

55/91

SUPREME COURT OF VICTORIA

DAVIE v WALTONS CREDITS LTD

O'Bryan J

15, 23 May 1991 — (1991) ASC 56,889

CONSUMER CREDIT – AGREEMENT FOR EXTENDED TERMS OF PAYMENT INCLUDING CHARGES – AGREEMENT TRANSFERRED BY RETAILER TO FINANCIER – CREDIT CERTIFICATE ISSUED BY FINANCIER – NOT EXCHANGEABLE FOR CASH – WHETHER "LOAN" – CERTIFICATE ENTITLING BEARER TO "EXCHANGE" FOR GOODS – WHETHER A "CASH ORDER": MONEY LENDERS ACT 1958, SS3, 36.

1. Where an agreement for extended terms of payment including charges was entered into between a customer and a retailer then transferred by the retailer to a financier which issued a credit certificate, such an agreement was not a "loan" within s3 of the *Money Lenders Act 1958* ('Act').

2. Where a certificate was issued in association with an agreement to pay a financier an amount by weekly instalments entitling the bearer to "exchange" the certificate for goods, the certificate was a "cash order" within s36 of the Act.

O'BRYAN J: [1] This order to review is concerned with a decision given in the Magistrates' Court at Melbourne on 8th August 1990. The respondent (complainant in the Court below) claimed \$775.14 from the applicant (defendant in the Court below) in a Default Summons in respect of an agreement dated 5th October 1981. The applicant relied upon three principal defences.

1. That the agreement was unenforceable because it contravened the *Money Lenders Act 1958*.
2. That the agreement was unenforceable because it contravened the *Consumer Affairs Act 1972*.
3. That the applicant was unaware of the nature of the agreement and believed that he was contracting with Waltons Stores and not the respondent Waltons Credits Ltd. Consequently the applicant relied upon the defence of *non est factum*.

The learned Magistrate rejected these defences and on 8th August 1990 ordered the applicant to pay to the respondent the sum claimed, \$775.14, together with interest of \$124.21 and costs of \$1292. An order nisi was granted by Master Barker on 4th September 1990 on nine grounds. Two grounds were abandoned by Mr Moshinsky, QC who appeared with Mr Bourke for the applicant. The facts may be stated quite briefly. On 5th October 1981 the applicant signed a document bearing a title Request for Store Currency Account. At the same time his signature was reproduced by carbon paper upon a document bearing a title Request for Credit Certificate. As a [2] consequence of signing the first document the applicant entered into unusual and complex agreements with Waltons Stores Limited and Waltons Credits Limited whereby he became liable to pay for goods purchased at Waltons substantial interest and charges. Between 5th October 1981 and 10th April 1987 the applicant made weekly payments from time to time but ceased to do so altogether after 10th April 1987. A statement of account produced in court (Ex. DHO) purported to show the balance due on 16th October 1989 was \$796.02.

The first point argued unsuccessfully in the Court below raised a question of whether the agreements entered into on 5th October 1981 constituted a "loan" within the meaning of the *Money Lenders Act 1958*. The respondent conceded here and in the Court below that, if the agreements constituted a loan, the claim based upon the loan is unenforceable in law because of non-compliance with the *Money Lenders Act* by the respondent. The first ground of the order nisi is concerned with this point.

"The learned Magistrate erred in law in finding that the Request for Credit Certificate No. 507 and dated 5th October 1981 (the agreement) was not a loan within the meaning provided in s3 of the *Money Lenders Act 1958*".

"The Request for Store Currency Account" document relevantly contained the following:

"Please open a Store Currency Account for me in the amount shown below as 'Amount of Account'. I understand that by opening the Account you undertake the supply to me of goods the total cash price of which equals that part of the 'Amount of Account' payment of which Waltons Credits limited is prepared to guarantee to [3] you. Such goods are to be supplied to me upon request and upon proof by me that Waltons Credits Limited is prepared to guarantee my credit with you to the extent of the cash price of the goods to be supplied. Subject to Waltons Credits Limited supplying me with such proof I agree that in consideration of your opening the Account I will pay to you the 'Amount of Account' on demand at any time after the expiration of three months from the date hereof".

