Case Note

Boman Irani Pty Ltd & Ors v St George Bank Ltd (2008) 22 VR 135

by

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Court of Appeal sounds warning to lenders claiming indemnity costs in circumstances where solicitors offer rebates on fees, and refers its reasons to ASIC

In the recently reported decision of *Boman Irani Pty Ltd & Ors v St George Bank Ltd* (2008) 22 VR 135 (***Boman***), the Victorian Court of Appeal had occasion to consider the propriety of an arrangement between a lender and borrower/guarantors that contemplated the extraction from the borrower/guarantors of legal costs that were not ultimately incurred by the lender. The reason for the disparity between the legal costs claimed and those ultimately paid was the (hardly unique) nature of the fee agreement between the lender and its solicitors, which entitled the lender to a rebate on the basis of the volume of work performed by the firm for the lender. In the leading judgment delivered by Hargrave AJA (with which Warren CJ and Neave JA agreed), his Honour not only deemed such arrangements to be improper, but also noted that the inference was open that the lender had for some years been wrongfully extracting excessive costs from other parties who were liable to indemnify it in respect of legal costs. In those circumstances, and having regard to the probability that such practices were likely to be widespread in the banking and financial community, the Court of Appeal took the unusual step of referring its reasons for judgment to the Australian Securities and Investment Commission (***ASIC***). As Neave JA concisely observed, it was considered that "... [such arrangements] *were contrary to public policy under the principle in Hamilton v Haw*"[1].

Hamilton v Haw [1962] VR 215 was a decision of the Full Court of the Supreme Court of Victoria and concerned an arrangement between a solicitor and a debt collector under which the solicitor, who instituted proceedings on behalf of the debt collector, was only entitled to charge the debt collector a percentage of the legal costs actually claimed from debtors in such proceedings. As a consequence of this arrangement, it followed that in cases where full recovery was obtained in the proceeding,

the judgment debtor paid legal costs which were (significantly) more that the debt collector was liable to pay the solicitor. When a dispute arose between the solicitor and the debt collector, and the debt collector sued the solicitor to recover moneys received by him from debtors, the solicitor raised a defence of illegality. Delivering the judgment of the Full Court, Adams J stated that it was "*sufficient to taint the agreement with illegality that it <u>contemplated the improper exaction of excessive costs</u> from judgment debtors and bound the* [solicitor] *to pay these over, if recovered*" [emphasis added][2].

In *Boman,* notwithstanding the fact that the rebates were part of the global relationship between the firm and the lender (rather that referrable to any one matter or proceeding), Hargrave AJA, considered the same principle could be applied, given the "*immediate, albeit deferred,*" effect upon the third parties who were liable to indemnify the Bank for its legal costs. His Honour noted that

> "... *when taken as a whole the relevant arrangements did contemplate the improper extraction of excessive legal costs from the bank's customers, their guarantors and other third parties liable to indemnify the bank in respect of its legal costs. The fact that the bank may have acted in the honest belief that it was entitled to be paid all of its legal costs without any credit in respect of the... rebates... is not to the point. Viewed objectively*, *the conduct of the bank in seeking to retain the volume rebates for itself was wrong and unjust.*"[3]

Relevantly, his Honour went on to suggest that had all the legal costs demanded of the appellants (guarantors) in that case actually been paid to the lender (which they had not), the excessive amount (i.e. the relevant proportion of the rebates) could have been recovered from the lender "*as money paid by mistake on principles of unjust enrichment*"[4].

The Court of Appeal's judgment in *Boman* is noteworthy not only for its warning to the banking and financial industry generally about the importance of factoring rebate arrangements into both claims for legal costs and calculations of debts generally, but also for the 'green light' seemingly given to past debtors to take steps to recover any such possibly excessive amounts paid under legal costs indemnities, upon the principles of unjust enrichment – and that is to say nothing of the Court's referral of its reasons to ASIC.