IN THE DISTRICT COURT
AT HUTT VALLEY

CIV-2015-096-000094
[2017] NZDC 27629

UNDER	the Credit Contracts and Consumer Finance Act 2003
IN THE MATTER	of a claim for liquidated damages
BETWEEN	REAL FINANCE LIMITED Plaintiff
AND	TOFI SETEFANO Defendant

Hearing:	6 December 2017
Appearances:	E Horner for Plaintiff No appearance for Defendant A McClintock for Commerce Commission (Intervener)
Judgment:	1 February 2018

RESERVED JUDGMENT OF JUDGE C N TUOHY

Introduction

[1] Real Finance is seeking judgment against Mr Setefano for relatively small sums owing under a loan agreement. The claim was filed as long ago as February 2015. Mr Setefano has taken no steps to defend it. Despite those facts, the claim has acquired a considerable procedural history and now requires a considered judgment.

Background

[2] The background facts and the procedural history up until that time have been set out by Mallon J in her judgment of 27 September 2016 in *Real Finance Limited v Setefano*[1]. It is unnecessary to repeat them.

[3] As a result of that judgment the claim was remitted back to the District Court for reconsideration on a formal proof basis. Real Finance was given the opportunity to adduce evidence to support its claim for administration fees which had been disallowed by me at the original hearing.

[4] Real Finance took that opportunity but the further evidence provided was, in my view, insufficient to enable me to decide whether to reopen the credit contract under s 120 of the Credit Contracts and Consumer Finance Act 2003 (the Act). I requested the Registrar to ask the Commerce Commission whether it wished to appear and be heard pursuant to s 112 of the Act[2]. The Commission decided to do so.

[5] Following that, both parties were given the opportunity to file further affidavits, following which the matter was set down for a hearing before me. Three substantial affidavits were filed, two from James McIvor, Team Leader of the Commission's Credit Investigation Team and one on behalf of Real Finance from Barry Jordan, a forensic accountant. These affidavits traversed the issue of the reasonableness of fees charged, particularly the administration fees. Mr McIvor also raised the issue of delayed enforcement and its effect on interest charged. A hearing was scheduled for 6 December 2017 with written submissions to be filed by the parties beforehand.

[6] A few days before the hearing, after Real Finance had been directed to clarify the specific amounts for which it was claiming judgment, Real Finance abandoned its claim for the monthly administration fees, disallowance of which had triggered its appeal against my original judgment.

[7] That concession did not, however, resolve the case. The Commission in its role as Intervener, has submitted that the Court ought to reopen the loan agreement

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1 [2016] NZHC 2293 Paras [1] – [22]
2 See my Minute of 14 December 2016

because of oppressive conduct on Real Finance's part in delaying enforcement of the loan agreement by Court action, with the result that Mr Setefano continued to incur high interest charges. As well as that, the Commission remains concerned about the reasonableness of two other aspects of the fees charged, that is, default fees totalling $219 and an establishment fee of $129 (which the Commission considers exceeds the actual cost by $43).

The Amount for which Judgment is Sought

[8] The amount for which Real Finance now seeks judgment was specified in the Memorandum of Counsel for Real Finance dated 28 November 2017, which includes a schedule showing the various debits and credits against the account for Contract L13745 up to 22 July 2015 when the amended statement of claim was filed[3]. The present claim is for sums owing only under the second loan agreement (Contract L13745). The way in which the sum sought is particularised is by calculating the total sum owing as at 22 July 2015 (inclusive of fees and interest) at $3,553.33 and adding default interest at 39.375% per annum on that sum ($3.83 per day) from 22 July 2015 to the date of judgment ($3,328.27 as at hearing date), totalling $6,881.60.

[9] The make-up of the sum of $3,553.33 is apparent from the schedule attached to the Memorandum. It is summarised below:

Loan Principal			
Allocated to First Loan	…	$ 615.00	
Further advance to Debtor	…	$1,000.00	
Establishment Fee	…	$ 129.00	
		$1,744.00	$1,744.00
Default Fees			
(Charged intermittently October 2012 – November 2014)	…		$ 219.00
Interest[4]			

[3] The amounts then claimed are set out in Mallon J's judgment at Para [15]. They differ in significant respects from those now claimed.

[4] The way in which the interest calculation is expressed above follows the Memorandum of Counsel. An alternative method of expressing the calculation which in my mind better represents the structure of the contract is that interest has been charged at the ordinary rate from 12 December to 18 December 2012 and at the default rate from 18 December 2012 to 21 July 2015. The result is the same.

