paid to Lightspeed;

(b) $2,500 paid to Summer Lawyers;

(c) $45,900 held for Mr Birnie's creditors; and

(d) $26,300 paid to Mr Birnie and Ms El Ghalemi.

19 Mr Birnie and Ms El Ghalemi defaulted on repayment of the Loan.

20 On 13 June 2018 Mr Broomhall obtained an order for possession of the Property.

21 On 6 December 2019 Mr Broomhall sold the Property for $200,000. None of the proceeds of sale were paid to Mr Birnie or Ms El Ghalemi.

The determinations

22 On 4 December 2018 AFCA issued a determination ("**the First Determination**") which required that:

(a) Lightspeed pay Mr Broomhall an amount equal to the loan debt (to the satisfaction of Mr Broomhall) within 14 days of notice of Mr Birnie's acceptance of the First Determination; and

(b) Mr Birnie pay Lightspeed $65,082.20 within seven days of the day on which Lightspeed confirmed it had repaid Mr Birnie's debt.

23 Mr Birnie accepted the First Determination on 10 December 2018.

24 AFCA informed Mr Fitzpatrick of the First Determination on 4 December 2018 and Mr Birnie's acceptance of the First Determination on 18 December 2018.

25 On 9 January 2019 Mr Fitzpatrick sent an email to Mr Birnie stating that, by reason of the First AFCA Determination, Mr Birnie was required to pay $65,082.20 to Lightspeed by 11 January 2019.

26 In that email, Mr Fitzpatrick also stated:

> We have each received the determination by FOS now AFCA. (as per attached) and email from the below (see bottom of this email)
>
> Can you please indicate when Lightspeed and our Nominated Lender can expect settlement funds as per AFCA letter?

27 On 9 January 2019 Mr Fitzpatrick wrote an email to Mr Broomhall stating:

> Hi Stephen,
>
> Happy new year.
>
> I have sent you a copy of my email to Chris Birnie' chasing up his payment to the broker of $65,082 dollars in 7 days of you and I reaching a deal.
>
> *as you know this will need to be paid as AFCA is now run by ASIC so he will have no choice in paying
>
> Your lawyer stated you would like me to pay you $145,000 which includes legal and costs as stated in the letter attached
>
> This means this deal has cost me just on $80,000 out of my own pocket not withstanding my bill from FOS for more than $20k to investigate this deal. Simple maths this is $100,000* I need to pay
>
> I simply cannot make this payment stephen.
>
> Can I please suggest that you look at excepting your principal back and then our

company pay your out of pockets this still leave me with cost of close to $50k debt however I can do this, I may need a couple of instalments of x2 months only?

Let's have a chat

Regards

Mark

28 On 10 January 2019 Mr Fitzpatrick sent an email to Mr Broomhall stating:

HI Stephen ,

I had a quick conversation with Adam apparently you and he have spoken.

Ok, I can really only come to the table with $90,000 which is your principal return together with

*pay your out of pockets (legal)

*and another $10k on top (circas 12%pa – ROI)

*I am pushing now to get the money from Bernie this week or early next week

This is going to cost me just under $100k for this if you are to except the above, I cannot claim on insurance this comes out of my back pocket, and I can tell you for anything more I would just have to close this company down as I am also expecting to run this case next month against Chris which is another $30k already invested.

If you could please review this offer I would like to get this matter closed between us.

The Lawyers on my side are also asking for another $30k on top of all of this.

I look forward to your response

Thanks

Mark

29 Mr Birnie sent an email to AFCA on 23 April 2019 saying that Lightspeed had not settled the matter. AFCA treated this as a new complaint.

30 On 12 July 2019, AFCA issued a further determination in relation to Lightspeed ("**Second AFCA Determination**") which required that, if Mr Birnie accepted the Second AFCA Determination:

(a) Lightspeed pay Mr Broomhall an amount equal to the loan debt (to Mr Broomhall's satisfaction) within 14 days of Mr Birnie's acceptance;

(b) Mr Birnie, within seven days after Lightspeed confirmed payment of the loan debt, pay Lightspeed $43,485.45.

