33/11; [2011] VSC 514

SUPREME COURT OF VICTORIA

SILBERMAN v CITIGROUP

Whelan J

6, 18 October 2011

CIVIL PROCEEDINGS – APPLICATION OF CONSUMER CREDIT CODE — DEFAULT ON CREDIT CARD FACILITY – CLAIM THAT CREDIT PROVIDER ACTED UNFAIRLY – WHETHER CREDIT PROVIDER KNEW THAT CLIENT COULD NOT PAY THE ACCOUNTS WITHOUT FINANCIAL HARDSHIP – MEANING OF "SUBSTANTIAL HARDSHIP" – QUESTION WHETHER APPELLANT'S PARTICULAR CIRCUMSTANCES FELL WITHIN STATUTORY CRITERIA — DEFECTIVE NOTICES – LEAVE TO COMMENCE PROCEEDINGS *NUNC PRO TUNC* – FINDING BY MAGISTRATE THAT DEFENCE CASE NOT MADE OUT — ORDER MADE ON THE CLAIM BY CREDIT PROVIDER – EVALUATIONS OF EVIDENCE — WHETHER MAGISTRATE IN ERROR IN MAKING ORDER – APPEAL DISMISSED BY ASSOCIATE JUSTICE – APPEAL TO SUPREME COURT JUDGE DISMISSED: *CONSUMER CREDIT CODE*, SS70, 80, 85.

S., a legal practitioner, applied to CP/L, a banker and credit provider, for a Visa credit card. S. stated that he worked as a lawyer and had a good credit rating. Subsequently, S. was given a second increase in his credit facility but later fell into arrears. A default notice was sent to S. warning him that if the entire balance was not paid within a certain time, legal action would be commenced. CP/L failed to notify S. that if a subsequent default of the same kind that occurred during the period specified in the default notices might be the subject of enforcement proceedings without further notice. S. failed to comply with the terms of the default notice and a claim by CP/L for the amount owing was upheld by the magistrate. The appeal to Mukhtar AsJ was dismissed. Upon appeal—

HELD: Appeal dismissed. Decision of Mukhtar AsJ [2011] VSC 295; MC28/2011, affirmed.

1. In relation to the argument which focused on the term "substantial hardship" in s70(2)(l) of the *Consumer Credit Code*, the Magistrate concluded that this expression was to be given its ordinary meaning. Definitions found in the *Shorter Oxford English Dictionary* and the *Macquarie Dictionary* were "painful difficulty, severe suffering or privation", the other was "a condition that bears hard upon one, severe toil, trial, oppression or need". The Magistrate also said that the presence of the word "substantial" meant that Parliament intended to convey something more than mere hardship.

2. The dictionary definitions of the expression "hardship" were appropriate in the circumstances and the Magistrate was correct to conclude that Parliament had intended the expression "substantial" to indicate that something more than mere hardship was required. This was not a case where what was being considered was in any sense a technical term and the Australian Securities and Investment Commission's view of responsible lending conduct did not relevantly alter the analysis. The definition contended for by S. was a definition which would enable asset rich but income poor persons to establish "substantial hardship" within the meaning of the subsection in the absence of any genuine hardship at all.

3. In the absence of a thorough and comprehensive analysis of S.'s financial position, the Magistrate could not have concluded that S. was at the relevant time suffering hardship. In this respect the Magistrate's conclusion was clearly correct.

4. The notices given prior to the institution of the CP/L proceeding had not complied with s80(3) of the Code. The reason for that non-compliance was inconsequential in the circumstances of this particular case. The default notices did specify the defaults, which was a failure to meet certain minimum payments due. They did specify the action necessary to remedy them. What they failed to do was to notify S. that a subsequent default of the same kind that occurred during the period specified in the default notices for remedying the original default might be the subject of enforcement proceedings without further notice. There was a theoretical possibility of a subsequent default of that kind. The omission was practically inconsequential in this case as S. had no intention of paying any amount. He denied all liability and claimed that the contracts ought to be reopened.

5. The magistrate held that in the circumstances the notices given were "appropriate to enable proceedings to be commenced". He also held that he had power to give CP/L leave to commence proceedings *nunc pro tunc*, and that he should do so. He reached this conclusion relying on a decision of the Supreme Court of *New South Wales in Bank of Queensland v Dutta* [2010] NSWSC 574.

