28/11; [2011] VSC 295

SUPREME COURT OF VICTORIA

SILBERMAN v CITIGROUP

Mukhtar AsJ

24, 31 May, 28 June, 30 August, 1 September 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 – QUESTION WHETHER APPELLANT'S PARTICULAR CIRCUMSTANCES FELL WITHIN STATUTORY CRITERIA — FINDING BY MAGISTRATE THAT DEFENCE CASE NOT MADE OUT — ORDER MADE ON THE CLAIM MADE BY CREDIT PROVIDER – EVALUATIONS OF EVIDENCE — WHETHER A QUESTION OF LAW — WHETHER MAGISTRATE IN ERROR IN MAKING ORDER – APPEAL DISMISSED: *CONSUMER CREDIT CODE*, SS70, 73, 80.

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. S. failed to comply with the terms of the default notice and a claim was made by CP/L for the amount owing. The magistrate upheld the claim. Upon appeal—

HELD: Appeal dismissed.

1. The paramount question before the magistrate was whether S.'s personal circumstances attracted the provisions of s70 of the Consumer Credit Code so as to make the relevant transaction unjust. Under that section, in determining whether a credit contract is unjust in the circumstances, the Court can have regard to the public interest and to all the circumstances of the case and (as was relevant in this case), could have regard to any of the following:

> **(b) the relative bargaining power of the parties;**
>
> **(j) whether the credit provider or any other person exerted or used unfair pressure, undue influence or unfair tactics on the debtor ... and, if so, the nature and extent of that unfair pressure, undue influence or unfair tactics;**
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> **(l) whether at the time the contract, mortgage or guarantee was entered into or changed, the credit provider knew, or could have ascertained by reasonable enquiry of the debtor at the time, that the debtor could not pay in accordance with its terms or not without substantial hardship.**
>
> **(o) any other relevant factor.**

2. The purpose of the *Consumer Credit Code* is, broadly speaking, to protect consumers from unfair or improper practices by credit providers. Provisions such as s70 are designed to relieve borrowers from certain consequences of "unjust" dealings where some unfair advantage has been exerted, possibly exploitative, but overall looking to protect the weak, the uneducated, the impoverished or the irresponsible or (for those not so unfortunate) to protect those who are not able to conserve their own interests and might fall prey to the attraction of available money when they cannot afford to incur the repayment obligation. Other descriptions can be used, but that is the essential purpose of the section. Here, S. was educated, a practising lawyer, and a man possessed of business and financial acumen. Whilst that does not make him impervious to unfair pressure or tactics, or incapable of exploitation, the evidence in the case naturally defied any sense of an individual being treated unfairly or whose interests this piece of consumer law was really meant to protect.

3. The Magistrate found as he was bound to, that the relative bargaining power of the parties under s70(2)(b) was simply not a factor. S. was a highly educated and highly intelligent person, not to mention a qualified lawyer. The transactions here were not the outcome of any "bargaining". That term means the ability of one party through a contract of adhesion or some other economic ascendancy to insist on certain terms which in the circumstances might be thought to be unfair or unjust. But there was no such situation here at all. The credit provider was offering an increase in facilities. It was not exerting itself or exercising any economic or financial ascendancy.

4. Section s70(2)(j) refers to the exertion of unfair pressure or unfair tactics. S.'s case was that in providing or offering an extra credit (that is to say tempting him with more money) the credit provider was exerting undue pressure. But, in this case, there was no factual basis whatsoever for the magistrate to conclude that the credit provider had perpetrated undue pressure, influence or tactics.

5. In the end, the magistrate found that not only was there no evidence that there was substantial hardship, but there was no basis for a conclusion that the credit provider knew, or could have ascertained by reasonable enquiry, that he could not pay without substantial hardship. There was no evidence of actual knowledge. Nor was there reason for the credit provider to be put on enquiry.

