

CITATION: *Australian Central Credit Union v Malone* [2008] NTMC 070

PARTIES: AUSTRALIAN CENTRAL CREDIT UNION

v

TERENCE JAMES MALONE

TITLE OF COURT: Local Court

JURISDICTION: Local Court

FILE NO(s): 20804128

DELIVERED ON: 30 October 2008

DELIVERED AT: Darwin

HEARING DATE(s): 29 September 2008

JUDGMENT OF: Jenny Blokland CM

CATCHWORDS:

Practice and Procedure – Application for Default Judgement – “Reasonable Enforcement Expense” – Interest on Interest - *Local Court Rule 39* – *Small Claims Rule 25*

Consumer Credit Act (NT)
District Court Act

Spain v The Union Steamship Company of New Zealand Ltd (1923) 32 CLR 138
Jovista Pty Ltd T/As SDR Construction v T O’Connor and Sons Pty Ltd, SA (SC), 18 February 1993, (unreported)
Geeveekay Pty Ltd, Keogh and Keogh v Director of Consumer Affairs Victoria, [2008] VSC 59
Hansmar Investments Pty Ltd v Perpetual Trustee Co Ltd [2007] NSWSC 103
Credit Corporation Ltd v Dalton and Others

REPRESENTATION:

Counsel:

Plaintiff: Ms Tillman
Defendant: N/A

Solicitors:

Plaintiff: Cridland MB Lawyers
Defendant: N/A

Judgment category classification:

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[2008] NTMC 070

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16

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20804128

BETWEEN:

**AUSTRALIAN CENTRAL CREDIT
UNION**
Plaintiff

AND:

TERENCE JAMES MALONE
Defendant

REASONS FOR DECISION

(Delivered 30 October 2008)

JENNY BLOKLAND CM:

Introduction

1. These proceedings sought judgement on the outstanding balance on a loan agreement between the plaintiff and the defendant filed 7 February 2008 in the Small Claims jurisdiction of the Local Court. The original claim for \$3803.36 plus interest at \$1.33 per day has not been finalised due to two outstanding issues. Firstly, the question of whether “reasonable enforcement expenses” not particularised in the Statement of Claim but included in the total sum claimed could be included in a default judgement without being set down for assessment for damages. The second issue is whether the judgement sum may include “interest on interest”, as although prohibited under the *Small Claims Rules* (“SCR”) r 25.04, (in the same terms to Rule 39.03 *Local Court Rules* (“LCR”), the question is whether this is a case that admits of the exception under SCR 25.04(3)(c). The learned Judicial Registrar referred the application for default judgement to a

Magistrate to be heard: (Reasons for Judgment, 21 August 2008). The Defendant was served with the Statement of Claim but has not entered an appearance or defence and did not appear at the hearing.

Reasonable Enforcement Expense

2. The Statement of Claim includes “reasonable enforcement expenses for which the defendant is liable under the Loan Agreement”. The “reasonable enforcement expenses” are not particularised, however the loan agreement between the plaintiff and the defendant is annexed to the affidavit of Bronwyn Alice Kitson sworn 22 July 2008. The loan agreement (Annexure “A”) to the affidavit of Bronwyn Alice Kitson provides at para 14:

“14. Enforcement Expenses

14.1 We may charge you enforcement expenses we reasonably incur. We may debit these to your loan account.

14.2 An enforcement expense includes an expense for doing any of the following under this loan contract, any guarantee or any mortgage:

- (a) enforcing any right we have;
- (b) attempting to enforce any right;
- (c) performing any of your obligations or those of any Guarantor in accordance with clause 13.4;
- (d) protecting any right;
- (e) waiving any right;
- (f) contemplating the enforcement of any right;
- (g) sending an arrears letter or default notice before commencing enforcement proceedings.

14.3 An enforcement expense also includes any expense we have to pay on the dishonour of a cheque or any other payment instrument given to us for a payment in relation to this loan contract.

3. Further, Annexure “B” to the affidavit of Bronwyn Alice Kitson includes a reference to an amount of \$80 being the cost of the “Default Notice”. The plaintiff submits the \$80 constitutes a “reasonable enforcement expense” recoverable under the terms of the Loan Contract and incorporated in the debt.
4. The submission by the plaintiff is the “reasonable enforcement expense” need not have been separately pleaded and the inclusion of it in the prayer for relief has meant it has been raised as a separate issue from the alleged debt that incorporated the \$80 fee. It is acknowledged it should not have been separately pleaded.
5. It is clear from the material before me the debt amount claimed (\$3,803.36) comprises in part the “reasonable enforcement expenses” that were in turn permitted by the terms of the Loan Agreement. I have come to the conclusion the debt claimed in total is a liquidated amount as understood in the authorities notwithstanding the reference to “reasonable enforcement expense”.
6. In *Spain v The Union Steamship Company of New Zealand Ltd* (1923) 32 CLR 138, the defendant argued the claim made by a plaintiff did not come within the appropriate provision of the *District Court Act* because the plaintiff’s right was to recover reasonable expenses and not a sum certain or any liquidated amount. Knox CJ and Starke J said at page 142 “The objection is untenable, even if it could be insisted upon at such a late stage of the hearing of the plaintiff[references omitted].....whenever the amount to which the plaintiff is entitledcan be ascertained by calculation or fixed by any scale or charges, or other positive data, it is.....liquidated”. This was applied directly in *Jovista Pty Ltd T/As SDR Construction v T O’Connor and Sons Pty Ltd*, SA (SC), 18 February 1993, (unreported) where Burley J stated that with one exception the Court would