6. The magistrate found that the Court was empowered under s80(4)(c) to authorise the credit provider to begin the enforcement proceedings and that could be done *nunc pro tunc* (now for then). The basis for that view was that the consumer in this case could not be said in any way to be embarrassed by the default notice or to have misunderstood its nature and effect. The magistrate proceeded on a proper authoritative basis and was correct that there was power to grant leave under s80(2)(4) *nunc pro tunc*.

***Bank of Queensland Limited v Dutta* [2010] NSWSC 574; and**
***Perpetual Trustees Victoria Limited v Monas* [2011] NSWSC 57, followed.**

7. There is a power under s85(2)(c) of the Code to authorise the bringing of an acceleration clause into operation without the required notice.

8. To have refused authorisation would or might have rendered the extensive court time spent on the proceeding wasted. It would have achieved nothing other than more delay. The relevant matters and all of the defences had been dealt with over several days before the Magistrate and there was no error on the part of the Magistrate having granted authorisation. If his remarks were to be interpreted as not having done so, authorisation would be granted *nunc pro tunc* insofar as it is necessary to do so.

WHELAN J:

1. By a complaint filed in the Magistrates' Court on 23 March 2010 (amended 14 October 2010) the respondent ("Citigroup") sought to recover a sum of $42,774.18 from the appellant, Mr Silberman, together with interest. That sum was allegedly due pursuant to the provisions of a credit contract. By a complaint filed 25 November 2010 Mr Silberman sought a variety of relief under the National Credit Code. In a judgment delivered on 23 March 2011 Braun M dismissed the proceeding brought by Mr Silberman and gave judgment in favour of Citigroup on its proceeding for the amounts claimed.

2. By notices of appeal dated and filed 27 April 2011 Mr Silberman appealed to this Court, purportedly on questions of law, in relation to the orders made in each of the proceedings. By a summons issued in each appeal on the same day Mr Silberman sought directions and a stay of the magistrate's orders. On the return of those summonses Citigroup applied pursuant to r58.10(8) to have each appeal dismissed on the basis that the respective notices did not identify a question of law or on the basis that the appellant did not have an arguable case. Those applications were heard by Mukhtar AsJ. He delivered judgment on 1 September 2011.[1] In relation to each appeal he ordered that the appeal be dismissed and that Mr Silberman pay Citigroup's costs. By notices of appeal each dated 2 September 2011 Mr Silberman appeals the judgment and the orders made by Mukhtar AsJ.

3. Mr Silberman is a practising Australian lawyer. I was told that Mr Korman of counsel appeared on his behalf before Braun M for the initial part of that hearing. Otherwise, prior to the hearing of these appeals, Mr Silberman has acted on his own behalf. On the hearing of these appeals Mr Korman of counsel appeared on behalf of Mr Silberman.

4. The claim in the proceeding instituted by Mr Silberman sought relief under the National Credit Code. The proceedings both in the Magistrates' Court and on appeal have been conducted on the basis that the applicable legislation is the *Consumer Credit (Victoria) Code* ("the Code"). The Code has since been replaced by the *National Credit Code*.

5. In his proceeding Mr Silberman sought to have certain contracts between him and Citigroup reopened on the basis that they were unjust.

6. Under s70 of the Code the court could, if satisfied that a contract when entered into or changed was unjust, reopen the transaction. In determining whether a contract or a particular term of a contract was unjust the court was required to have regard to the public interest and to all the circumstances of the case and could have regard to a number of specified circumstances, one of which (s70(2)(l)) was:

> "Whether at the time the contract ... was entered into or changed, the credit provider knew, or could have ascertained by reasonable inquiry of the debtor at the time, that the debtor could not pay in accordance with its terms or not without substantial hardship; ..."