31 Mr Birnie accepted the Second AFCA Determination on 24 July 2019.

32 AFCA informed Mr Fitzpatrick of the Second AFCA Determination on 12 July 2019 and of Mr Birnie's acceptance of the Second AFCA Determination on 25 July 2019.

33 As at the date of this Statement of Agreed Facts Lightspeed has not complied with either the First AFCA Determination, or the Second AFCA Determination.

Liability and penalty

34 As mentioned, the parties have reached agreement as to the respondents' liability for the breach of the NCCP Act and as to the quantum of the penalties which might be imposed. They have produced a joint set of submissions which justify the making of the declarations and the imposition of the penalties. Those submissions should be accepted and the following is largely an adoption of them.

Liability for breach

35 Sections 47(1)(a) and (m) of the NCCP Act provides:

> **47 General conduct obligations of licensees**
>
> General conduct obligations
>
> (1) A licensee must:
>
> (a) do all things necessary to ensure that the credit activities authorised by the licence are engaged in efficiently, honestly and fairly; and
>
> …
>
> (m) comply with any other obligations that are prescribed by the regulations.

36 Regulation 11A of the *National Consumer Credit Protection Regulations 2010* (Cth) provides:

> **11A Obligations of licensees—cooperation with AFCA**
>
> (1) For the purposes of paragraph 47(1)(m) of the Act, a licensee must comply with the obligations in subregulation (2).
>
> (2) The licensee must take reasonable steps to cooperate with AFCA in resolving any complaint under the AFCA scheme to which the licensee is a party, including by:
>
> (a) giving reasonable assistance to AFCA in resolving the complaint; and
>
> (b) identifying, locating and providing to AFCA any documents and information that AFCA reasonably requires for the purposes of resolving the complaint; and
>
> (c) giving effect to any determination made by AFCA in relation

to the complaint.

(3) Subregulation (2) does not apply to superannuation complaints (within the meaning of Chapter 7 of the Corporations Act 2001).

Note: For provisions relating to superannuation complaints, see Division 3 of Part 7.10A of the Corporations Act 2001.

37 The effect of the above is that, by reg 11A(2)(c), a licensee must give effect to any determination by AFCA in relation to a complaint. Accordingly, a failure to do so is a breach of s 47(1)(m) of the Act.

38 By s 47(4) of the NCCP Act, a contravention of s 47(1)(m) is, since 13 March 2019, a contravention of a civil penalty provision.

39 It follows that, by failing to give effect to the Second AFCA Determination, Lightspeed contravened s 47(1)(m) of the Act, being a civil penalty provision.

40 By s 169(2) of the NCCP Act a person who is involved in a contravention of a civil penalty provision is taken to have contravened the provision. Accordingly, by reason of his being involved in the first respondent's contravention of s 47(1)(m) of the NCPP Act, the second respondent is taken to have contravened that provision.

41 It should be interpolated here that the expression "involved in" is defined by s 5 as follows:

> ***involved in***: a person is ***involved in*** a contravention of a provision of legislation if, and only if, the person:
>
> (a) has aided, abetted, counselled or procured the contravention; or
>
> (b) has induced the contravention, whether by threats or promises or otherwise; or
>
> (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
>
> (d) has conspired with others to effect the contravention.

42 Given the agreement of the parties that Mr Fitzpatrick was involved in Lightspeed's contravention of s 47(1)(m) of the NCCP Act, there is no need to consider the circumstances by which that conclusion was reached.

43 In the result it is appropriate to make a declaration in the terms agreed by the parties that the Lightspeed and Mr Fitzpatrick have contravened s 47(1)(m) of the NCCP Act and Regulation 11A(2)(c) to the *National Consumer Credit Protection Regulations 2010* (Cth) by failing to give effect to the determination of the Australian Financial Complaints Authority made on 12 July 2019.

