

## RECEIVERS AND THE CREDIT CODE — ISSUES FOR SUCCESSFUL RECOVERY (A CASE STUDY)

JUDY LOUGHNAN

Solicitor, Corporate Solicitors Department  
Metway Bank Limited, Brisbane

Stewart Desperate (Desperate) has defaulted under his credit contract with Ritz Car Finance Pty Ltd (Ritz Finance). His ute has been repossessed and sold. In this paper I will examine the options for Desperate under the Consumer Credit Code and the potential liability of Ritz Finance and the receiver.

### WHAT CAN DESPERATE DO?

Desperate has been to Legal Aid and has been told that his credit contract does not comply with the Consumer Credit (Queensland) Act, (the Code).

Desperate has also been to the media and his story has been presented on a current affairs programme.

Consumer Affairs have investigated Ritz Finance and have discovered that:

- customers are pressured to buy vehicles;
- there are no compliance systems;
- the documents and the computer systems do not comply with the Code.

### WHAT REMEDIES ARE AVAILABLE TO DESPERATE?

The obvious question to ask is **whether the finance contract is regulated by the Code.**

The Code primarily applies to loans made by credit providers to resident humans, where the money is predominantly for personal purposes and a fee or interest is charged.

In this case, Desperate intended to "use the car for work".

The wording of section 6(1)(b) of the Code is sufficiently obscure to create controversy as to whose purpose applies, the financier's or the borrower's purpose.

In this case, Desperate purchased a recent model utility (ute) and his purpose for the vehicle was "work" or business purposes. Ritz Finance, on the other hand, has intended a regulated credit transaction.

The critical words in section 6(1)(b) are “the credit is provided or intended to be provided”. Credit is always provided by the financier which would indicate that it is the financier’s purpose that is the critical test.

In any proceedings, if Desperate claims that the contract is regulated, it is presumed that it will be regulated under section 11(1) unless the contrary is established.

If section 6(1)(b) refers to the credit provider’s purpose, why have a Business Purpose Declaration which establishes the borrower’s purpose? Section 169 renders void any attempt to contract out of the provisions of the Code. In my view, it should be the borrower’s purpose that is relevant in determining whether the contract is regulated.

In this case there is no evidence that a Business Purpose Declaration, in the form required by section 11, was obtained. In order to establish that the contract was not regulated by the Code, Ritz Finance will need to lead evidence that Desperate is a self employed courier or some like occupation.

## WHO IS THE CREDIT PROVIDER?

We know that Ritz Finance lent the money to Desperate to buy the ute.

Ritz Finance obtained the money from Ritz Car Dealers Pty Ltd (Ritz Car Dealers).

Ritz Car Dealers obtained the money from a wholesale facility provided by Oz Bank.

“Credit Provider” is defined in the first schedule to be “the person that provides credit”.

In accordance with the meaning of “credit” in section 4, the only credit provider is Ritz Finance.

## WHAT REMEDIES ARE AVAILABLE TO DESPERATE?

### 1. Application under Section 101 of the Code

Desperate is a Queensland resident. Provided that no prior application has been filed by Ritz Finance or Consumer Affairs, Desperate can apply to the Queensland Supreme Court (the court) for an order that a civil penalty be imposed in respect of a breach of a key requirement of the Code (Section 100 and Regulation section 72).

“Key requirements” relate to disclosure of important information such as the amount of credit, the interest rate, repayments, fees and charges.

Civil Penalties are not automatically imposed on discovery of a breach as was the case with the Credit Acts. The court must declare whether Ritz Finance has breached a key requirement in connection with Desperate’s contract and then may make an order requiring Ritz to pay a civil penalty: section 102.

The court in considering Desperate’s application must have regard to:

- (a) the conduct of Ritz Finance and Desperate before and after the credit contract was entered into;
- (b) whether the contravention was deliberate or not;
- (c) loss or detriment suffered by Desperate as a result of the insufficient or inaccurate disclosure of information;

- (d) when Ritz Finance first became aware, or ought reasonably to have become aware, of the contravention;
- (e) any systems or procedures to prevent or identify contraventions; (Consumer Affairs have found this to be inadequate);
- (f) whether the contravention could have been prevented by Ritz Finance;
- (g) any action taken by Ritz Finance to remedy the contravention or compensate the borrower or prevent further contraventions; (no evidence of this);
- (h) the time taken to make the application and the nature of the application;
- (i) any matter the court considers relevant.

The maximum penalty that may be imposed where an application is brought by the borrower is all interest charges payable under the contract from the date the contract was made. At this stage there is no precedent for penalties imposed for breaches of the Code.

Section 103(2) provides that the court may impose a greater civil penalty if Desperate can satisfy the court that he has suffered a "loss", in which case, the civil penalty is to be not less than the "loss".

It will be interesting to see how the courts and tribunals will define "loss". In my view the reasoning in *Grays case*<sup>1</sup> should be followed and "loss" should be limited to loss or damage resulting from the particular contravention giving rise to the civil penalty.