7. In the proceeding brought by Citigroup, Mr Silberman relied upon a number of defences. One defence was based upon what were alleged to be invalid notices of demand given by Citigroup prior to the institution of the proceeding. In this respect the applicable provision of the Code was s80, which relevantly provided:

> "(1) Enforcement of credit contract. A credit provider must not begin enforcement proceedings against a debtor in relation to a credit contract unless the debtor is in default under the credit contract and –
> (a) the credit provider has given the debtor ... a default notice, complying with this section, allowing the debtor a period of at least 30 days from the date of the notice to remedy the default; and
> (b) the default has not been remedied within that period.
> Maximum penalty – 50 penalty units.
> ...
> (3) Default notice requirements. A default notice must specify the default and the action necessary to remedy it and that a subsequent default of the same kind that occurs during the period specified in the default notice for remedying the original default may be the subject of enforcement proceedings without further notice if it is not remedied within the period.
> ...
> (4) When default notice not required. A credit provider is not required to give a default notice or to wait until the period specified in the default notice has elapsed, before beginning enforcement proceedings, if –
> ...
> (c) the court authorises the credit provider to begin the enforcement proceedings; ... ."

8. In the course of the appeal before me it was also contended on behalf of Mr Silberman that there had been a failure to comply with s85 of the Code, which concerns the operation of acceleration clauses. There is no reference to this issue in the defence filed by Mr Silberman. I was told by Mr Korman in the course of the appeal hearing that he did raise the issue of compliance with s85 at the outset of the hearing before Braun M and counsel for Citigroup accepted that that was so.

Appeal in relation to Mr Silberman's proceeding (1937 of 2011)

9. Mukhtar AsJ set out in some detail why he reached the conclusion that no question of law, or no arguable question of law, is raised in this appeal. Braun M had also set out his reasons in considerable detail. A transcript of his judgment, which was delivered orally, is on the Court file.

10. On the hearing of the appeal before me the argument on behalf of Mr Silberman focused on the term "substantial hardship" in s70(2)(l).

11. Braun M concluded that this expression was to be given its ordinary meaning, and he went to dictionaries for assistance. The magistrate referred to definitions found in the *Shorter Oxford English Dictionary* and the *Macquarie Dictionary*. One was "painful difficulty, severe suffering or privation". The other was "a condition that bears hard upon one, severe toil, trial, oppression or need". Braun M also said that the presence of the word "substantial" must mean that Parliament intended to convey something more than mere hardship.

12. Having considered the evidence before him, Braun M reached the following factual conclusion:

> "All in all, [Mr Silberman] has failed to satisfy me that he has suffered any hardship at the relevant times, let alone substantial hardship."[2]

13. On the hearing before me the submission was that the magistrate made an error of law by giving the term "substantial hardship" its ordinary meaning. Reliance was placed on authorities as to the use of technical terms, in particular *Collector of Customs v Agfa-Gevaert Ltd*[3], and upon extrinsic materials, in particular Regulatory Guide 209 entitled "Credit Licensing: Responsible Lending Conduct" published by the Australian Securities and Investment Commission in March 2011. The submission was that the correct construction to be given to the term "hardship" is that a borrower who incurs payment obligations which cannot be satisfied from the income remaining after deduction of his or her expenses is, *prima facie*, unable to make the necessary payments without hardship; and that where the shortfall is substantial, the hardship will be substantial. It was conceded that this construction would be subject to special circumstances such as bridging loans or reverse mortgages.

14. Reliance was then placed upon an exhibit tendered in the hearing before Braun M (Exhibit C) which, it was submitted, revealed that there always was in fact a shortfall between Mr Silberman's minimum obligations and his income remaining after deduction of his expenses.

15. Braun M observed in the course of his reasons that Mr Silberman had chosen to give the court "a very limited view of his financial history".[4] I was told by Mr Korman, appearing on behalf of Mr Silberman on this appeal, that there was no evidence tendered before Braun M in relation to Mr Silberman's assets.

16. I do not accept the construction sought to be given to the term "substantial hardship" by counsel for Mr Silberman. It seems to me that the dictionary definitions of the expression "hardship" were appropriate in the circumstances and that Braun M was correct to conclude that Parliament had intended the expression "substantial" to indicate that something more than mere hardship was required.

17. In my view, this is not a case where what is being considered is in any sense a technical term and the Australian Securities and Investment Commission's view of responsible lending conduct does not relevantly alter the analysis.

18. The definition contended for on behalf of Mr Silberman is, in my view, a definition which would enable asset rich but income poor persons to establish "substantial hardship" within the meaning of the subsection in the absence of any genuine hardship at all.