Penalty

44 By s 47(4) of the NCCP Act a contravention of s 47(1)(m) is a contravention of a civil penalty provision (Regulation 7.6.03C of the *Corporations Regulations 2001* (Cth) imposes a similar obligation as Regulation 11A(2) of the Regulations).

45 Section 47 further provides that the relevant civil penalty is 5,000 penalty units (presently $210 per penalty unit).

46 Section 167 of the NCCP 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.
>
> *Court may order person to pay 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 section 167A).
>
> *Determining pecuniary penalty*
>
> (3) In determining the pecuniary penalty, the court must take into account all relevant matters, including:
>
> (a) the nature and extent of the contravention; and
>
> (b) the nature and extent of any loss or damage suffered because of the contravention; and
>
> (c) the circumstances in which the contravention took place; and
>
> (d) whether the person has previously been found by a court (including a court in a foreign country) to have engaged in similar conduct.
>
> *Civil enforcement of penalty*
>
> (4) A pecuniary penalty is a debt payable to the Commonwealth.
>
> (5) The Commonwealth may enforce a pecuniary penalty order as if it were an order made in civil proceedings against the person to recover a debt due by the person. The debt arising from the order is taken to be a judgement debt.

47 Section 167A provides that the maximum pecuniary penalty must not be more than the "pecuniary penalty applicable to the contravention".

48 By s 167B the "pecuniary penalty applicable to the contravention" is, for an individual, the greater of the penalty specified for the civil penalty provision (in this case 5,000 penalty units), or three times the "benefit derived and detriment avoided". That latter term is defined in s 167D.

49 For a corporation, the pecuniary penalty applicable to the contravention is the greater of ten times the penalty specified (ie 50,000 penalty units in this case), or three times the "benefit derived and detriment avoided", or 10% of the annual turnover of the body corporate (up to a maximum 2.5 million penalty units).

50 In relation to the assessment of an appropriate civil penalty, the Full Court in *Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd* (2007) 161 FCR 513, 527 – 528 [61] held:

> In determining a pecuniary penalty the Court will have regard to the nature, character, content and extent of the contravening conduct; whether the conduct was deliberate and undertaken by Mr Russell in disregard of the prohibition imposed by the legislation; the scale (size, resources, and market power) of the corporation engaging in the conduct through the actions of Mr Russell; the seniority of and role discharged by Mr Russell in relation to the conduct of the corporation; the commercial consequences of the conduct upon all participants affected by the conduct; the contextual events within which the conduct occurred (such as the nature of the industry and the methodology adopted to give effect to the conduct); whether the contravention is truly isolated or aberrant notwithstanding a demonstrated culture of compliance (if one exists) on the part of the corporation or a demonstrated culture of compliance on the part of the senior manager engaged in the conduct giving rise to the contravention; whether Mr Russell has cooperated with ACCC in seeking to address the conduct in the face of examples of contravening conduct identified and put by ACCC to Mr Russell; and whether Mr Russell has previously been found by the Court to have contravened a provision of Part IV of the TPA.

51 More recently in *Australian Securities and Investments Commission v GoGetta Equipment Funding Pty Ltd* [2021] FCA 420 [35], Davies J assayed the current authorities and observed:

> The purpose for the imposition of a pecuniary penalty is to act as a specific deterrent to the contravener and as a general deterrent to others who might be tempted to contravene the law: *Fair Work* at 506 [55] per French CJ, Kiefel, Bell, Nettle and Gordon JJ (Gageler J agreeing at 511 [68], Keane J agreeing at 513 [79]); *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd* [2018] FCA 155 (ASIC v ANZ). The specific and general deterrent effect of pecuniary penalties is achieved by putting a price on a contravention that is "sufficiently high" to deter repetition by both the contravener and would-be contraveners: *Fair Work* at 506 [55] per French CJ, Kiefel, Bell, Nettle and Gordon JJ (Gageler J agreeing at 511 [68], Keane J agreeing at 513 [79]). In *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission*, in a passage at p 265 at [62]–[63], approved by the High Court in Australian Competition and *Consumer Commission v TPG Internet Pty Ltd* , the Full Court explained the need to ensure that the penalty "is not such as to be regarded by that offender or others as an acceptable cost of doing business" and will deter those engaged in trade and commerce "from the cynical calculation involved in weighing up the risk of penalty against the profits to be made from contravention". The penalty must also be proportionate to achieve the objective of specific and general deterrence, because the punishment should reflect what the offender has done.