At the ordinary rate of 29.3795% per annum from 12 December 2012 to 21 July 2015 ($2.86 per day)	…	$1,621.90	
At the default rate of 39.3795% per annum from 18 December 2012 to 21 July 2015 ($0.97 per day)[5]	…	$ 693.47	$2,315.37
			$4,278.37
Less payments made (intermittently over the period May 2014 – July 2015)			$ 725.04
			$3,553.33

[10] The effect of calculating the amount sought in that way is that default interest has been charged on a compounding basis up to 22 July 2015, but not after that date. Now that the claim for administration fees has been abandoned, default interest accounts for $5,626 of the total claim of $6,881.60 ($3,328.27 plus $2,315.37 (less 6 days at $2.86 per day)).

The Default and Establishment Fees

[11] The Commission does not seek to argue that either the reduced establishment fee of $129 or the default fees totalling $219 are themselves oppressive, although it does not accept they have been demonstrated to be reasonable. These are comparatively small sums. In the context of the abandonment of the claim for $2,900 for administration fees, at first blush neither appears oppressive or unreasonable.

[12] As I said in my original judgment, the Court should not go out of its way to consider whether a claim is oppressive, a sentiment expressed in more studied language by Mallon J in her judgment in the High Court[6], I do not propose to consider reopening the contract for oppression on the basis of the default and establishment fees.

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5 The Schedule annexed to the Memorandum indicates that default interest was actually charged as from 18 September 2012. I have not sought to clarify that given the small monetary difference.

6 Ibid at Para [56]

Duration of the Default Interest Charges

[13] As set out above, Real Finance is seeking to recover default interest for the entire period from the first default on 18 December 2012 to the date of judgment over five years later. That default interest constitutes the great bulk of its claim. There are, in principle, two discrete periods of delay within that five year period: first, the delay from when the loan first went into default until the proceeding was issued (December 2012 – February 2015); secondly, the period from when judgment was first entered on 10 November 2015 until now.

[14] The first period is one which occurred simply because Real Finance chose not to exercise its right to bring a claim as soon as it could have. It is this period which is addressed in the Commission's evidence and submissions.

[15] The second period occurred simply because Real Finance exercised its right to pursue the claim for administration fees by appealing against the decision of this Court to reopen the contract for oppression on its own initiative and to disallow them. That appeal was unsuccessful on the issue of the Court's power to reopen the contract. The issue of the reasonableness of the fees was remitted back to this Court for hearing in late September 2016. Real Finance pursued the claim for administration fees in this Court, necessitating the involvement of the Commission. Then more than a year later and just a few days before the hearing, it abandoned that claim. This period of delay has been only briefly referred to in the Commission's submissions although the amount of default interest incurred during it is greater than that incurred prior to the issue of the proceeding.

[16] A preliminary issue arises as to whether the Court should even consider reopening the contract for oppressive conduct of this nature without giving Real Finance a further opportunity to present evidence and argument on the point. I am conscious that the original judgment was remitted back to this Court because Real Finance was not then given advance notice that the Court was contemplating reopening the contract in respect of the administration fees. There is a question whether it has been given adequate notice in respect of these delays.

[17] Following the remission of the case back to this Court by the High Court, it came before me again on a formal proof basis. Because the further evidence then provided by Real Finance still did not satisfy me of the reasonableness of the administration fees, I caused a Minute to be sent to the Commerce Commission asking whether it wished to appear and be heard on the claim. That Minute was accompanied by Mallon J's judgment, the amended statement of claim and Real Finance's affidavits. A copy was provided to Real Finance's solicitors.

[18] That Minute focussed on the issue then concerning the Court viz. the reasonableness of the administration fees. No mention was made of delay or the duration of the default interest charges. Nor was that issue mentioned in Mallon J's judgment. However, in the Deputy Registrar's covering letter explaining the background, she mentioned that the Central Processing Unit which first received the claim had deemed that the charges on fees *and interest* claimed were excessive.

[19] Apparently prompted by that, the affidavit of James McIvor for the Commission did overtly and in detail address the issue of the delay in enforcement until the proceeding was issued in February 2015 and the charging of default interest over that period in the context of oppression. The affidavit of Barry Jordan for Real Finance which followed did not touch upon the issue. Nor did Mr McIvor's affidavit in reply (understandably so).