19. It was submitted at one point on behalf of Mr Silberman that Braun M's interpretation of the term did not include or encompass hardship in a financial sense. That is not the case. There is nothing in Braun M's judgment which suggests that he took that view.

20. In the absence of a thorough and comprehensive analysis of Mr Silberman's financial position, I do not see how a conclusion could have been reached that he was at the relevant time suffering hardship. In this respect Braun M's conclusion seems to me to be clearly correct.

21. Otherwise, the reasons for dismissing this appeal given by Mukhtar AsJ seem to me to be full and cogent. I adopt them without repeating them.

Appeal in Citigroup's proceeding (1936 of 2011)

22. It was accepted on this appeal that the notices given prior to the institution of the Citigroup proceeding had not complied with s80(3) of the Code. The reason for that non-compliance was inconsequential in the circumstances of this particular case. The default notices did specify the defaults, which was a failure to meet certain minimum payments due. They did specify the action necessary to remedy them. What they failed to do was to notify Mr Silberman that a subsequent default of the same kind that occurred during the period specified in the default notices for remedying the original default might be the subject of enforcement proceedings without further notice. There was a theoretical possibility of a subsequent default of that kind. The omission was practically inconsequential in this case as Mr Silberman had no intention of paying any amount. He denied all liability and claimed that the contracts ought to be reopened.

23. The magistrate held that in the circumstances the notices given were "appropriate to enable proceedings to be commenced".[5] He also held that he had power to give Citigroup leave to commence proceedings *nunc pro tunc*, and that he should do so. He reached this conclusion relying on a decision of the Supreme Court of *New South Wales in Bank of Queensland v Dutta*.[6]

24. Confusingly, where the magistrate indicated that he ought to "allow these proceedings to be commenced" the transcript records him saying that he did that pursuant to "s82(4)(c)",[7] which is probably meant to be a reference to s80(4)(c).

25. Mukhtar AsJ also relied on the decision in *Dutta* in concluding that there was no arguable question of law identified in the appeal.

26. Two issues were concentrated on by counsel for Mr Silberman in the appeal before me. First, it was submitted that the decision in *Dutta* is wrong. Second, it was submitted that the

defective s80 notices meant the acceleration clauses could not operate by virtue of s85 of the Code.

27. Counsel for both parties before me agreed that if I were to take the view that Mr Silberman's position on these issues was arguable I should proceed to determine the appeal.

28. I do consider that the submissions made on behalf of Mr Silberman on each of these issues raises an arguable question of law, subject to a reservation as to whether the s85 issue was ever properly raised as an issue in the proceeding. In the circumstances, the appropriate course is to decide the issues, as counsel for both parties invited me to do.

29. The submission on behalf of Mr Silberman in relation to *Dutta* is that *Dutta* is not correctly decided as it is inconsistent with the High Court decision in *Emanuele v Australian Securities Commission*,[8] and is inconsistent with prior decisions on the same legislation, being *Permanent Mortgages Pty Ltd v Cook*,[9] *Benjamin v Ashikian*[10] and *ANZ Banking Group Limited v Smith*.[11]

30. On behalf of Citigroup it is submitted that *Dutta* is correctly decided, as it is consistent with an earlier decision of the Queensland Court of Appeal in *Shakespeare Haney Securities Limited v Crawford*,[12] and has been followed and applied in *CKM (Mortgages) Limited v Burtenshaw*,[13] *Perpetual Trustees Victoria Limited v Monas*,[14] *Commonwealth Bank v Selby-Fullgrabe*[15] and *Mango Media Pty Ltd v Comitogianni*.[16]

31. It was further submitted on behalf of Mr Silberman that if there was a power to give leave to commence proceedings *nunc pro tunc* then that was a power which ought not to have been exercised in this case. In that respect reliance was again placed upon certain observations made in *Emanuele*.