## 2. Prohibited Monetary Obligations

If Desperate has been charged more than is permitted by the Contract or the Code, he may recover the amount under section 21(3) as a civil penalty.

## 3. Reopening Unjust Transactions – Section 70

Desperate can apply to the court under section 70 of the Code. The court may reopen the transaction if Desperate can establish that the circumstances relating to the contract at the time it was entered into were unjust. There are 14 specified circumstances which a court can have regard to in determining whether the contract was unjust as well as the catch all "any other relevant factor". Desperate will be able to lead evidence under several of the section 70 sub-sections including:

- It is unlikely that the provisions of the contract and the legal and practical effect were accurately explained to Desperate: section 70 (i).
- There may also be evidence that the sales rep exerted unfair pressure or undue influence in order to get Desperate to obtain finance for a ute he could not afford: section 70(j).
- There is no evidence that Ritz Finance took any measures to ensure that Desperate understood the nature and implications of the transaction: section 70(k).
- Desperate told the sales rep that he had a low income and a history of defaulting on credit and that he did not think he would be able to get finance to buy the more expensive car,

---

<sup>1</sup> *Custom Credit Corporation Ltd v Gray* (1991) ASC 56-096.

indicating an inability to repay the loan in accordance with its terms. The sales rep told him not to worry: section 70(l).

The court could reopen the credit contract and set it aside or alter the agreement or relieve Desperate from payment of any amount in excess of such amount as the court considers to be reasonable.

#### **4. Default Requirements**

Desperate has made a default in payment under the credit contract. The Code requires the financier to follow certain procedures before it can take action to recover the loan.

##### **(a) Notice of Default**

Unless Ritz Finance served a notice of default complying with section 80 and at least 30 days lapsed after the notice was served, Ritz Finance has breached section 80 and could be liable to a penalty of \$5,000.

Consumer Affairs have found that Ritz Finance's computer systems did not comply so that it is unlikely that the information required by section 80 was correctly set out in a default notice.

It is assumed that security was taken over the vehicle entitling Ritz Finance to repossess the vehicle in the event of default by Desperate.

##### **(b) Repossession of Mortgaged Goods**

It is unclear at what stage in the contract Desperate defaulted. If the amount owing at the time of repossession was less than 25% of the amount originally financed or \$10,000, a court order is required before Ritz Finance can take possession of the ute. Maximum penalty for breach of this provision is \$10,000.

##### **(c) Entry onto residential premises**

It is unclear whether the vehicle was repossessed from Desperate's residence or place of work. If the vehicle was repossessed from home then unless Ritz Finance obtained a court order authorising the entry or obtained the informed consent of the occupier of the home, Ritz Finance may be liable to a further fine of \$5,000 as well as being liable to the occupier for damages for trespass: section 91.

##### **(d) Notice requirements after Repossession**

Ritz Finance is required to give Desperate within 14 days of repossessing the vehicle, written notice including:

- (i) estimate of the value of the goods;
- (ii) the enforcement expenses to the date of repossession and thereafter the rate of accrual.
- (iii) Form 8 Notice After Taking Possession of Mortgaged Goods.

A breach of any of these requirements is an offence under the Code with a maximum penalty of \$5,000: section 94.

Ritz Finance is required to sell the goods as soon as reasonably practicable for the best price reasonably obtainable and provide Desperate with written notice of same. Failure to do so is an offence with a maximum penalty of \$5,000: section 96.

If Ritz did not get the best price reasonably obtainable for the ute, Desperate may apply for an order under section 98 that Ritz Finance credit Desperate with "a payment, fixed by the court, exceeding the net proceeds of sale".

It is a little ambiguous as to how the amount of the "payment" should be calculated. The amount must be credited by Ritz Finance as "a payment". This indicates that the potential compensation is limited to the amount outstanding on the loan. In this case the amount of any shortfall between the sale price and the amount of the loan would be the maximum "payment".

Unless Ritz Finance can prove that it exercised the power of sale in accordance with the Code requirements, Desperate may also be entitled to compensation for loss suffered as a result.

Credit Act cases provide some guidance as to how the court will determine loss.<sup>2</sup> Matters which are likely to be taken into consideration include:

- (i) inability to sell the mortgaged goods in the manner and at the time that the mortgagor chooses;
- (ii) loss of deposit and trade-in and equity in the vehicle;
- (iii) interest charges between possession and the hearing;
- (iv) lack of use of the vehicle;
- (v) cost of repurchasing a vehicle including stamp duty and other associated costs;
- (vi) best price reasonably obtainable by private sale;
- (vii) loss occasioned by failure to comply with the proper procedures and failure to give adequate notice.

## **5. Related Sale Provisions**

The sales rep for Ritz Car Dealers also arranged the finance for Ritz Finance.