permit all amounts claimed in that action to be claims for liquidated sums.

The Court stated:

“In effect the amounts claimed are either for reasonable sums or for the expenses necessarily incurred. Given that, in failing to enter an appearance, the defendant is taken to admit the allegations contained in the statement of claim: (of *Cribb v Freyburger* [1919] WN 22; except allegations as to damages: cf *Watson’s Specialised Tooling Pty Ltd v Stevens* [1991] 1 Qd R 85), the defendant is taken to admit, for example, that the variations were agreed and that the reasonable costs for same were as pleaded in the statement of claim”.

7. This is further confirmed in *Geeveekay Pty Ltd, Keogh and Keogh v Director of Consumer Affairs Victoria*, [2008] VSC 59 at para [72]:

It is helpful to draw attention to the fundamental distinction between a debt and damages. A debt is an obligation to pay an ascertained or ascertainable amount, which the law sometimes calls a liquidated amount. Damages is what a court orders one party to pay to the innocent party in compensation for, say, the former’s breach of contract. The amount cannot be ascertained in advance because it is assessed by the Court”.

8. Further I note *Hansmar Investments Pty Ltd v Perpetual Trustee Co Ltd* [2007] NSWSC 103 to the same effect. The reasonable enforcement sum is provided for generally in the contract, specifically in the default notice and in my view is readily ascertainable and forms part of the debt for which the default judgement can be signed. I confirm it is my view that if there were any uncertainty in ascertaining the sum, there is still a discretion to set the matter down for assessment but in my view it is not necessary here. It is important however that in the application for Judgement, the particular sum or expense is clearly identified.

Interest and the Terms of the Loan Contract

9. The claim is for the unpaid balance of the defendant’s account plus interest calculated at \$1.33 per day to the date of judgement. It needs to be

considered whether this is prohibited under SCR 25.04 that provides as follows:

25.04 Interest up to judgment

(1) In a proceeding, the Court may order that interest is to be included in the sum for which judgment is given at the rate it considers appropriate on the whole or a part of the sum for the whole or a part of the period between the date when the cause of action arose and the date of the judgment.

(2) Subrule (1) does not –

(a) authorise the giving of interest on interest;

(b) apply in respect of a debt on which interest is payable as of right, whether by virtue of an agreement or otherwise; or

(c) affect damages recoverable for the dishonour of a bill of exchange.

(3) Where –

(a) a claim is made for a debt or demand for a fixed amount (whether or not another claim is also made in the proceeding); and

(b) the plaintiff is entitled under Part 12 to an order for default judgment on that claim,

unless the court orders otherwise, the plaintiff may enter final judgment against the defendant for an amount not exceeding the amount claimed in the statement of claim together with interest from the commencement of the proceeding up to and including the date of judgment –

(c) on any debt that carries interest – at the rate it carries; or

(d) on any other amount – at the rate payable on a judgment debt during that time.

10. The Local Court Rule in the same terms was dealt with in detail by Her Honour Ms Fong Lim RM in *Credit Corporation Ltd v Dalton and Others*, (File Nos. 20615207, 20621993, 20612779), 5 February 2007.

11. Her Honour noted that the restriction on the granting of interest on interest does not apply to matters where interest is claimed by virtue of an agreement, however, Her Honour noted the Court still retains a discretion. In that matter before Her Honour, she concluded the relevant agreements all

calculated interest on the daily balance accruing monthly and there was no provision for interest to compound in any of the agreements.

12. The relevant parts of the Terms of Loan Contract between the plaintiff and defendant are as follows:

“3. Amount of Credit

- 3.1 Subject to Clause 2 and this loan contract, we agree to lend you up to the Amount of Credit.
- 3.2 However, we will not advance to you the difference between the amount of a Credit Fee and Charge we are to pay out of the Amount of Credit and the amount that we actually pay of that Credit Fee and Charge.

