Federal Court of Australia

Dennis v Commonwealth Bank of Australia [2022] FCA 1338

|  |  |
| --- | --- |
| File number(s): | QUD 172 of 2020  QUD 177 of 2020 |
|  |  |
| Judgment of: | **COLLIER J** |
|  |  |
| Date of judgment: | 11 November 2022 |
|  |  |
| Catchwords: | **APPEAL –** appeal from a decision of the Federal Circuit Court granting summary judgment against the appellant – whereas the appellant contended that the respondent breached provisions of the *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**) and *Code of Banking Practice 2013* by declining to provide her with additional finance – appellant alleged bias on the part of the primary Judge only after reasons delivered – no bias on the part of the primary Judge demonstrated - whereas a lender is not obligated to provide additional finance to an individual – primary Judge did not err in summarily dismissing the appellant’s action – appeal dismissed  **APPEAL -** appeal from a decision of the Federal Circuit Court declining to dismiss the respondent’s claim for a breach of s 160D *National Consumer Credit Protection Act 2009* (Cth)(**NCCPA**) by the appellant – whereas the appellant declined to provide the respondent with additional finance – whereas the appellant did not engage in a credit activity for the purposes of the NCCPA by declining to provide the respondent with additional finance – no statements made in connection with that decision enliven the operation of s 160D of the NCCPA – appeal allowed |
|  |  |
| Legislation: | *Evidence Act 1995* (Cth)  *National Consumer Credit Protection Act 2009* (Cth)  *Federal Circuit Court Rules 2001*  *Code of Banking Practice 2013* |
|  |  |
| Cases cited: | *ASIC v Financial Circle Pty Ltd* [2018] FCA 1644  *Charisteas v Charisteas* [2021] HCA 29  *Dennis v Commonwealth Bank of Australia* [2020] FCCA 1313  *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; 205 CLR 337  *Johnson v Johnson* [2000] HCA 48  *Kumar v Secretary, Department of Social Services* [2022] FCAFC 95  *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* [2021] HCA 2 |
|  |  |
| Division: |  |
|  |  |
| Registry: | Queensland |
|  |  |
| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Regulator and Consumer Protection |
|  |  |
| Number of paragraphs: | 65 |
|  |  |
| Date of hearing: | 26 August 2021 |
|  |  |
| Counsel for the Appellant in QUD 172 of 2020 and Counsel for the respondent in QUD177 of 2020 | The appellant/respondent appeared in-person |
|  |  |
| Counsel for the Respondent in QUD 172 of 2020 and Counsel for the appellant in QUD 177 of 2020 | Mr M Alexander |
| Solicitors for the Respondent in QUD 172 of 2020 and Counsel for the appellant in QUD 177 of 2020 | Gadens Lawyers |
|  |  |

|  |  |
| --- | --- |
| **Table of Corrections** |  |
|  |  |
| 12 December 2022 | In paragraph 59 “not” has been inserted before the words “false or materially misleading within the meaning of s160D(1)…” |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | QUD 172 of 2020 |
|  | | |
| BETWEEN: | SUSAN DENNIS  Appellant | |
| AND: | COMMONWEALTH BANK OF AUSTRALIA  Respondent | |

|  |  |
| --- | --- |
| order made by: | COLLIER J |
| DATE OF ORDER: | 11 November 2022 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the respondent’s costs of and incidental to the appeal, such costs to be taxed if not otherwise agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | QUD 177 of 2020 |
|  | | |
| BETWEEN: | COMMONWEALTH BANK OF AUSTRALIA  Appellant | |
| AND: | SUSAN DENNIS  Respondent | |

|  |  |
| --- | --- |
| order made by: | COLLIER J |
| DATE OF ORDER: | 11 november 2022 |

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The respondent pay the appellant’s costs of and incidental to the appeal, such costs to be taxed if not otherwise agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

COLLIER J:

1. Before the Court are two appeals from a decision of the Federal Circuit Court (as it then was) delivered on 26 May 2020 in *Dennis v Commonwealth Bank of Australia* [2020] FCCA 1313 (**primary decision**). These appeals were filed in QUD172/2020 (**first appeal**) and QUD177/2020 (**second appeal**) on 8 June 2020 and 12 June 2020 respectively.
2. The first appeal was filed by the Ms Susan Dennis and the second appeal was filed by the Commonwealth Bank of Australia (**the Bank**). On 8 October 2020, Reeves J made orders that the applications for leave to appeal, and the substantive appeals, in both these proceedings be heard together. Leave to appeal was granted by Reeves J in relation the first appeal on 2 February 2021, and on 3 March 2021 referable to the second appeal.
3. In summary, Ms Dennis appealed the decision of the primary Judge to summarily dismiss her claims against the Bank relating to alleged contraventions by the Bank of certain provisions of the *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**) and the *Code of Banking Practice 2013* (**Code of Banking Practice**). In turn, the Bank appealed the refusal of the primary Judge to summarily dismiss that part of Ms Dennis’ claim referable to alleged contravention by the Bank of s 160D (1) of the NCCPA.