32. The Code is, or more correctly was, part of a national legislative scheme. The *Consumer Credit (Victoria) Act* 1995 adopted the *Consumer Credit Code* which was an appendix to the *Consumer Credit (Queensland) Act*. That legislative scheme amongst the States has now been replaced by a Commonwealth Scheme.[17]

33. Before turning to the decision in *Dutta* itself, it is useful to review earlier decisions on the relevant legislation, the first of which is a decision of the District Court of Queensland in *Dale v Nichols Constructions Pty Ltd*.[18]

34. *Dale* concerned a failure to give a notice provided for by s80. In that particular case it was not a notice under a credit contract (s80(1)) but a notice under a mortgage (s80(2)). McGill DCJ considered the question of whether a failure to give the notice was a defence to a claim under the New South Wales *Land Titles Act* for possession. Relevantly the issue was the same as the issue concerning s80 raised before me on this appeal. The judge referred to the provisions of s80, and emphasised that s80 did not contain a specific provision detailing the effect of a failure to give notice, beyond the imposition of a penalty. He then referred to s114 of the Code which empowered the court to order a credit provider to make restitution or pay compensation to any person affected by a contravention. He also referred to s170 of the Code which expressly provided that a credit contract or mortgage or guarantee or any other contract is not "illegal, void or unenforceable" because of a contravention of the Code unless the Code contained an express provision to that effect. Considering these provisions together, the judge concluded that non-compliance with s80 rendered the creditor liable to a penalty but did not give the debtor a defence.

35. The next case is *Cook*, the first of the authorities relied upon by counsel on behalf of Mr Silberman. That case also concerned a failure to give a notice required under s80 in relation to a mortgage. Patten AJ in the Supreme Court of New South Wales determined that this was a proper basis for summarily dismissing the proceeding. He did so relying upon a decision of the New South Wales Court of Appeal in *Graham v Aluma Lite Pty Ltd*,[19] which dealt not with the Code but with the *Credit (Home Finance Contracts) Act* 1984. Whilst Patten AJ acknowledged the obvious differences between the Code and that Act he considered that there was such a degree of similarity that he should hold himself bound by that decision.

36. *Benjamin* was also relied upon by counsel on behalf of Mr Silberman. In that case Smart

AJ in the New South Wales Supreme Court, again considering a failure to give a s80 notice under a mortgage, held that the action before him had been incorrectly instituted and that it could not be continued. He determined that the best course was to strike out the action without prejudice to the right of the plaintiffs to bring fresh proceedings after they had served a default notice in conformity with the Code.

37. *Smith* was a decision of Mukhtar AsJ. In that case Mukhtar AsJ accepted that non-compliance with the notice provisions in s80 rendered a proceeding liable to summary dismissal or to being struck out, following the decisions in *Cook* and *Benjamin*.

38. *Shakespeare* was a case which predominantly concerned the issue of whether the Code applied to a particular loan, but the Court of Appeal in Queensland also considered a s80 notice which had the same omission in relation to subsequent default as the notices here. In that case the default had been a default in repayment of the principal sum and there was no circumstance in which it was possible that there could be a subsequent default of the same kind. Accordingly Muir JA, with whom Mullins and Douglas JJ agreed, found that on a proper construction of s80(3) there was no requirement to refer to a subsequent default in that particular case. Muir JA went on, however, to observe:

> "If contrary to the respondent's contentions the notice does not comply with s80(3) of the Code, it should be held that the respondent remains entitled to enforce its security. There are conflicting decisions as to whether non-compliance with s80 prevents a credit provider from taking enforcement steps [*Dale* and *Benjamin* cited]. The decision of McGill DCJ in *Dale v Nichols Constructions Pty Ltd* should be followed: breach of s80 exposes the credit provider to a penalty but does not prevent enforcement of the security."[20]

39. On 14 May 2010 Benjamin was followed in the New South Wales Supreme Court in *Fast Funds Pty Ltd v Coppola*.[21] On 30 July 2010 Davies J delivered judgment in *Dutta*.

40. Davies J undertook a comprehensive review of the relevant cases on s80 of the Code, with the exception of *Shakespeare* (which he did refer to in a different context). He concluded that Patten AJ in *Cook* had been wrong to follow *Graham* because of the very significant differences in the respective applicable legislation. He concluded that s80 does not have the result that a failure by a credit provider to have served a notice prior to commencement of the proceeding will result in that proceeding being dismissed. Amongst other things, Davies J stated, without analysis, that subsection (4)(c) "must allow the court to authorise the credit provider *nunc pro tunc*".[22] Davies J held that if he was wrong in his approach to the proper construction of s80 he would authorise the plaintiff *nunc pro tunc* to bring the proceeding.