4. Repayments

- 4.1 You must repay the balance of the loan by making the repayments set out in the Schedule. However this is subject to other terms of this loan contract, for example, if we increase repayments or if you are in default.
- 4.2 If we do not receive value for a cheque, payment order or direct credit, we may:
- (a) reverse the credit; and
 - (b) charge you interest or default interest; and
 - (c) exercise any right or remedy under this contract;
- as if the repayment had never been made.
- 4.3 If you are liable to us under 2 or more loan contracts and do not tell us to which account we are to credit any repayment, we may credit the repayment to this loan contract or any of the other loan contracts as we choose.
- 4.4 We may apply any payment from you or the Guarantor to enforcement expenses, default interest, credit fees and charges, interest or principal as we choose.
- 4.5 We may apply any payment from you or the Guarantor to the most recent debit to your account.

5. Calculating Interest Charges

- 5.1 We will calculate interest daily by multiplying the unpaid daily balance of the account at the end of the day by the daily percentage. The daily percentage rate is the Annual Percentage Rate divided by 365.
- 5.2 We will debit interest on or about the same day every month. This day will not necessarily be the same day that your repayments are due. We will also debit interest on the day you pay the balance of the loan.

13. Default

- 13.1 You are in default under this loan contract if:
- (a) you do not make a repayment in full by the date it is due;
 - (b) you or the Guarantor breach any term of this loan contract, the guarantee, any mortgage or any Insurance policy that we require;
 - (c) the guarantee or any mortgage that we require is unenforceable according to its terms;
 - (d) the insurer terminates any insurance policy we require;
 - (e) you or the Guarantor fail to renew on terms that satisfy us any mortgaged property insurance that we require;
 - (f) you become a bankrupt;
 - (g) you seek to make an arrangement or composition with your creditors under a law dealing with bankruptcy; or
 - (h) you seek to be a member.
- 13.2 If you are in default, we may send you a default notice. The notice will tell you;
- (a) what the default is;
 - (b) what you have to do to remedy the default; and
 - (c) that you will have at least 30 days of the notice to remedy the default.

- 13.3 If you do not comply with the default notice, you become liable to pay us the balance of the loan immediately.
- 13.4 If you or the Guarantor fails to do anything that this loan contract, the guarantee, any mortgage or any insurance policy requires to or the Guarantor to do, we may:
- (a) do the thing as required;
 - (b) do it in your name; and
 - (c) do it at your expense and debit your account for the expense.

14. Enforcement Expenses

- 14.3 We may charge you enforcement expenses we reasonably incur. We may debit these to your loan account.
- 14.4 An enforcement expense includes an expense for doing any of the following under this loan contract, any guarantee or any mortgage:
- (h) enforcing any right we have;
 - (i) attempting to enforce any right;
 - (j) performing any of your obligations or those of any Guarantor in accordance with clause 13.4;
 - (k) protecting any right;
 - (l) waiving any right;
 - (m) contemplating the enforcement of any right;
 - (n) sending an arrears letter or default notice before commencing enforcement proceedings.
- 14.3 An enforcement expense also includes any expense we have to pay on the dishonour of a cheque or any other payment instrument given to us for a payment in relation to this loan contract”.

13. In Ms Kitson’s affidavit, sworn 22 July 2008, she deposes that as of 4 February 2008 the balance was \$3,803.36 and as of 1 July 2008 the balance

was \$4,671.13, the difference being made up by accruing interest under the Terms of the Loan Contract. In submissions I have been referred to the definition of “unpaid balance” in s 25(1) *Consumer Credit Act* (NT) that provides: “unpaid balance under a credit contract at any time means the difference between all amounts credited and all amounts debited to the debtor under the contract at that time”. I agree that the Terms of Loan Contract makes it clear that the interest, calculated on a daily basis is added to the “unpaid daily balance of the account” on a monthly basis. In my view the Terms of the Loan Contract permit the interest to be added according to its terms. On a proper application of SCR 25.04(3)(c), given there is a finding that there is an agreement, unless the court orders otherwise, the plaintiff may enter final judgement against the defendant “for an amount not exceeding the amount claimed in the statement of claim together with interest from the commencement of the proceeding up to and including the date of judgment – (c) on any debt that carries interest – at the rate it carries”.

14. It is important that evidence of the relevant terms and rate of interest under any agreement be capable of clear identification and definition in the application to enter judgement otherwise the Registrar will generally need to refer the matter to a Magistrate.
15. I intend to order that default judgement be entered for \$3,803.36 together with interest at the rate of 12.75% per annum from 5 February 2008 until entry of judgement. Further, that the plaintiff be awarded 10% interest on the judgment sum inclusive of pre judgment interest.
16. I will forward these reasons to counsel for the plaintiff and list the matter for 30 October at 3.30pm where I will make final orders after provision of the calculations.

Dated this 30th day of October 2008.

Jenny Blokland
CHIEF MAGISTRATE