# background

1. On or around 20 August 2013, Ms Dennis and the Bank entered into a loan agreement. In accordance with that agreement, the Bank loaned Ms Dennis the amount of $285,000 by means of a Complete Home Loan facility. The terms of that agreement required Ms Dennis to make monthly repayments to the Bank over a term of 20 years; one year being an interest-only period, and the remaining 19 years consisting of principal and interest repayments. As security for this loan, Ms Dennis granted the Bank a first registered mortgage over her primary residential property.
2. Subsequently, Ms Dennis failed to make repayments to the Bank in accordance with the loan agreement. As of the date of the hearing, Ms Dennis had yet to remedy this default. As at 19 March 2018, the Bank claims it was owed $311,353.53 by Ms Dennis.

# DECISION OF THE PRIMARY JUDGE

1. The primary Judge considered an application by the Bank for summary dismissal of Ms Dennis’s primary application, in which she claimed the amount of $750,000 (or otherwise the maximum compensation possible) pursuant to s 178(1) of the NCCPA for compensation for alleged contraventions by the Bank of that Act and breaches of theCode of Banking Practice. As his Honour explained, the alleged contraventions by the Bank occurred on 4 November 2015 when an employee of the Bank decided to decline temporary financial accommodation sought by Ms Dennis. Ms Dennis claimed compensation for the loss she allegedly incurred as a consequence of that decision. She also claimed that the Bank should refund to her the interest it charged from 11 November 2015 to four accounts that she held with the Bank, as well as refunding to her the repayments she had made on her then existing home loan, personal loan and credit card accounts since 11 November 2015.
2. In the principal proceedings before his Honour the grounds on which Ms Dennis relied were as follows:

1. In November 2015 the Commonwealth Bank of Australia (CBA) breached its responsible lending obligations under the National Consumer Credit Protection Act 2009 and the Code of Banking Practice 2013 by declining a temporary loan I had the capacity to repay in full approximately four (4) months later solely on the basis that my income is stopping temporarily while I am taking leave. The CBA disregarded all the relevant information I provided about my circumstances at that time except that my income is stopping temporarily. The CBA disregarded my financial situation at that time which demonstrated my capacity to repay the temporary loan. The CBA disregarded my requirements and objectives at that time even though the CBA knew that it was vital for every aspect of my life that I remain employed and my permanent government employment was not in jeopardy. The CBA failed to recognise the significant financial hardship I was suffering at that time i.e. my companion animals and I were facing starvation, and placing all my loan repayments on hold would not have provided me with funds to purchase food and petrol to travel to purchase food etc. to enable me to continue to live at that time. When I applied for a temporary loan, the CBA knew I was planning to return to work as soon as possible. If the CBA had approved this temporary loan I would have returned to my government employment, working my standard hours, on 4 January 2016. The CBA knew that their decision in November 2015 to decline this temporary loan would force me to resign from my permanent government employment to access my superannuation and significant financial hardship for the remainder of my life.

2. In November 2015 the Commonwealth Bank of Australia deceived me about its responsible lending obligations in accordance with what was described to me at that time as the ‘Lending Code of Practice implemented by the Australian government’.

3. In addition to breaching its responsible lending obligations, the Commonwealth Bank of Australia (CBA) breached its obligations under the Code of Banking Practice 2013 and the recommendations of the Code Compliance Monitoring Committee by failing to give genuine consideration to my significant financial hardship at that time and not engaging actively and cooperatively with me to ensure an effective outcome. The CBA failed to assist me to stop my circumstances from deteriorating. The CBA failed to deal with my urgent complaint dated 5 November 2015 about the decision of the CBA on 4 November 2015 in a genuine, fair and prompt manner. The CBA did not contact me about my complaint dated 5 November 2015 until 16 November 2015 after the CBA knew I had been forced to resign from my permanent government employment to access my superannuation so that my companion animals and I could continue to live at that time.

1. His Honour commenced his reasons as follows:

1. Does the *National Consumer Credit Protection Act 2009* (Cth) and the Code of Banking Practice 2013 impose an enforceable obligation on a bank to lend a customer money in the event that the bank assesses that a particular credit contract or extension to the limit on a credit contract is suitable for its customer? The answer to this question underpins the claim made in these proceedings by the applicant, Ms Dennis, against the respondent, Commonwealth Bank of Australia.