There is evidence of a linked credit provider relationship and a tied loan contract between Ritz Car Dealers and Ritz Finance.

Ritz Finance could be liable for any representation made by the sales rep from Ritz Car Dealers about the finance contract: section 118(1). Ritz Finance would be entitled to be indemnified by the sales rep and Ritz Car Dealers against any damage suffered: section 118(2).

There is an issue with the interpretation of section 119. Section 119(1)(b) only refers to the finance contract. The effect is that the supplier and financier are liable if the borrower suffers loss or damage as a result of misrepresentation, breach of contract, or failure of consideration in relation to the finance contract.

## **6. Third Line Forcing**

Whilst Desperate would not have obtained credit from a "reputable financier" the sales rep may have breached section 130 which prohibits a supplier from requiring the purchaser to apply or obtain credit from a particular credit provider (also section 47 of the Trade Practices Act).

---

<sup>2</sup> *Wilson v Australian Guarantee Corporation Limited* (1987) ASC 55-598 (No 1); *Wilson v Australian Guarantee Corporation Limited* (1987) ASC 55-606 (No 2).

**7. Harassment**

Consumer Affairs have found that “customers are pressured to buy vehicles”.

It is an offence under the Code for a credit provider or supplier to harass a person in attempting to get that person to apply for credit or to enter into a credit contract or a related transaction. Although the Code contains no definition of “harass”, Desperate may be able to establish that the sales rep harassed him to purchase the more expensive vehicle and get the loan when he was unable to afford it. Maximum penalty under section 145 is \$10,000.

**SIMULATION OF THE LOAN AND MAXIMUM POTENTIAL PENALTIES**

I have added imaginary amounts to the facts of the case study in order to illustrate the maximum potential liability of Ritz Finance:

Retail purchase price of the Ute	\$20,000.00
Amount of the personal loan (at 13.5% p.a. for a term of 5 years)	\$18,000.00
<u>Approximate Credit Charges</u>	<u>\$6,750.00</u>
Borrower defaults	
Sale of repossessed vehicle	\$15,000.00
<u>Shortfall</u>	<u>\$3,000.00</u>
Section101 Civil penalty total amount of credit charges	\$6,750.00
Plus compensation for loss	\$?
Section 21(3) Prohibited monetary obligations	\$?
Section 70 Re-opening	\$?
Section 80	\$5,000.00
Section 83	\$10,000.00
Section 91	\$5,000.00
Section 94	\$5,000.00
Section 96	\$5,000.00
Section 118 Liability for misrepresentations by sales rep	\$?
Section 119 Liability for misrepresentation, breach of contract, failure of consideration	\$?
Section 130 Third line forcing	\$10,000.00
Section145 Harassment	\$10,000.00

Maximum penalty of:

- \$50,000.00 in criminal penalties payable to the Crown;
- plus interest charges (\$6,750.00) civil penalties )
- plus refund of prohibited monetary charges ) payable to Desperate.
- plus compensation )

It appears that Desperate’s plight may not be as bleak as his name suggests.

Of course, if Ritz Finance can establish that the loan was not regulated by the Code these penalties will not apply.

**LIABILITY OF THE RECEIVER**

Oz Bank appoints a receiver and manager who continues to run the finance company book, collecting debts from borrowers without being aware of the Code obligations.

Is the receiver and manager liable in the capacity of (a) a credit provider or (b) an officer of Ritz Finance?

- (a) The receiver does not, in my view, become a credit provider.

The receiver has been appointed by Oz Bank to assume control of all the assets of Ritz Finance including the loan book. The receiver is the agent of Ritz Finance.

Under section 166, if the rights of a credit provider under the credit contract are assigned or pass by law to another person, the Code from then on applies to that other person. In my view the rights of a credit provider have not been assigned or passed by law.

- (b) In section 232 of the Corporations Law, "officer" in relation to a corporation includes "a receiver, or receiver and manager of property of the corporation".

Under section 183 of the Code, each officer of the corporation is taken to have contravened the provision, if the officer knowingly authorised or permitted the contravention. For the purpose of the Code "officer" means a director or a person who is otherwise concerned in its management. The receiver in this case has assumed management of the loan portfolio.

The receiver is unaware of the Code and presumably unaware that the computer system does not comply.

What does "knowingly" mean? Intention to do the act or intention to breach the law.

The receiver is required to exercise the degree of care and diligence that a reasonable person in a like position in a corporation would exercise in the circumstances.

In this case, the administrator was appointed because of the adverse publicity about Code breaches. The receiver was appointed because the administrator was appointed.

In my view, the receiver could be personally liable for breaches which the receiver permitted or authorised. These could include disclosure breaches in relation to any new loans made and breaches of the enforcement provisions. It is less clear if the receiver passively receives repayments whether he or she would be personally liable for a breach of section 21.

*(The views expressed in this paper are the views of the writer. They do not necessarily reflect the views of SUNCORP-METWAY Ltd.)*