41. Davies J's approach in *Dutta* has been adopted and followed in the Supreme Court of New South Wales. It was adopted by Schmidt J in *CKM*. Her Honour quoted a long passage from *Dutta*, referred to the decisions in *Cook* and *Benjamin*, and observed that she found Davies J's reasoning "compelling".[23] In *Monas* Hoeben J undertook an analysis of the earlier cases and addressed in detail the issue of why the power under s80(4)(c) could be exercised *nunc pro tunc*.[24] Finally, in *Mango Media* Davies J followed his own decision in *Dutta* and adopted the further analysis of Hoeben J in *Monas*.[25]

42. One case relied upon by counsel on both sides was *Selby-Fullgrabe*. Counsel for Mr Silberman relied upon that decision in the context of s85. Counsel for Citigroup relied upon the fact that Withers J in that case accepted and followed *Dutta*.

43. The decision in *Emanuele* is not of assistance in this context. The judgments concern legislation in very different terms to the legislation in issue here.

44. It seems to me that I should follow what is now a clear line of authority in New South Wales and in South Australia and accept the analysis in *Dutta*. I note in that respect that that course is also relevantly consistent with the judgment of the Queensland Court of Appeal in *Shakespeare*. Uniformity of decision in the interpretation of uniform national legislation is important in itself.[26] For the reasons given by Davies J in *Dutta* and by Hoeben J in *Monas*, I conclude that there is power to grant leave under s80(2)(4) *nunc pro tunc*.

45. An arguable question of law as to the correctness of *Dutta* was raised in the appeal. I determine that question against the appellant.

46. On the issue of whether leave ought to have been given in this case, I do not consider that there is any arguable question of law raised. When asked why leave ought to have been refused, assuming there was a power to give leave, the only factor put forward by counsel on behalf of Mr Silberman was what was described as the "policy" consideration that the granting of leave would "emasculate the Act". It seems to me that if there was a power to grant leave, there was every reason to grant it in this case. In any event, as I indicated, no question of law is raised in relation to that aspect of the matter.

47. In relation to the argument put concerning s85, the position is complicated because it is unclear what was in issue in the Magistrates' Court. No reliance was placed upon s85 in the defence that was filed. It was accepted by counsel before me that an issue addressing s85 had been raised before the magistrate. Braun M does refer to s85 in his judgment, but he does not do so in reference to the issue that was raised before me.[27]

48. The argument put before me concerning s85 was that this was a case where acceleration clauses had purportedly operated and that pursuant to s85 an acceleration clause can only operate if a notice has been given under s80. The notices under s80 were defective, and so judgment should only have been given for the default amounts and not the full balances due.

49. There is a power under s85(2)(c) of the Code to authorise the bringing of an acceleration clause into operation without the required notice.

50. If the issue was raised in the proceeding, it seems to me that Braun M must be taken to have given the authorisation provided for by s85(2)(c). The orders he made are consistent with such an authorisation, and authorisation is consistent with what he did say in the passage I have previously quoted which contains the erroneous reference to "s82(4)(c)". The relevant questions of law set out in the notice of appeal proceed on the basis that Braun M did allow the respondent to enforce the acceleration clause (question 4) and that he authorised the respondent under s85(2)(c) (question 5).

51. The case relied upon by counsel for Mr Silberman on this issue is *Selby-Fullgrabe*.

52. *Selby-Fullgrabe* concerned a series of applications brought by credit providers consequent upon earlier findings that default notices they had given were defective because the respective periods specified for remedy were too short. In each case what was sought in the various proceedings was possession of secured real property. The applicable legislation there was the *National Credit Code*, but the relevant provisions are the same as under the Code.

53. Consequent upon the findings that the required notices were defective, the credit providers applied for leave, and Withers J in the Supreme Court of South Australia granted that leave *nunc pro tunc*, following and applying *Dutta*.[28] After the hearing of those applications for leave *nunc pro tunc*, supplementary submissions were received by the court from the credit providers, without prior permission, in which authorisation was sought, under the equivalent provision in the *National Credit Code* to s85(2)(c) of the Code, in relation to the acceleration provisions. Withers J refused those applications. In doing so he referred to the fact that in *Dutta* Davies J had identified the "just, quick and cheap resolution of the real issues in the proceedings" as being one of the most persuasive factors in granting leave *nunc pro tunc* to commence the proceeding. In a passage relied upon by counsel for Mr Silberman before me, Withers J said:

> "In my view, that factor does not apply to the application for dispensation with proper notice in relation to the application of an acceleration cause."