52 In *Australian Securities and Investments Commission v Kobelt* [2017] FCA 387, White J referred to the High Court decision in *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 326 ALR 476, and noted the "primary role of deterrence in the fixing of civil penalties". His Honour said, at [10]:

> In *Commonwealth v Director, Fair Work Building Industry Inspectorate* at [59], French CJ, Kiefel, Bell, Nettle and Gordon JJ said, in relation to civil penalties generally, that they are not retributive but are "essentially deterrent or compensatory and therefore protective". Earlier, at [24], the plurality had noted that civil penalties are part of the range of enforcement mechanisms available to regulators by which to achieve compensation, prevention and deterrence. Their Honours also referred to the primary role of deterrence in the fixing of civil penalties at [55]:
>
> > [W]hereas criminal penalties import notions of retribution and rehabilitation, the purpose of a civil penalty, as French J explained in *Trade Practices Commission v CSR Ltd*, **is primarily if not wholly protective in promoting the public interest in compliance**:
> >
> > > "Punishment for breaches of the criminal law traditionally involves three elements: deterrence, both general and individual, retribution and rehabilitation. Neither retribution nor the rehabilitation, within the sense of the Old and New Testament moralities that imbue much of our criminal law, have any part to play in economic regulation of the kind contemplated by Pt IV [of the Trade Practices Act]. ... The principal, and I think probably the only, object of the penalties imposed by s 76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act."
>
> (Emphasis added).

53 Subsequent to the filing by the parties of their joint submissions on penalty, the High Court handed down its decision in *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13 (*Pattinson*). There, a majority (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ) reaffirmed the centrality of the object of deterrence in the imposition of civil penalties. Their Honours identified (at [15] – [16]) that "it has long been recognised that, unlike criminal sentences, civil penalties are imposed primarily, if not solely, for the purpose of deterrence", such that notions of denunciation, retribution and rehabilitation derived from the Criminal law have no part to play: *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482, 506 [55] (the *Agreed Penalties Case*). The object sought to be achieved by the imposition of civil penalties is the promotion of the public interest in compliance with enacted regulation by putting a price on contravention that is sufficiently high to deter repetition by the contravenor and those who might be tempted to contravene in the future: *Trade Practices Commission v CSR Ltd* [1991] ATPR ¶41-076 at 52,152. In other

words, a penalty must be fixed at a level so as to ensure that it is not regarded by the offender as being the acceptable cost of doing business.

54 The majority also cited with apparent approval the several non-exclusive factors identified by French J in *Trade Practices Commission v CSR Ltd* [1991] ATPR ¶41-076 at 52,152 – 52,153, which may inform the assessment of a penalty in a particular case. His Honour said:

> The assessment of a penalty of appropriate deterrent value will have regard to a number of factors which have been canvassed in the cases. These include the following:
>
> 1. The nature and extent of the contravening conduct.
> 2. The amount of loss or damage caused.
> 3. The circumstances in which the conduct took place.
> 4. The size of the contravening company.
> 5. The degree of power it has, as evidenced by its market share and ease of entry into the market.
> 6. The deliberateness of the contravention and the period over which it extended.
> 7. Whether the contravention arose out of the conduct of senior management or at a lower level.
> 8. 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.
> 9. Whether the company has shown a disposition to co-operate with the authorities responsible for the enforcement of the Act in relation to the contravention.

55 These submissions, which were advanced jointly by the parties, are consistent with the principles stated by the majority in *Pattinson*.