[20] It was made clear in the Memorandum of Counsel for the Commission dated 30 November 2017, filed immediately after Real Finance confirmed that it was abandoning its claim for administration fees, that the Commission did want to be heard on that issue. In her submissions for the hearing, Real Finance's counsel pointed out that no issue had been taken about interest either by this Court in its earlier judgment, or before Mallon J in the High Court where an amicus curiae had participated. Nevertheless the memorandum did contain submissions which addressed the issue of delay in enforcement and its effect on interest.

[21] Although it may not have been clearly apparent to Real Finance and its lawyers until a few days prior to the hearing that the issue would be pursued on its own, I do consider on reflection that Real Finance has had adequate notice of it. The matter was

clearly raised in Mr McIvor's affidavit filed some months before the hearing. It was clearly centre stage once the claim for administration fees was abandoned. Counsel for Real Finance did not seek further time to file any further evidence on the issue and she did address it substantively in her submissions. In those circumstances I do intend to consider whether the first period of delay amounts to oppressive conduct.

[22] There is some uncertainty in the evidence as to exactly when Mr Setefano went into default on the second loan. At the latest it was in December 2012. Thus there was a period of two years and two months before proceedings were issued to enforce it.

[23] The Court's power to reopen a credit contract extends to situations where a party has exercised, or intends to exercise a right or power conferred by the contract in an oppressive manner[7]. The right to charge default interest is a right conferred by Contract L13745.

[24] There is a relative dearth of authority directly relevant to this issue. That was apparent at the hearing. I gave counsel the opportunity to provide any further relevant authority after the hearing, including any Australian authority. Despite the endeavours of both counsel, both before and after the hearing, there were only three authorities of direct relevance to which I was referred: *Aotea Finance (West Auckland) Limited v Hiku*[8], *Crawford v Heaven*[9] and *Pay Day Loan Limited v Lepou*[10].

[25] The *Aotea Finance* case was something of a test case for the application of s 120(b) of the Act to the issue of delay in enforcement of credit contracts under which a high rate of interest continued to accrue. Harrison DCJ referred to the relevant provisions of the Act and the authorities in which their meaning had been discussed to support the view he had adopted in numerous previous cases. That view was that finance companies ought to take legal proceedings culminating in judgment by default within one year of the date on which the borrower defaults on their contractual

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7 S 120(b) of the Act
8 [2015] NZDC 22553
9 [2000] 14 PRNZ 255 (HC)
10 [2009] DCR 890

repayment obligations. He stated that that view had been accepted by most, if not all of the finance companies.

[26] His Honour acknowledged that the period of one year was somewhat arbitrary, but explained the practical reasons why he considered it generally appropriate. He relied in support on the dicta of Broadmore DCJ in *Pay Day Loan Limited v Lepou*[11], where in relation to a similar type of loan contract he said:

> [39] I therefore consider that the rates of interest charged by the plaintiff are justifiable for the short-term, low value, high risk loans which constitute the plaintiff's business. But I further consider that such rates are justifiable only in the short term, or, put another way, justifiable for the intended term of the loan, and the period reasonably required to enable the plaintiff to obtain judgment against a defaulting borrower. …

[27] *Crawford v Heaven* was decided under s 10 of the Credit Contracts Act 1981, the predecessor to s 120 of the Act. There is, however, no material distinction in terms of the reopening of a credit contract for oppressive conduct. The judgment of Laurenson J was very much moulded by the peculiar facts of the case. However, the case is an example of the Court reopening a credit contract because the Court has considered that the exercise of a contractual power to charge penalty interest over an extended period of time amounted, objectively and in hindsight, to oppressive conduct.

[28] Obviously, the one year period referred to in *Aotea Finance* has no statutory basis. It is a rule of thumb not a rule of law. A delay of enforcement for a longer period may not be unconscionable in particular circumstances. Nevertheless, I agree with Harrison DCJ, that it is an appropriate yardstick against which to assess individual cases.

[29] The submissions of counsel for Real Finance on the issue were not extensive. She submitted that *"on ordinary commercial principles"* there is no fetter on when a party may choose to crystalise a claim and, if ultimately successful, interest is recognised as payable to the other party. She referred in that regard to the provisions of the Judicature Modernisation Bill. She also submitted that there is no binding authority that time taken by a party in enforcing its rights deprives a claimant of

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[11] supra

otherwise properly payable interest; or that such delay amounts to oppressive conduct for the purposes of the Act.

[30] I accept that (apart from limitation provisions) there is no fetter on when a party may issue proceedings for breach of contract. I am not familiar with the Judicature Modernisation Bill, which obviously is not law. I am, however, cognisant of the provisions of the Interest on Money Claims Act 2016 which did become law on 1 January 1918, but which is not applicable to this proceeding which commenced before then. It contains provisions for mandatory awards of interest similar to those in the Bill referred to by counsel.