6. The default notice did not say, as s83(3) required it so say, "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". The first question of law raised by S. was that the Court erred by not dismissing the proceeding because of the invalid default notices under s80(3). It is to be borne in mind that Mr Silberman accepted that he has not remedied his default. The case for the credit provider was that this omission in the default notice was of no consequence. The Magistrate took the view that there was no prejudice to S. here because the notice specified the default and informed the consumer what was required to be done to remedy the default specified even though it did not contain the notification concerning subsequent default.

7. 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*. 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 misunderstand its nature and effect. The magistrate proceeded on a proper authoritative basis.

***Bank of Queensland Limited v Dutta* [2010] NSWSC 574, applied.**

MUKHTAR AsJ:

1. The appellant has filed two separate notices of appeal under s109 of the *Magistrates' Court Act* against orders made in two interrelated proceedings which were heard concurrently in that court, as constituted by His Honour, Magistrate Braun. The respondent is a banker and credit provider. It sued Mr Silberman for about $43,000 for default under two facilities: (i) a "Ready Credit Account" facility which is akin to an overdraft and cheque account; and (ii) a "Platinum Visa" credit card account. Mr Silberman admitted default under both facilities. But, in effect he brought a countervailing claim under s70(1) of the *Consumer Credit Code* that the credit contract was unjust.[1] Under that law the Court can reopen certain transactions. The outcome is not to annul the credit contract, but to possibly deprive the credit provider of its interest or credit charges. He also raised what I not disparagingly call technical defences concerning the content of default notices which under s80 of the code can be a pre-condition to enforcement proceedings by a credit provider.

2. I am told the case went for five days in the Magistrates' Court. Mr Silberman gave evidence for two and a half days. The magistrate dismissed Mr Silberman's claim and found Citigroup's claim proved. The computation of Citigroup's claim was not in dispute. Accordingly, the magistrate made an order on the claim for $49,978.88 with costs. It is fortunate this Court has a transcript of the magistrate's *ex tempore* reasons and, more importantly, his Honour's findings of fact.

3. The appellant seeks to appeal both decisions. He can only do so on a question of law. The respondent contends that the Court ought dismiss now the appeals under r58.10(8) principally because they do not identify a question of law and in any event the appellant does not have an arguable case. The gravamen of the respondent's case is that the case was decided on unassailable findings of fact by the Magistrate and so much of the appellant's case is a transparent attempt, in the face of some strong facts to transform the case into one that involves questions of law.

4. This application has had to be heard over three days in this Court, largely as a result of trying to "fit in" extensive argument amidst the daily pressure of work for general applications. There are bankruptcy proceedings which I am told are pending which in turn attract notification procedures with the Legal Practice Board, for Mr Silberman is a practising lawyer. All of these things combine to make it necessary I think for this Court to produce an expedited judgment. In doing so, it is simply not possible to recite and deal in detail with all submissions. I confine myself to the decisive considerations. The difficulty with these intensively fought applications is that, in my experience, as much time can be taken on a dismissal application as might well

be taken on the hearing of the appeal proper. And even then, there is always the prospect of an appeal *de novo* on a summary dismissal of the appeal, which just makes for more delay. There are occasions when the application for a dismissal can be deferred to the hearing of the appeal proper. But, the purpose of the dismissal rule is to prevent appeals proceeding when there truly is no question of law and that is best made out by demonstrating the case was decided on facts that were open. Or it might be shown the appeal is bound to fail.

5. And I think this is such a case on both counts. I would dismiss this appeal on the grounds as advanced by the respondent, that is, that the case came to be decided essentially on findings of fact and not on any questions of law. In any case, even if one could distil a question of law (in this case statutory construction) I think Mr Silberman's appeal is bound to fail.

6. In reaching this conclusion, I apply the analysis of the Court of Appeal in *S v Crimes Compensation Tribunal*[2] which commenced with the following statement by Phillips JA with whom other members of the Court agreed:

> Appeals like the present are common enough, arising out of the attempt by a claimant to bring his or her case within one or more statutory descriptions with a view to securing some benefit provided by the statute. The determination of such a claim ... will depend upon two things. The first is the proper meaning, as a matter of statutory construction, of the statutory description (or descriptions) at base, so far as relevant of the claim which is being pursued. The second is whether, and if so to what extent, the particular circumstances of the claimant are such as to bring his or her case within the statement description. So much is trite because on one level it merely distinguishes between the construction of the statutory description and its application to the facts. Yet because the first is essentially a question of law which the second essentially a question of fact, it serves to encapsulate in very broad outline the basic distinction which must be drawn between what may and what may not be canvassed on an appeal which lies only on a question of law.