56 The parties also correctly submitted that the key criterion to be considered by the Court in imposing penalties on Lightspeed and on Mr Fitzpatrick is the level of deterrence necessary to promote the public interest, and to set that level at least to some extent above the benefit otherwise gained by the respondents. That is, the level of deterrence should be sufficient that the respondents do not consider the penalty to be merely the "acceptable cost of doing business". However, the penalty imposed should not be excessive, and not directed toward retribution.

57 As the parties further submitted, here, the relevant contravention was not the facilitation of any loan to Mr Birnie or Ms El Ghalemi. It was the failure to give effect to the second AFCA determination. The respondents operated a small to medium business and there is no evidence

that they have significant income or assets in this case. Moreover, the contravention here is a single contravention (each) and there has been some co-operation with ASIC in this action.

58 The parties referenced the following decisions on the basis that they might be useful comparators relating to the penalties imposed in other cases:

(a) In *Australian Securities and Investments Commission v Financial Circle Pty Ltd* [2018] FCA 1644, O'Callaghan J imposed penalties of several million dollars for numerous (totalling in the thousands) breaches (set out in a table in paragraph [185]). A penalty of $1 million was sought, and imposed, for 144 contraventions of s 961L of the *Corporations Act 2001*. That provision requires licensees to take reasonable steps to ensure that their representatives comply with certain other provisions of that act. A penalty in that sum amounts to about $7,000 for each contravention of s 961L;

(b) In *Australian Securities and Investments Commission v ACN 092 879 733 Pty Ltd* [2012] FCA 923, Nicholas J imposed a penalty of $7,500 for a breach of s 30 of the Act, by the director of a corporate respondent holding itself out on a number of occasions as engaging, or being able to engage, in credit activity. At the time, contravention of that provision provided for a maximum penalty of 2,000 penalty units (or 10,000 for a company), and the value of a penalty unit was $110. The maximum penalty which could be imposed on an individual was $220,000, and on a company $1,100,000.

59 In addition to the prospect of an order for compensation being made against them, the respondents have also agreed to pay ASIC's costs (being the costs of this proceeding and investigation costs) in the sum of $50,000.

60 For these reasons the parties jointly submitted that in this case, an appropriate pecuniary penalty to be imposed in respect of the contravention by each respondent of s 47(1)(m) of the Act is:

(a) $15,000 in respect of the first respondent;

(b) $5,000 in respect of the second respondent.

61 These submissions should be accepted. Here, there has only been a single breach of s 47(1)(m) of the NCCP Act although that is not to diminish its seriousness. Lightspeed and Mr Fitzpatrick were entitled to the benefit of a credit licence so as to engage in their business only by reason of their agreement to be bound by the AFCA external dispute resolution scheme. They took advantage of the opportunities which the licence afforded them but failed to meet the

obligations which it entailed by their refusal to comply with AFCA's determinations. However, it is important to keep in mind that Lightspeed and Mr Fitzpatrick conducted a relatively small operation and there is nothing to suggest that either would be able to meet a substantial penalty. The respondents have co-operated with ASIC in this matter and, to a degree, this evidences an appreciation of the situation and an intention to avoid future contraventions. The penalties suggested by ASIC and agreed to by the respondents impose a sufficient deterrence to further conduct by them as well as providing a deterrence by others. The penalties to be imposed should be in the amount proposed by the parties.

Compensation

62 This issue is concerned with the amount of compensation which the respondents should pay to Ms El Ghalemi pursuant to ss 178 and 179 of the NCCP Act. The first of those sections provides as follows:

> **178 Compensation orders**
>
> *Court may order person to pay compensation*
>
> (1) The court may order a person (the ***defendant***) to compensate another person (the ***plaintiff***) for loss or damage suffered by the plaintiff if:
>
> (a) the defendant has contravened a civil penalty provision or has committed an offence against this Act (other than the National Credit Code); and
>
> (b) the loss or damage resulted from the contravention or commission of the offence.
>
> The order must specify the amount of compensation.
>
> Note: An order may be made under this subsection whether or not a declaration of contravention has been made under section 166.
>
> *When order may be made*
>
> (2) The court may make the order only if:
>
> (a) the plaintiff or ASIC (on behalf of the plaintiff) applies for an order under this section; and
>
> (b) the application is made within 6 years of the day the cause of action that relates to the contravention or commission of the offence accrued.
>
> *Applications for order*
>
> (3) For the purposes of paragraph (2)(a), ASIC may make an application on behalf of the plaintiff, but only if the plaintiff has given consent in writing before the application is made.
>
> *Recovery of compensation as a debt*

(4) If the court makes the order, the amount of compensation specified in the order that is to be paid to the plaintiff may be recovered as a debt due to the plaintiff.