[31] None of that is relevant to the issue here, which is whether the charging of default interest for an extended period after default and before enforcement amounts to oppression under the Act. There is authority, referred to above, that such conduct is capable of amounting to oppression. The question is whether it does in this case.

[32] There appears to be no good reason for the extent of the delay in this case. The schedule of credits and debits shows that Mr Setefano made no payments at all from the time the loan was first advanced and default charges applied. Payments of $30 per fortnight commenced in May 2014, well after the loan should have been repaid in full, and continued until 21 July 2015. However, default interest charges continued to be applied throughout that period, the net effect being that the balance owing continued to increase albeit a little more slowly.

[33] I have come to the conclusion that the imposition of the very high default interest rate for the whole period between the time of the first default and the commencement of proceedings is unduly burdensome and unconscionable and amounted to oppressive conduct justifying reopening the contract. In my view, it must have been obvious that Mr Setefano either would not or could not make the payments on this short term loan once two or three months had passed without any payment at all. If proceedings had then been taken, a judgment by default ought to have been obtained within a year of the original default, even allowing for the usual procedural hiccups.

[34] The other period of delay was that between the date of the original judgment by default and now. Once more, there was very little warning that this period of delay would be an issue, but there are fleeting references to it in both parties' submissions. In any event, it is difficult to see how any further evidence could be called about it. The course of events is apparent from the Court file. The submissions made by the parties on delay in enforcement apply also on this aspect of delay. This case, involving as it does only relatively small amounts, has already gone on for three years and justice requires a final resolution.

[35] Real Finance was entitled to appeal and entitled after the appeal to pursue the administration fees. Nevertheless, more than two years after the original judgment disallowing them, that quest was abandoned. Objectively and with the benefit of hindsight[12], the delay created by those actions of Real Finance has achieved nothing in respect of its claim against Mr Setefano. In those circumstances, it is unconscionable that Mr Setefano should be charged default interest at nearly 40% per annum during the period of that delay.

[36] The result is that I am satisfied that the Court should reopen the contract on the basis that Real Finance has exercised its rights oppressively by charging default interest for the whole of the period from 18 December 2013 to the present time.

[37] The Court has the power to adjust the interest rate for that period pursuant to s 127 of the Act. If Real Finance had obtained a judgment in December 2013, as it could have, it would have carried interest after judgment at the prescribed rate of 5% per annum pursuant to s 65A of the District Courts Act 1947[13]. I consider that that simple interest rate should be applied to the amount outstanding as at 18 December 2013 (inclusive of default interest to that date).

Costs

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12 See *Crawford v Heaven* (supra) at Para [136]

13 Which remained in force until 1 January 1918 pursuant to s 2(2)(b) District Courts Act 2016 despite its repeal by s 240(2) of that Act.

[38] The final issue is costs. The loan agreement confers on Real Finance the right to charge the costs of enforcement against Mr Setefano's account, including actual solicitors' fees and disbursements. As part of the original judgment, I awarded costs on that basis totalling $1,948.02 and further disbursements of $474. On the day of this hearing, Real Finance filed an affidavit from its solicitors recording that it has incurred legal costs of $23,718.86 since the matter was remitted back to this Court and a disbursement of $1,800 for the hearing fee. The affidavit confirmed that Real Finance is seeking that its judgment include that sum.

[39] It is self-evident that the vast bulk of these additional costs, which are grossly out of proportion to the sum involved in this case, were incurred in the effort to justify the administration fees, an effort which was abandoned at the last moment. Objectively, with or without the benefit of hindsight, it is harsh and quite unconscionable that Mr Setefano should bear these charges. In seeking to charge them all to him, Real Finance is exercising its contractual right oppressively. This finding also justifies the reopening of the contract.

[40] However, it should be recognised that the High Court did set aside this Court's original judgment so that Real Finance had to go back to the Court to obtain a judgment. There is no reason why it should not be awarded the estimated actual solicitor/client costs of obtaining a formal proof judgment which did not include administration fees. Section 127(1) of the Act is sufficiently broadly expressed to allow that result. In my view that would not have added more than $1,000 to the original award of $1,948.02 which itself covered all work required to obtain the original judgment. Any additional Court fees should also be included.

Result

[41] Judgment is to be entered for Real Finance in accordance with the terms of this decision. Counsel for Real Finance is to make the necessary calculations and file a memorandum with a draft judgment for sealing.

C N Tuohy
District Court Judge