54. Counsel for Mr Silberman did not rely upon the next sentence, which, in my view is critical. Withers J continued:

> "That issue does not affect the ability of the plaintiffs to obtain orders for possession of the security properties."[29]

55. Withers J also observed that it was at least arguable that the requirements of the acceleration provision had been met even though the default notices themselves had had defects. [30]

56. The consideration which prompted Withers J to refuse authorisation in relation to the acceleration provisions in those cases does not apply here. In the cases he was considering what was sought was possession. It was not necessary to have authorisation in relation to the acceleration provisions in order to obtain that relief. Here, it is recovery of the accelerated amounts which is the relief sought. To have refused authorisation would or might have rendered the extensive court time spent on the proceeding wasted. It would have achieved nothing other than more delay. The relevant matters and all of the defences had been dealt with over several days before Braun M. I see no error in Braun M having granted authorisation. If his remarks were to be interpreted as not having done so, I would grant authorisation *nunc pro tunc* insofar as it is necessary to do so.

Orders

57. I will hear the parties on the orders necessary to give effect to these reasons.

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[1] [2011] VSC 426.
[2] Magistrates' Court transcript p27.
[3] [1996] HCA 36; (1996) 186 CLR 389; (1996) 141 ALR 59; (1996) 71 ALJR 123; (1996) 43 ALD 193; (1996) 24 AAR 282; (1996) 20 Leg Rep 30; (1996) 35 ATR 249.
[4] Magistrates' Court transcript p26.
[5] Magistrates' Court transcript p32.
[6] [2010] NSWSC 574 ("*Dutta*").
[7] Magistrates' Court transcript p32.
[8] [1997] HCA 20; (1997) 188 CLR 114; (1997) 144 ALR 359; (1997) 71 ALJR 717; (1997) 15 ACLC 763; (1997) 23 ACSR 664; (1997) 8 Leg Rep 14 ("*Emanuele*").
[9] [2006] NSWSC 1104; [2006] ASC 155-082 ("*Cook*").
[10] [2007] NSWSC 735; [2007] ASC 155-086 ("*Benjamin*").
[11] [2009] VSC 556 ("*Smith*").
[12] [2009] QCA 85; [2009] 2 Qd R 156 ("*Shakespeare*").
[13] [2010] NSWSC 1044 ("*CKM*").
[14] [2011] NSWSC 57 ("*Monas*").
[15] [2011] SASC 102 ("*Selby-Fullgrabe*").
[16] [2011] NSWSC 152 ("*Mango Media*").
[17] See *National Consumer Credit Protection Act* 2009 (Commonwealth), *National Consumer Credit Protection (Transitional and Consequential Provisions) Act* 2009 (Commonwealth), and *Credit (Commonwealth Powers) Act* 2010 (Victoria).
[18] [2003] QDC 453 ("*Dale*").
[19] (1996) 39 NSWLR 58 ("*Graham*").
[20] [2009] QCA 85; [2009] 2 Qd R 156, [25].
[21] [2010] NSWSC 470, [297].
[22] [2010] NSWSC 574, [145].
[23] [2010] NSWSC 1044, [32].
[24] [2011] NSWSC 57, [34]-[82].
[25] [2011] NSWSC 152, [203].
[26] See *Australian Securities Commission v Marlborough Gold Mines Limited* [1993] HCA 15; (1993) 177 CLR 485, 492; (1993) 112 ALR 627; (1993) 10 ACSR 230; (1993) 67 ALJR 517.
[27] Magistrates' Court transcript p32.
[28] [2011] SASC 102, [20]-[22], [30], [34]-[36], [43].
[29] [2011] SASC 102, [49].
[30] [2011] SASC 102, [50].

APPEARANCES: For the appellant Silberman. Mr J Korman, counsel. Mr D Silberman, solicitor. For the respondent Citigroup Pty Ltd: Mr M McNamara, counsel. Lander & Rogers, solicitors.