63 Section 179(1) of the NCCP Act is in similar terms and provides:

179 Other orders to compensate loss or damage

Court may make other orders to compensate loss or damage

(1) If:

(a) a person (the defendant) has contravened a civil penalty provision or has committed an offence against this Act (other than the National Credit Code); and

(b) another person (the plaintiff) has suffered, or is likely to suffer, loss or damage as a result of the contravention or commission of the offence;

the court may make such order as the court considers appropriate against the defendant to:

(c) compensate the plaintiff, in whole or in part, for the loss or damage; or

(d) prevent or reduce the loss or damage suffered, or likely to be suffered, by the plaintiff.

Note: An order may be made under this subsection whether or not a declaration of contravention has been made under section 166.

64 It was not disputed before this Court that Ms El Ghalemi had consented in writing to ASIC bringing the application for compensation.

Causation

65 As appears from ss 178 and 179 the NCCP Act requires that there be a causal nexus between the contravention and the loss or damage suffered by the person to be compensated. In s 178 it is identified as the loss or damage which "resulted from" the contravention and in s 179 it is that loss or damage which is suffered "as a result of" the contravention. It was not submitted that there was any substantial difference between these two causal requirements. Mr Steel for ASIC referred to the decision of Bergin J in *Australian Securities and Investments Commission v Loiterton* [2004] NSWSC 897 [85] where her Honour considered the nature of the causal requirements of s 1317HA of the *Corporations Act 2001* (Cth) which also used the expression "as a result of" as being the relevant connection between a contravention of the Act and loss or damage.

> Compensation may be ordered if the loss or damage was suffered "as a result of" the act or omission constituting the contravention. Only damage which, as a matter of fact, was caused by the contravention can be the subject of a compensation order. A causal connection between the damage and the contravening conduct, free from the strictures

> of analogy with equitable claims against fiduciaries is required to be shown: *Adler & Ors v Australian Securities Investment Commission* (2003) 46 ACSR 504 at paras 1,2 and 695-710.

66 To similar effect are the observations of Giles JA (with whom Mason P and Beazley JA agreed) in *Adler v Australian Securities and Investments Commission* (2003) 179 FLR 1, 156 [709]:

> In my opinion, the words "resulted from" in s 1317H are words by which, in their natural meaning, only the damage which as a matter of fact was caused by the contravention can be the subject of an order for compensation. Like the word "by" in s 82 of the Trade Practices Act 1974 (Cth) (see *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at [38]-[42]), they should be given their ordinary meaning of requiring a causal connection between the damage and the contravening conduct, free from the strictures of analogy with equitable claims against fiduciaries.

67 Finally, reference should be made to the consideration of this topic by Jackson J in *LM Investment Management Ltd (receiver appointed) (in liq) v Drake* (2019) 350 FLR 17, where his Honour identified the need for some real connection between the loss and the contravention such that the "but for" test is an insufficient instrument with which to gauge the loss as is the concept of "common sense". His Honour (at 44 – 45 [145]) highlighted that, in modern times, the attribution of liability for loss to party for breach of a statutory obligation is expected to involve two issues. First, the contravention must be a necessary condition of the concurrence of harm (this being factual causation) and, secondly, whether the contravenor should be liable for the loss so caused by reason of the breach of some legal norm. In this context his Honour remarked in relation to s 1317H(1) (at 45 [146] – [147]):