7. I am firmly of the view that in this case the paramount question before the magistrate was whether Mr Silberman's personal circumstances attracted provisions of s70 of the Code so as to make the relevant transaction unjust. Under that section, in determining whether a credit contract is unjust in the circumstances, the Court can have regard to the public interest and to all the circumstances of the case and (as was relevant in this case), could have regard to any of the following:

> (b) the relative bargaining power of the parties;
>
> (j) whether the credit provider or any other person exerted or used unfair pressure, undue influence or unfair tactics on the debtor ... and, if so, the nature and extent of that unfair pressure, undue influence or unfair tactics;
>
> (l) whether at the time the contract, mortgage or guarantee was entered into or changed, the credit provider knew, or could have ascertained by reasonable enquiry of the debtor at the time, that the debtor could not pay in accordance with its terms or not without substantial hardship.
>
> (o) any other relevant factor.

8. For the purpose of determining whether Mr Silberman's circumstances fell within any of those statutory descriptions (a question of fact), *S v Crimes Compensation Tribunal* established that:[3]

> The determination of that question of fact may depend upon the acceptance or rejection of evidence that is led; it may depend upon a choice between witnesses, and an assessment of their credibility or reliability; or it may depend more directly upon the sufficiency or insufficiency of the evidence that is given. All these things are committed to the tribunal (in this case, the court below) and not to the Court; ... Essentially, the question whether the particular circumstances of the claimant are such as to bring his or her case within the statutory description is a question of fact, not law.

9. It is plain that the purpose of the *Consumer Credit Code* is, broadly speaking, to protect consumers from unfair or improper practices by credit providers. Provisions such as s70 are designed to relieve borrowers from certain consequences of "unjust" dealings where some unfair advantage has been exerted, possibly exploitative, but overall looking to protect the weak, the uneducated, the impoverished or the irresponsible or (for those not so unfortunate) to protect those who are not able to conserve their own interests and might fall prey to the attraction of

available money when they cannot afford to incur the repayment obligation. Other descriptions can be used, but that is the essential purpose of the section. Here, Mr Silberman was educated, a practising lawyer, and as I read the magistrate's appraisal, a man possessed of business and financial acumen. I suppose that does not make him impervious to unfair pressure or tactics, or incapable of exploitation. But when examining the evidence in the case, as the magistrate did, it has to be said that even on the face of it, the case naturally defied any sense of an individual being treated unfairly or whose interests this piece of consumer law was really meant to protect.

10. The first thing to do is to commence, as the magistrate did, with an examination of the various transactions. The first was the Ready Credit account. In February 1998, Citigroup offered Mr Silberman this facility at a special introductory rate. In the written application which was in evidence Mr Silberman said that he earned more than $30,000 per annum in taxable income and had a good credit rating. He stated that he was employed as a lawyer with a taxable salary of $35,000. The evidence then showed that in May 1999, he was pre-approved for a credit increase to $10,000 which he accepted. As part of that acceptance, he signed a declaration saying, “I can confirm that I can afford to repay this extra amount without undue hardship”.

11. Then, the evidence shows that in about July 2000, Mr Silberman applied for a Citibank gold Visa credit card. In his application form he said that he earned more than $45,000 per annum taxable income and had a good credit rating. He stated that he worked as a lawyer with a gross annual salary of $52,000. Attached to the application was a letter from Messrs Harvey Bruce and Co, solicitors, “certifying” that Mr Silberman was in partnership with the firm and was drawing a base salary of $52,000 as from 1 July 2000. He already had a Citibank silver card which he obtained in 2000 with his overdraft facility. That had a limit of $5500. But he wanted a gold card.

