

New consumer credit protection regime: Solicitors beware!

With new credit laws applying to retainer arrangements, practitioners need to proceed with caution, as a Victorian case illustrates. Report by Wei-Loong Chen and Elise Whalan.

B*rott v Shtrambandt* [2009] VSC 467 was a case in the Victorian Supreme Court which considered a solicitor's costs agreement that created a charge over all of the client's property, both real and personal, to secure the payment of legal fees.

The court held that this costs agreement was a credit contract regulated by the Uniform Consumer Credit Code (UCCC), which meant it was invalid because of the UCCC's prohibition on mortgages granted over all of the property owned by a mortgagor.

Facts

Mr and Mrs S were getting a divorce and, consequently, were engaged in extensive legal proceedings.

Mrs S engaged a solicitor to act on her behalf. Since she could not afford to pay the legal fees upfront, she entered into a costs agreement that charged all of her property, both real and personal, in favour of her solicitor, "for the due and punctual payment of all moneys that may become due". This was a common practice of the firm, since the firm was one that habitually represented parties that did not have ready cash available in Family Court proceedings.

Five years later, with the proceedings still on foot, Mrs S terminated her solicitor's retainer. Her solicitor then lodged a caveat to protect his interest in the property. When the Family Court proceedings

were finally resolved, a property settlement was reached where the charged properties were transferred to Mr S.

After the proceedings settled, Mrs S failed to pay her legal fees which were in excess of \$250,000. As a result, her solicitor made a claim against her for the unpaid fees, and also against Mr S (as a result of the charge granted over the properties now held by Mr S).

Issues

Since Mrs S did not contest the debt that she owed to her solicitor, the main issue in this case was the validity of the charge granted by Mrs S over the property (now owned by Mr S).

The validity of the charge was disputed on the following grounds:

- that the charge over the entirety of a mortgagor's property was void for uncertainty and against public policy, and
- that the charge was void because the UCCC renders void any mortgages which are granted over the entirety of a mortgagor's property.

The court's decision

Although Mr S had claimed that the charge over all the real and personal property of Mrs S was void for uncertainty, Justice Beach found that it was possible to identify the charged property in this case. This meant that the charge had been

validly granted.

Justice Beach then considered whether the costs agreement was a "credit contract" under the UCCC.

For the costs agreement to be a credit contract under the UCCC, there had to be:

- the deferral of a debt
- incurred wholly for personal, domestic, or household purposes, and
- a charge made for the provision of the credit.

It was conceded by the solicitor that the debt owed by Mrs S had been deferred by the costs agreement she had entered into.

Justice Beach found that the credit had been provided "wholly for personal, domestic, or household purposes", since obtaining credit for the purpose of conducting Family Court proceedings against a former spouse fell into this category.

Finally, Justice Beach looked to the terms of the costs agreement in determining that a charge had been made for providing the credit. He considered two clauses of the costs agreement:

- a clause that allowed a 10 percent loading where the matter was particularly complex (in compliance with the Family Law Rules), and
- a clause that charged 12.3 percent interest for the period between the termination of



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the solicitor's retainer and the actual date of payment of the solicitor's fees.

Justice Beach considered that both of these clauses indicated that a charge had been made for providing the credit. His Honour also noted that, even if he had not been satisfied that a charge had been made for providing credit, the solicitor had failed to call evidence to rebut the presumption arising from section 11(1) of the UCCC that the UCCC applied.¹

This meant that the costs agreement was void because of section 40 of the UCCC as it did not describe or identify the property charged.

Instead, general words had been used which encompassed all present and future estates or interests of the mortgagor, preventing the solicitor from enforcing the charge against the property.

Conclusion

This case was decided under the UCCC, the result of which the solicitor was unable to enforce the charge against the property.

However, if this case had been decided under the new National Consumer Credit Protection Act, more serious consequences may have resulted for the solicitor, as the solicitor did not have an ACL which authorised him to provide credit. Under the NCCP Act, providing

credit without holding an ACL may result in both civil and criminal liability.

It is expected that the NCCP Regulations (when passed) will provide an exemption in certain circumstances for legal practitioners who engage in "credit activities".

Under the draft NCCP Regulations, in order to be covered by the exemption, the legal practitioner must:

- be acting on the instructions of a client (or an associate of the client)
- be acting in their professional capacity
- be acting in the ordinary course of their activities as a lawyer
- ensure that the credit activity is a necessary part of their activities as a lawyer
- ensure that they do not receive any benefit from the credit activity other than the payment of their professional fees and reimbursement of their expenses, and
- not hold themselves out as being able to suggest or assist a consumer to apply for a credit contract.

According to the explanatory memorandum of the NCCP Regulations, this exemption is intended to enable lawyers to act for

borrowers and ACL holders without themselves needing to obtain an ACL. This exemption will apply as long as the lawyer is acting in the ordinary course of their activities as a lawyer.

However, no further guidance has been provided as yet on what is considered to be in the ordinary course of a lawyer's activities. Further, it is uncertain what will be considered to be a "benefit" under the credit contract.

In this case, it would be interesting to know whether the clause in the costs agreement providing for a 10 percent loading in complex matters, or the clause charging interest for delay in payment, would have been considered a "benefit" under the exemption in the draft NCCP Regulations, given that Justice Beach held that these particular clauses were a charge for the provision of credit. ●

Footnote:

1. As required under section 11(1). See *Geeveekay v Director of Consumer Affairs Victoria* (2008) 19 VR 512 at 137.

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