The plain meaning and legal effect of this document is a request for credit made by the applicant Waltons Stores in respect of goods to be purchased by the applicant to the cash price or value of \$200. The applicant also made a "Request for Credit Certificate" to Waltons Credits Ltd when he signed the "Request for Store Currency" document. Relevantly, the Request for Credit Certificate contained the following:

"I, the undersigned hereby request the issue to me by Waltons Credits Limited of Store Credit Certificates stating that Waltons Credits Limited is prepared to guarantee the bearer's credit with Waltons Stores Limited up to the amount endorsed thereon, to a total amount equal to the 'Amount of Account' shown. Waltons Credits Limited may accept this Request by issuing the Store Credit Certificates aforesaid ... In consideration of you so doing I agree to pay to you the amount shown in Column I as charges by consecutive equal weekly payments over the period shown below commencing one week from the date hereof".

Pausing there, it should be noted that in column 1 is shown \$200 ("amount of account") and \$127.10 "charges". Total: \$327.10. The plain meaning and legal effect of this part of the document is a request to Waltons Credits for "Store Credit Certificates" which will enable the applicant to [4] purchase goods from Waltons Stores up to an amount of \$200 in consideration for which the applicant has agreed to pay \$327.10 by instalments. The Store Credit Certificates issued by Waltons Credits will state that Waltons Credits "is prepared to guarantee (the applicant's credit with Waltons Stores up to the amount endorsed thereon", to a total amount of \$200.

By signing the document the applicant requested Waltons Stores to open a store currency account for a credit limit of \$200 and also requested Waltons Credits to guarantee his credit with Waltons Stores for which he is prepared to pay "charges" and the amount of the credit by instalments. The Request for Credit Certificate contains a further agreement. Relevantly the document says:

"I agree further, as an independent agreement, that if you arrange for me to be released from 'my liability to 'Waltons' (meaning my liability to pay to Waltons Stores the 'amount of account' pursuant to my 'Request for Store Currency Account') I will in consideration thereof pay to you the amount shown below in Column II as 'new account' by consecutive weekly payments over the period shown below commencing one week from the date hereof and that the following provisions shall have effect:"

Below these words is printed five provisions, none of which are relevant to the issues. In Column II, alongside "amount of account" the sum of \$200 is written. Previous Balance, \$908.42, has been added to "amount of account" to produce "New Account" – \$1108.42. To this amount has been added "Charges", \$127.10. Weekly instalments of \$7.90 payable over 156 weeks is shown. [5] It would appear that when the applicant made a request to Waltons Credits for Credit Certificates for use in Waltons Stores on 5th October 1981 he was already in debt to Waltons Credits for \$908.42. The plain meaning and legal effect of the "independent agreement" is that the applicant agreed that Waltons Credits may consolidate the existing debt (Previous Balance) with the new debt (amount of Account plus charges).

It is now necessary to consider the *Money Lenders Act* 1958 and in particular the definition of "loan" in s3. Section 3 is an interpretation clause in which a number of words and expressions are defined. All the words and expressions defined in s3, with the exception of "loan" are defined exhaustively, in my opinion, because they are followed by the word "means". "Loan" is followed by the word "includes". The word "includes", in an interpretation clause in a statute, usually enlarges the meaning of a word or phrase. In *Dillworth v Commissioner of Stamps* (1899) AC 99; 15 TLR 61 Lord Watson said at AC 105-6:

"The word 'includes' is very generally used in interpretation clauses to enlarge the meaning of words or phrases occurring in the body of the statute, and when it is so used, these words or phrases must be construed as comprehending not only such things as they signify, according to their natural import, but all those things which the interpretation clause declares that they shall include".

In my opinion, the legislature intended to enlarge the ordinary meaning of "loan" by using "includes" after "loan" in contradistinction to the word "means" which is used after every other word or expression defined in s3.

[6] "Loan" bears its ordinary meaning:

1. the act of lending; a grant of the use of something temporarily.
2. something lent or furnished on condition of being returned, esp. a sum of money lent at interest. (*The Macquarie Dictionary*).

The extended definition of "loan" in s3, so far as is relevant, reads as follows:

"Loan includes advance, discount, money paid for or on account of or on behalf of or at the request of a person, or the forbearance to require payment of money owing on any account whatsoever, and includes every contract (whatever its terms or form may be) which is in substance or effect a loan of money"

Mr Moshinsky submitted correctly, in my opinion, that because the Act is remedial legislation enacted for the protection of borrowers the Act should be construed beneficially to give the fullest relief which the fair meaning of its language will allow. *Bull v Attorney-General for NSW* [1913] HCA 60; (1913) 17 CLR 370 at 384.