12. Pausing there, the magistrate made reference to this letter and made measured findings which did Mr Silberman no credit. In essence, Mr Silberman acknowledged in evidence that this letter was untrue or at least ambiguous. That is, he never became entitled to draw $52,000 per annum and that the making of a partnership agreement depended upon “certain economic conditions”. The magistrate recited that Mr Silberman’s evidence to be that it was “basically for the bank to work out what the letter meant, and to draw any conclusions that it chose to”. Mr Silberman’s evidence, was that the question of what the word “drawing” meant was a matter for an accountant to say. The Magistrate found there was an “intended ambiguity” in completing the applications. The point is: this was the beginning of the eventual view that Mr Silberman was not being overborne in some way by a lender, but himself was looking to attract favourable credit treatment.

13. Then, in August 2002, he was given a second increase in the Ready Credit facility which he obtained by making a telephone acceptance rather than a written application. Had he used the written application, he would have been required to sign the declaration in which he was obliged to say “I can confirm that I can repay this additional amount without undue hardship.” The Magistrate determined that as Mr Silberman was a member of the legal profession he knew that the credit provider was proceeding on the basis that he was able to repay the additional amount without undue hardship. I take that to mean that as a member of the legal profession he would be reasonably regarded as responsible enough to know of the problems that can arise in incurring a financial obligation (at least of this scale) if the borrower really does not have the means of repaying.

14. There was no documentation to show the grant of the gold card but it was common ground that whether it was offered, or whether he sought it, he certainly obtained it. That was in May 2004. Then, in August 2005 Citibank wrote to Mr Silberman to inform him that “in recognition of your excellent credit history” that he had been pre-approved for the grant of a Citibank platinum card with a credit limit of $21,000. That offer was not immediately taken up. In September 2005 Citibank renewed the offer for a platinum card with the same credit limit. On that occasion, Mr Silberman signed an acceptance form accepting the upgrade. He signed a declaration confirming “that I can afford to repay this extra amount without undue hardship”.

15. Default then occurred under the Ready Credit facility and under the Platinum Visa card. On 3 November 2009 a default notice was sent to Mr Silberman stating the Ready Credit balance of $18,671.34. The notice required him to pay the overdue amount no later than 31 days from

the date of the notice. The notice warned him that if the entire balance was not paid, legal action may commence. Likewise, the default notice under the Platinum Visa card stated the credit card balance of $21,363.31. It also gave him 31 days to make payment failing which the entire balance of the account will become due and legal action could be commenced.

16. For present purposes, that suffices as an exposition of the facts.

17. I shall deal first with the issue that dominated the proceedings below, namely, whether this was an unjust transaction under s70(2). I have already set out the three heads under which Mr Silberman was seeking to re-open the transaction. The relevant time is when the contract was made or changed. His case, so the Magistrate recorded, was that at the time of the increase in the overdraft facility and the granting of the platinum card, Citibank could have ascertained by reasonable enquiry that he could not repay in accordance with the terms of the facility without substantial hardship. His case was not that the facilities were unjust from their inception. He says they became unjust when the overdraft limit was increased and when the credit limit on the credit card was increased. His case, as I see it, was that the credit provider was tempting him with more credit money without satisfying itself (despite his explicit declaration) that he could repay without substantial hardship.

18. The Magistrate found, I think as he was bound to, that the relative bargaining power of the parties under s70(2)(b) was simply not a factor. The magistrate found that Mr Silberman was a highly educated and highly intelligent person, not to mention a qualified lawyer. True it is, as a broad proposition, a major credit provider has greater economical bargaining power. But the fact is, the transactions here were not the outcome of any "bargaining". That term I think means the ability of one party through a contract of adhesion or some other economic ascendancy to insist on certain terms which in the circumstances might be thought to be unfair or unjust. But there was no such situation here at all. The credit provider was offering an increase in facilities. It was not exerting itself or exercising any economic or financial ascendancy. I see nothing to suggest the magistrate misunderstood that statutory provision or misapplied the facts to it. The finding was open, and I think absolutely correct.