> [146] The statutory provision in question in the present case is s 1317H(1) of the CA. The role of "common sense" and the "but for" approach to causation in that context were dealt with in two parts of *Agricultural Land Management Ltd v Jackson (No 2)* (2014) 48 WAR 1 as follows. First, as to the non-statutory law:
>
> > In difficult cases the "sense" of an answer is rarely common amongst judges. In the leading exposition of the common sense test in *March v E & MH Stramare Pty Ltd*, the "sense" of the result was not "common" between the five judges of the High Court of Australia (who allowed the appeal) and the majority of the Full Court of the Supreme Court of South Australia. This is one of the reasons why "common sense" has been criticised as a test for causation. It is also why a number of High Court judgments have doubted whether "common sense" can be a useful legal norm. It is important that "common sense" be contextualised and supported by reasoned explanation so that it does not become a shroud which obscures teleological reasoning.
>
> > Within a "common sense" approach it has been held that at common law the "but for" test has an important role to play as a negative criterion. In other words, it is generally necessary, but not always sufficient, for the plaintiff to prove that the plaintiff's loss would not have been suffered but for the defendant's breach of duty. (*Agricultural Land Management Ltd v Jackson (No 2)* (2014) 48 WAR 1 [393]-[394].)

> [147] I entirely agree with that passage. I observe, as well, that the lack of utility of "common sense" as a legal norm has been identified in the context of the recovery of alleged loss of damage suffered by a contravention of s 52 of the *Trade Practices Act 1994* (Cth) (*Travel Compensation Fund v Tambree (t/as R Tambree & Associates)* (2005) 224 CLR 627, [45].) which is a useful comparator for consideration of the proper construction of s 1317H(1).

68 There is much force in his Honour's comments and especially those to the effect that the "common sense" approach lacks utility in relation to statutory causes of action. The far better approach is one of construing the statutory obligation to ascertain from the scope, object and nature of the Act and its provisions, the legislative intention as to the scope of the liability it is intended to impose upon a contravenor.

69 It can be accepted that the expressions used in ss 178 and 179 adopt similar orthodox concepts of causation rather than some special notion derived from equity.

Application to the present case

70 The parties agreed that, in the circumstances of the contravention in this case, an appropriate figure to be paid to Ms El Ghalemi as compensation for the loss which she suffered is $150,000. There is no need to consider whether that figure can be agreed between the parties or is a matter requiring an exercise of the Court's discretion. It is an amount which, in the circumstances of this case, falls well within the range of possible outcomes.

71 The first issue is to identify that which the legislature identified as the required cause of any compensable loss. It is sufficiently clear that both ss 178 and 179 identify the contravention of the NCCP Act as the essential causal element of compensable loss. It is, therefore, necessary to identify the losses generated by that contravention.

72 Here the contravention was Lightspeed's omission to comply with AFCA's second determination which was that, if Mr Birnie accepted it, Lightspeed would pay to Mr Broomhall, the lender, an amount equal to the loan debt within 14 days of the acceptance. Seven days after that Mr Birnie would pay to Lightspeed the sum of $43,485.45. It follows that here the contravention was a negative as opposed to a positive act, although that does not mean that it cannot be productive of loss. In terms of causation the issue is what was the loss suffered by reason of Lightspeed's failure to comply with the second AFCA determination? That can be quantified by determining the amount of money which would return Ms El Ghalemi to the position which she would have been in had the contravention not occurred; that is, had Lightspeed complied with the second AFCA determination.

73 As at 24 July 2019 when Mr Birnie accepted AFCA's latest determination, Lightspeed was required to discharge the debt to Mr Broomhall. It is axiomatic that had it done so the mortgage would have been released and possession returned to Ms El Ghalemi free of that encumbrance. It follows that the quantification of the loss and damage suffered by her can be quantified as the amount of money which would return her to the position that she would have been in on 24 July 2019 with possession of her land free of the mortgage.

