Contravention of disclosure requirements of the Credit Act

Australia and New Zealand Banking Group Limited v various debtors and Department of Justice

David Niven, Maurice Blackburn, Carlton

This case relates to a large number of contraventions of the disclosure requirements of the Credit Act 1984 committed by the bank between 1985 and at least 1993. It is unknown how many contracts are affected by these errors, although it is believed that the disclosure errors occur on a significant percentage of the banks personal loan portfolio. Housing loans, overdrafts and credit cards are not effected.

The case arose out of an investigation by Consumer Credit Legal Service during the course of 1993 when that service became increasingly concerned by the level of compliance by the bank with the Credit Act. Under the Credit Act a credit provider is required to disclose extensive financial information concerning the cost of a loan on the loan contract. Failure to provide disclosures in accordance with the Act results in the credit provider losing its entitlement to interest on the loan, although it can seek to have interest reinstated either in full or in part by applying to the Credit Tribunal of Victoria. After an extensive investigation by Consumer Credit Legal Service, the bank acknowledged that it had a number of disclosure errors on its contracts and so in December 1993 lodged an application for reinstatement with the Credit Tribunal. The errors subject to the application at this time principally related to incorrect disclosure of insurance which was financed by the loan contract. In particular, the failure to disclose insurance commissions and to fully state the name of the insurers providing credit related insurance were common examples of error.

As part of the Credit Tribunal procedures relating to handling very large applications of this type, the Credit Tribunal ordered that the bank advertise its application in the press. Both Consumer Credit Legal Service and Maurice Blackburn & Co. indicated a willingness to represent consumers in this case and each agreed to advise consumers as to whether they were affected by the current application, and if so, act on their behalf. Both Consumer Credit Legal Service and Maurice Blackburn & Co. now act for approximately 2,000 consumers.

Having reviewed several thousand loan contracts the solicitors acting for the respondents were able to institute a further investigation into the banks compliance with disclosure requirements and this investigation revealed a number of serious disclosure errors by the bank which had previously not come to light. This included the failure to disclose fees and charges associated with the loan (sometimes in excess of $100), and some loan contracts disclosed a flat rate of interest as well as the nominal interest rate required to be disclosed by the Credit Act. Other loan contracts failed to disclose that the loan contract was secured by a mortgage which the debtor may have entered into some years previously in relation to another transaction, e.g. their home loan. This latter aspect of the proceedings was determined in December by the Credit Tribunal of Victoria which held that each of the above errors constituted a breach of the Credit Act 1984 and resulted in the bank losing its entitlement to interest charges, subject to its right to seek reinstatement.

The bank has now appealed this decision to the Supreme Court of Victoria and that appeal is to be heard in early April this year.

Medical negligence – failure to warn

Chappel v Hart

In *Chappel v Hart* (unreported, NSW Supreme Court CA, 24 December 1996), the plaintiff suffered damage to her vocal chords following a fairly rare complication of an operation on her oesophagus. The operation was elective although at a later stage it would have become necessary. There was no allegation that the operation was negligently performed, but rather that the doctor was negligent in having failed to warn the plaintiff of the risk of vocal damage.

The trial judge found that if the plaintiff had been warned of the risk to the vocal chords, she would have postponed the operation and made further enquiries to minimise the risk and made an award for the plaintiff.

The Court of Appeal dismissed the defendant's appeal and followed *Rogers v Whittaker* (1992) 175 CLR 479. The court held that a doctor should warn of a material risk where a patient is likely to attach significance to it and the doctor knows or should have known of this. It was also held that the "but for" test is an important criterion of causation, but not decisive and although the performance of the operation was not negligent, superior skill and experience would have reduced the risk of perforation, so the coincidence exception was not applicable. The negligence did in fact expose the plaintiff to a greater risk than would otherwise have been the case.