19. Next, s70(2)(j) refers to the exertion of unfair pressure or unfair tactics. Mr Silberman's case was that in providing or offering an extra credit (that is to say tempting him with more money) the credit provider was exerting undue pressure. I suppose that means the pressure of temptation. I could imagine situations where an ignorant or vulnerable person might become the victim of an unfair tactic by a lender with the sheer temptation of money which the borrower really cannot afford to repay. But, in this case, there was no factual basis whatsoever for the magistrate to conclude that the credit provider had perpetrated undue pressure, influence or tactics. And that is precisely what the Magistrate found. Mr Silberman is an educated man and a qualified lawyer. I think it was simply preposterous for him to say that he was somehow the victim of an undue influence of unfair tactics.

20. It appears the real question was whether there was under s70(2)(l) a basis for finding that the credit provider knew, or could have ascertained by reasonable enquiry, that Mr Silberman could not pay or at least not pay without substantial hardship. The creditor's knowledge, or what it could have ascertained, is a factual enquiry. The question of the presence of substantial hardship is a factual enquiry. The magistrate approached that task by asking, correctly I think, the anterior question of whether it was established as a matter of fact that Mr Silberman could not repay without substantial hardship. The onus to show that was upon Mr Silberman. On that question, he received oral testimony as well as some forensic accounting detail. The magistrate regarded this evidence as either being irrelevant or in other situations containing "so many shifts and changes between documents and between entries in documents" that he found it simply hard to follow. The gist of the evidence seemed to be that a time came when he was drawing cheques on the overdraft account in order to pay out moneys due on the visa card and to pay out another line of credit with American Express. To draw a cheque on overdraft to pay a credit card does not of itself establish financial hardship. In the end the Magistrate could not find a sufficient evidentiary basis to conclude that Mr Silberman was at the relevant time unable to pay the increased burden without substantial hardship. His Honour found that Mr Silberman was using the credit cards and the overdraft facility to live, to run his practice or his business and trading in options which was his preferred investment interest.

21. In any case, there was no evidence to show the credit provider actually knew or ought to have known of any putative financial hardship. He was keeping a good credit history, hence the offer of an increase in the credit limit. At all relevant times the credit provider was proceeding on the basis of Mr Silberman's statement that he was a partner of a law firm, giving him a base drawing of $52,000 per annum and Mr Silberman's declarations that he could repay without undue hardship. The magistrate naturally was compelled to conclude that as a practising lawyer, Mr Silberman knew that was important information and that he was conveying to a credit provider. When a credit provider receives from a practising lawyer a declaration about such a thing, it is only reasonable for the credit provider to assume that the lawyer understands what he is saying and also to attach credence to the declaration more than might be attached for example if there was some doubt about the education or competence of the applicant.

22. Eventually, so the Magistrate's reasons record, Mr Silberman's submission was that merely having to borrow money in order to meet one's financial obligation is itself a matter of substantial hardship. The magistrate rejected that submission, correctly in my view. In the end, the magistrate found, as I think he was bound to, that not only was there [no] evidence that there was substantial hardship, but there was no basis for a conclusion that the credit provider knew, or could have ascertained by reasonable enquiry, that he could not pay without substantial hardship. There was no evidence of actual knowledge. Nor was there reason for the credit provider to be put on enquiry.

23. What is telling is the next finding:

> Mr Silberman was as most (sic) calculated borrower. He borrowed even when he did not need to. He extended lines of credit even when he did not have any particular use for them. He cleverly – and quite properly – not inappropriately (sic). I certainly do not want anyone to think I am thinking that. He cleverly paid attention to special offers of interest whenever they were available. He managed by doing so to convert lines carrying much larger interest rates to very low ones – much lower than was the norm for the market at the time.

24. I see nothing at all to suggest, first, that these findings of fact were not open. Secondly, I see no basis for an assertion that the magistrate somehow misunderstood the legislation when it came to applying the facts. Mr Silberman contended that just because he was a lawyer who was educated, clever and astute and who had business acumen did not therefore mean that nevertheless he might be subject to substantial hardship. That is, an educated person may find it hard to repay loans. That may be; but there was no evidence so the magistrate found, that he was under substantial hardship. More to the point, there was no evidence that the credit provider knew or ought to have known about that. To the contrary, as the magistrate was bound to find I think, the credit provider was led to assume to the contrary.