Mr Moshinsky first submitted that the "independent agreement" which contemplated Waltons Credits arranging for the applicant to be released from his liability to pay Waltons Stores, the amount of his account falls squarely within the extended meaning of "loan" because it involves "money paid ... on behalf of or at the request of" the applicant by Waltons Credits. Alternatively, he submitted, it involves "forbearance to require payment of money owing" by the applicant to Waltons Stores.

Evidence given in the Court below did not reveal by what means Waltons Credits arranged with Waltons Stores for [7] the applicant to be released from his liability. I was informed that a certificate was tendered to prove the release, but as far as I am aware the certificate was not produced to this Court. The only witness called for the respondent in the Court below was not asked how the release was effected. In the absence of evidence from which one could be satisfied that Waltons Credits paid money to Waltons Stores to effect a release of the applicant's debt it is simply not possible to determine that the "release and guarantee" arrangement was a "loan".

I am not persuaded that these agreements create a loan because of "forbearance (by Waltons Credits) to require payment of money owing". Forbearance by a creditor, in its plain meaning, is the giving of indulgence after the day originally fixed for payment. The essence of the agreements entered into between the applicant and Waltons Credits involved extended terms of payment of the "amount of account" and "charges" which is not the same as forbearance by a creditor, in my opinion.

Finally, on this point, one must ask whether this agreement "is in substance and effect a loan of money". Two authorities to which counsel referred in argument need to be considered. In *Metropolitan Discounts and Investments Co Ltd v Bowra Radio and Electrical Co Ltd (In liquidation)* (1944) 18 ALJ 88 the High Court had to determine whether certain transactions constituted sales of radio sets or loans of money. Rich J observed:

[8] "It was frequently said that the Court must have regard to the real substance of the transactions and not be bound by the mere form of the document by means of which they are carried out. But in order to ascertain the substance the Court must look at the legal effect of the bargain which the parties had entered into".

Williams J in a separate judgment, expressed a similar view:

"In order to determine whether the contract was in substance a loan of money, the substance or real nature of the transaction must be determined by ascertaining the legal effect of the bargain which the parties had entered into".

This principle was given statutory recognition in the definition of "loan" by the words:

"Loan includes every contract (whatever its terms or form may be) which is in substance or effect a loan of money".

Starke J, in *Bowra Radio* warned that the burden of establishing that the transaction was in truth a loan transaction was upon the party who asserted it. The second authority *Benison v Custom Credit Corporation Ltd* (1962) WAR 44 simply recognized and applied the principle stated in *Bowra Radio* that a Court will inquire into the real truth and substance of the transaction to determine whether the agreement is *bona fide* and genuine or whether it is a mere cloak or screen for another transaction.

In my opinion, it is not possible to bring these Waltons transactions within the ordinary or extended meaning of "loan". For commercial reasons which are not apparent on the face of the documents or revealed in the course of the evidence, a "credit" or "deferred payment" arrangement was [9] entered into between the applicant and Waltons Stores and then transferred by Waltons Stores to Waltons Credits by "release and guarantee". Cash money was never advanced to the applicant by Waltons Credits. The "Store Credit Certificate" issued by Waltons Credits which had the appearance of a "cash voucher" verified "that Waltons Credits is prepared to guarantee the bearer's credit with Waltons Stores up to the amount endorsed hereon". The certificate could not be exchanged for money or, at least, the evidence did not reveal that it could. The first ground of the order nisi fails.

The second and third grounds of the order nisi are concerned with Part II Division 2 of the *Money Lenders Act*. Part II of the Act contains provisions governing money lending transactions. Division 2 regulates the activities of "cash order" traders. By s36:

"'Cash order' includes any document which is issued for the purpose of enabling a person to receive goods services or other valuable consideration in exchange therefor and in consideration of or in association with an agreement by that person to pay to the person issuing the order the amount thereof at a fixed or determinable future time or by instalments, but does not include a bill of exchange".