74 The first and major item of that loss is the capital value of the land. On the evidence it can be assumed that Ms El Ghalemi would still be in possession of it. There is no evidence of its current value which could be problematic. However, that is not the only basis on which the loss can be quantified and here the current difficulty arises because Lightspeed's failure to comply with AFCA's determination resulted in the land being sold. Moreover, it is not inappropriate to assess the loss which Ms El Ghalemi sustained on the date when the obligation fell to be performed, being 24 July 2019 and then assess any consequential loss of use of that money by an award of interest.

75 ASIC produced to the Court what it said was historical evidence of the value of the land. These were:

a. a market appraisal of $200,000 - $220,000 dated 2 February 2017 (that is, nearly three years before sale);

b. a Ray White marketing campaign appraisal dated 22 June 2018 (prepared for Mr Broomhall's lawyers) with a marketing appraisal of between $380,000 and $420,000;

c. a marketing appraisal by Elders (also prepared for Mr Broomhall's lawyers) dated 28 June 2018, with an estimated market value of between $242,000 and $268,000;

d. that the Property sold in December 2019 for $200,000, after auction.

76 There was no expert evidence adduced before the Court but there was also no objection to the above material being relied upon. Rather the parties were prepared to allow the Court to evaluate that material as evidence and accord it whatever weight it considered appropriate.

77 As was submitted on behalf of Lightspeed, there are good reasons to reject all of the purported valuations or appraisals. Firstly, none are formal expert reports given by licensed valuers. Second, the origin of the first appraisal of 2 February 2017 was unclear and it was also not relevantly contemporaneous with the date of the assessment of loss. Third, the second appraisal, which was given by Ray White Torquay, is rather too vague in its terms. Moreover, it is apparent that the agent who prepared the report had not inspected the property. It states

that the dwelling 'appears to be' a two-storey American barn-style house and, had an inspection occurred, the appraiser would have been able to definitively state the nature of the structure on the land. Fourth, the third appraisal which was undertaken by Elders also suggests that no inspection occurred. Finally, the appraisals prepared for Summer Lawyers, who were acting for the mortgagee, Mr Broomhall, were not intended to be used as evidence in court proceedings but were apparently for the purposes of the sale process and they can be discounted for that reason.

78 In the circumstances, the most reliable evidence of the land's value is the price for which it was sold at auction in December 2019. There is nothing to suggest that the land was not properly or adequately marketed or that the requirements of s 85 of the *Property Law Act 1974* (Qld) to sell at market price were not complied with. The auction process should have revealed the actual market price of the land at the time of its sale and that is so regardless of whether it was being sold by a mortgagee. The price obtained after the marketing process was its market value.

79 It follows that Lightspeed's failure to pay Mr Broomhall an amount equal to that owed by Mr Birnie to Mr Broomhall resulted in Ms El Ghalemi suffering the loss of her property which was worth $200,000. *Prima facie*, that might be thought to be the amount of her loss. It might also be thought that interest would accrue on that loss from the date of the sale of the property or, at least, Ms El Ghalemi's exclusion from it. However, part of AFCA's second determination was that Mr Birnie was to repay to Lightspeed the sum of $43,000 and, in that respect, the failure of Lightspeed to comply with the determination relieved Mr Birnie of that obligation. It must be kept in mind that Mr Birnie and Ms El Ghalemi were apparently in a relationship and the original loan was to both of them and for their benefit. That can be best seen in the fact that the proceeds of the loan were paid partly to the discharge of Mr Birnie's creditors in the sum of $45,900 and $26,300 was paid to the personal use of Mr Birnie and Ms El Ghalemi.

80 In these circumstances, and adopting a broad brush approach to the assessment of compensation, the figure of $150,000 generally equates to the amount of loss suffered by Ms El Ghalemi following the contravention of the NCCP Act by Lightspeed in respect of which Mr Fitzpatrick was knowingly involved. It was described as generally equating to the value of the land less the amount which Mr Birnie was required to repay.

Conclusion

81 For the foregoing reasons it is appropriate that orders appearing at the commencement of these reasons be made.

I certify that the preceding eighty-one (81) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Derrington.

Associate: 

Dated: 4 May 2022