25. Next, s70(2)(o) refers to "any other relevant factor". The magistrate found there was simply no other evidence of any other relevant factor.

26. It is for those reasons, I would conclude that there is no question of law on this, the dominant part of the case, because the exercise was decisively one that involved an investigation into the facts. The facts were clearly open. I would go further and say that it was the compelling conclusion on the evidence.

27. The second question of law concerns s73 of the Code. That section states:

> An application ... may not be brought under this Division more than two years after the relevant credit contract is rescinded or discharged or otherwise comes to an end.

28. I have already referred to the fact that Mr Silberman went from a silver card to a gold card to a platinum card. The platinum card account was opened on 4 October 2005 and was eventually closed by the respondent by reason of Mr Silberman's default. It was accepted by all parties in the court below that Mr Silberman's application to reopen the transaction concerning the platinum card came within the two year limitation period of s73, but any re-opening of the silver or gold card would fall outside the two year period. It was argued in the court below that the credit cards should be seen as being the one credit card account and that each change of card was nothing more than simply a variation of the one account. The fact is that in the transaction

from one card to another, the moneys owing on the earlier card were transferred and moved into a new account for the new card.

29. The embarrassing problem for Mr Silberman at trial was that by his own statement of claim, he had contended that each of the three credit cards created a separate credit contract. The facts are:

> (a) The silver credit card contract came to an end in about May 2004 when, as Mr Silberman alleged and the credit provider admitted in its pleadings, Silberman and the credit provider made a credit contract for the provision of credit to him by way of a Gold Visa account facility;
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> (b) the Gold Visa account facility came to an end in about October 2005 when, as was common ground, the parties made a credit contract for the provision of credit to him by way of a Platinum Visa card.

30. Those allegations were admitted. There was common ground. From there, the magistrate concluded, as I think he was legally bound to, that the only application that could be brought by Mr Silberman concerned the credit contract created by the Platinum credit card account. Therefore, the conclusion is that the magistrate's finding first of all is unassailable as a matter of common ground.

31. In any case, I see this ground of being of no utility at all and therefore I see no injustice in refusing a right of appeal. There is no injustice because even if Mr Silberman could have tried to reopen the Silver and Gold card as an unjust transaction, he simply had no grounds to do so under s 70(2) because as the magistrate found there was simply no basis to say any of these contracts were unjust.

32. The above disposes of the appeal in proceeding S CI 2011 01937. The appeal in the concurrent proceeding (S CI 2011 01936) concerned the validity of the default notices. Section 80(1) of the Code states:

> 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, and any guarantor, a default notice, complying with the 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.

33. Section 80(3) states that:

> 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.

34. Section 80(4) is a relief provision. It states that:

> 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.

35. I have already referred to the default notice under the Ready Credit facility and under the Platinum Visa facility. In the Magistrates' Court, the credit provider acknowledged that the notices did not say, as s83(3) required it so say, "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". As an ancillary matter, s85(1) states that an acceleration clause can only operate if amongst other things the credit provider has given a default notice under s80.

36. The first question of law raised by Mr Silberman is that the Court erred by not dismissing the proceeding because of the invalid default notices under s80(3). It is to be borne in mind that Mr Silberman accepted that he has not remedied his default. The case for the credit provider was that this omission in the default notice was of no consequence. His Honour took the view that

there was no prejudice to Mr Silberman here because the notice specified the default and informed the consumer what was required to be done to remedy the default specified even though it did not contain the notification concerning subsequent default.

37. Following a decision of Davies J in the Supreme Court of New South Wales in *Bank of Queensland Limited v Dutta*,[4] the magistrate held that as the question of subsequent default simply was not relevant to the case at all, its omission from the notice did not matter. *Dutta* held that non compliance did not render the proceeding a nullity. But, as occurred in *Dutta* the magistrate went on to say that in any event 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*. The basis for that view was, as I would see it, that the consumer in this case could not be said in any way to be embarrassed by the default notice or to misunderstand its nature and effect. The magistrate proceeded on a proper authoritative basis.