The learned Magistrate determined that the agreement entered into did not constitute a "cash order" as defined in s36. It was conceded by counsel for the respondent here and in the Court below that if the agreement was or formed part of a "cash order" it was unenforceable by reason of non-compliance with the Act. [10] Mr Moshinsky submitted that each "Store Credit Certificate" issued by Waltons Credits at the request of the applicant was a document issued for the purpose of enabling the applicant to receive goods in exchange for the certificate and in association with an agreement by the applicant to pay to Waltons Credits the amount thereof by instalments. Should this submission be right, then each "Store Credit Certificate" issued was a "Cash order" and Waltons Credits was a "cash order trader" within the meaning of s36 of the Act.

Mr Moshinsky relied upon a decision of the full Court of South Australia in *Allchurch v Popular Cash Order Company Limited* (1929) SASR 212. The facts in that case disclosed a transaction which the Court had no difficulty in determining was a loan. Mr Strahan QC who appeared with Mr De Vries for the respondent submitted that a store credit certificate is not a cash order because it did not entitle the applicant to receive goods in exchange for the certificate. Mr Strahan submitted that the word "exchange" should be read as meaning "consideration" or "money's worth" and that a certificate is not a document that may be exchanged for goods. He further submitted that the document simply certifies to Waltons Stores that Waltons Credits is prepared to guarantee the bearer's credit with Waltons Stores up to the dollar amount endorsed on the certificate.

In my opinion, one needs to look at the reality of the transaction and not be bound by the mere form of the certificate by which means the transaction was carried out. [11] See *Bowra Radio* (*supra*). The "Request for Credit Certificate" was a request to Waltons Credits for certificates "stating that Waltons Credits is prepared to guarantee the bearer's credit with Waltons Stores

up to the amount endorsed thereon". The small print of the certificate certainly did verify that Waltons Credits is prepared to guarantee the bearer's credit with Waltons Stores up to the amount endorsed thereon. But, in bolder and enlarged print the certificate also carried the name Waltons Credits and a dollar sign alongside the numeral 20. The certificate had more than one purpose, in my opinion. Not only did the certificate verify the credit worthiness of the bearer, it was also a token or voucher representing \$20 with an implied invitation to the holder to use it to purchase goods in any Waltons Department Store, the names and addresses of which were listed on the reverse side of the certificate.

There is an apt aphorism: "If something walks like a duck, and quacks like a duck and looks like a duck, it probably is a duck". A credit certificate has the appearance of a cash token, it reads like one and it invites the holder to use it in specified stores against the purchase of goods. The transaction was in substance and effect one whereby Waltons Stores invited an application for credit which was effected by Waltons Credits issuing a "Credit Certificate" to the bearer entitling the bearer to "exchange" the certificate for goods. I am satisfied that Waltons Credits intended the bearer to believe that each certificate could be tendered in Waltons Stores as payment of or in exchange [12] for goods. Each certificate was issued in association with an agreement by the applicant to pay Waltons Credits the amount thereof by weekly instalments. Accordingly, each certificate is a "cash order" as defined by s36.

The concession made by counsel for the respondent means that the agreement between the applicant and the respondent is unenforceable at law. The decision made in the Court below must be set aside. I uphold grounds B and C of the order nisi. It is unnecessary to dwell upon grounds D, E, F and G. Grounds D and E are concerned with a defence of *non est factum* which was not made out in the Court below. In my opinion, the learned Magistrate was entitled to find, as he did, that the applicant did not prove that he believed the document he executed was radically different from what it was in fact.

Grounds F and G are concerned with defences under the *Consumer Affairs Act 1972*. In my opinion, the defence sought to be relied upon now under Part II division 3 of the Act was not open to the applicant in the Court below when the learned Magistrate ruled that he disallowed late amendments to the defence which raised a Division 3 defence. The refusal by the Magistrate to allow an amendment to the defence at the trial was not made the subject of a ground of review of the decision. The defence disallowed in the Court below is not available on review. For these reasons I am of the opinion that the order nisi should be made absolute on grounds B and C. The orders made in the Magistrates' Court should be set aside and [13] in lieu an order should be made dismissing the claim with costs to be fixed by the Court in default of agreement. Costs in this Court are to be paid by the respondent.

APPEARANCES: For the applicant Davie: N Moshinsky QC with N Bourke, counsel. For the respondent Waltons Credits Ltd: JA Strachan QC with G DeVries, counsel. Lewis Walker, solicitor.