38. The power to authorise the commencement of proceedings under s80(4) is discretionary having regard of course to the purposes of the section. As was submitted by the respondent, Mr Silberman has not contended nor has he been able to point to any evidence or other legal consideration to demonstrate that the magistrate erred in his discretion to grant leave. To do so would require him to demonstrate that the magistrate had misdirected himself about the exercise of the discretion. The magistrate took the course he did also relying upon the approach of Davies J in *Dutta*.

39. Accordingly, I do not regard the appellant as having identified a question of law about the exercise of the magistrate's discretion here. In any case, I would say the exercise of the magistrate's direction was judicially based having regard to the purposes of the section and any argument on appeal as highly likely to fail. For the very same reason the question of law in paragraph 4 of the appellant's notice of appeal collaterally falls. That concerns the enforcement of the acceleration clause. That question in turn depends on the validity of the default notice.

40. The question of law in paragraphs 2 and 4 also fall to the same purpose.

41. As for the question of law in paragraph 3, that also collaterally fails. Under that ground, Mr Silberman asks for a reduction of the amount of the credit provider's claim by reference to the concurrent claim concerning the reopening claim. But Mr Silberman lost that other case and accordingly there is no basis for an abatement.

42. Likewise, the same may be said for the question of law in paragraph 6. Paragraph 7 contends that if the default notices were valid, the Court should have reduced the amount of the claim by an amount which would take into accounts ss7 and 8 of the *Fair Trading Act*. They are unconscionability provisions that were pleaded. But it is not disputed that an unconscionability case was not argued below and there was no evidence adduced below. If it was not argued and not adduced I cannot see that Mr Silberman can seek to appeal on the ground that the magistrate erred in not considering those questions. I would go further and say that to the extent that the unconscionability was a concomitant of his other arguments concerning the "unjust" credit contract they too would fail for the same factual reasons as the magistrate found.

43. I have not in this judgment covered every single detailed part of the submissions that were put. But they have been taken into account. In particular, I should refer to Mr Silberman's written submissions contending that the magistrate's findings were logically inconsistent or were not open to him, relying on well-known cases such as *Warren v Coombes*[5] and *Percy v Fox*.[6] I can see no basis for any contention that the magistrate's findings were "glaringly improbable" or "contrary to compelling inferences" or otherwise not open. I see no basis for saying that the magistrate somehow misdirected himself on the facts or allowed extraneous or irrelevant matters to affect the exercise of a discretion to the extent that was exercised under s80(4). I would also specifically reject his contention that there was a public interest component in this appeal.

44. In closing, despite the many submissions made, the two decisive considerations that lead me to dismiss the appeal are first, that on the decisive matters these appeals involve questions of fact that are unassailable. Secondly, there was no basis for saying the magistrate misunderstood or misconstrued the meaning of the relevant statutory provision.

45. Accordingly, I would order in each appeal that:
1. The appeal be dismissed under Rule 58.10(8)(a) and (b).
2. the appellant pay the respondent's costs of the appeal.

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[1] The pleadings in the Magistrates' Court make reference to the *National Consumer Credit Protection Act Code*, but the case was fought and decided by reference the Consumer Credit Code, the relevant provisions of which are said to be identical.
[2] [1998] 1 VR 83 at 86.
[3] [1998] 1 VR 83 at 89.
[4] [2010] NSWSC 574 at [136] ff
[5] [1979] HCA 9; (1979) 142 CLR 531; (1979) 23 ALR 405; (1979) 53 ALJR 293.
[6] [2003] HCA 22; (2003) 214 CLR 118; (2003) 197 ALR 201; (2003) 77 ALJR 989; (2003) 38 MVR 1; (2003) 24 Leg Rep 2.

APPEARANCES: For the appellant Silberman: In person. Dov Silberman, lawyer. For the defendant Citigroup Pty Ltd: Mr M McNamara, counsel. Lander & Rogers, solicitors.