1. His Honour set out in detail relevant background facts, including referable to Ms Dennis’ employment history, her relationship with her companion animals, and her dealings with the Bank. In particular, his Honour set out details of Ms Dennis’ caring for her companion dog Hobson, her need to take leave to do so, and that Ms Dennis would receive no income during that leave period. His Honour referred to correspondence between Ms Dennis and the Bank, in which Ms Dennis sought “an increase in my loan amounts. It does not matter whether it is in the form of a personal loan overdraft and an increase in my personal loan.” The Bank’s response to that, as found in a letter of 4 November 2015, included:

I understand it must be a very stressful time for you at the moment, emotionally and financially.

I have discussed your situation with my manager and as your income is stopping while you are taking leave, unfortunately will not be able to put in an application for an overdraft increase at this stage. I can see the home loan is still on interest only so you are paying the minimum payment.

I understand your frustration, I think best plan would be to look at withdrawing funds from your superannuation.

I am thinking of you at this hard time, it is very difficult for you.

I can definitely look at your finances once you are receiving an income again when you are back at work and understand this will not help unfortunately in the interim.

1. On 5 November 2015 Ms Dennis wrote a letter of complaint to the Bank about the Bank’s letter of 4 November 2015, in particular about “the attitude of the manager at the Upper Coomera branch.” His Honour summarised:

13. Ms Dennis set out the circumstances that led to the predicament in which she found herself. She also pointed out that she had never defaulted on any repayments on any financial facilities in her life. She set out the background to her employment situation. She pointed out that although she was temporarily without income she still had employment on a permanent basis and had real property in which he had “significant equity”. She pointed out that she could access her superannuation when she turns 65 although she was unable to access it early because she will remain employed and not on Centrelink benefits. She was going to turn 65 in about four months’ time. She pointed out that when she had used her immediately available cash reserves she would be without any resources with which to purchase food and petrol or to care for her animals. She pointed out that she would then have no other option than to resign from her secure, permanent, government employment even though she could not afford to retire and did not want to. She considered the attitude of the Upper Coomera branch manager as “extremely harsh and inhumane” and she requested a response to her concerns, if possible by return the same day.

1. Ms Dennis submitted that the Bank did not reply to her letter of complaint until 16 November 2015, by which time she had resigned from her employment with a view to accessing her superannuation. Ms Dennis asserted that the Bank knew that she had been forced to resign from her employment so that she could access her superannuation.
2. The parties agreed before his Honour that the NCCPA applied to the dealings between Ms Dennis and the Bank, and that that legislation imposed certain statutory duties on the Bank. Further, his Honour noted that the terms of the Code of Banking Practice were incorporated into the contracts Ms Dennis had with the Bank in respect of each of her banking products. It was not in dispute that the terms of the Code of Banking Practice formed part of the contracts between Ms Dennis and the Bank in respect of the loans and other credit facilities Ms Dennis had with the Bank in November 2015.
3. His Honour examined the relevant obligations cast upon the Bank by Chapter 3 of the NCCPA, and found that Part 3-2 had relevance in the primary proceedings (in particular Divisions 2 and 3). His Honour noted that the point of the obligations in that part was summarised in s 125, which provided that the rules in the Part applied to licensees that are credit providers and are aimed at better informing consumers and preventing them from being in unsuitable credit contracts.
4. His Honour then set out paragraphs 27-28.11 of the Code of Banking Practice.
5. At [28] his Honour referred to the arguments of Ms Dennis that addressed the ways in which the Bank allegedly breached its “legal lending obligations under Sections 130 and 131 of the National Consumer Credit Protection Act (and Section 27 Provision of Credit of the Code of Banking Practice) as well as its contractual obligations in its four (4) Loan Agreements” with her, namely:

a) by ignoring her capacity to repay the temporary loan that she was seeking in full in approximately four (4) months;

b) by refusing to provide her with temporary financial assistance, which she argues forced her into substantial financial hardship “for the remainder of my life even though my permanent government employment was secure and I was in a position to return to work on a full-time basis on 4 January 2016”; and

c) by ignoring that she only required a temporary increase in funds and that she intended to remain in permanent government employment which would enable her to continue to increase her wages income, continue to manage her loan repayments, improve her standard of living and remain living on her property.

1. At [30] his Honour noted the argument of Ms Dennis that the decision of the Upper Coomera branch manager on 4 November 2015 took away from her the opportunity to continue in permanent employment, to increase her wages and to continue to service her borrowings and thereby remain living on her property with her companion animals, which decision forced her into retirement and was grossly negligent. His Honour continued:

31. Ms Dennis’s case is that on a proper assessment of her financial circumstances and her situation, the respondent could not have come to the conclusion that the credit contract that she was seeking to enter into with the respondent was unsuitable for her for the purposes of the Act. She further argues that in order for the respondent to meet its legal lending obligations under the Act and the Code, the respondent should have approved the minimal increase in her overdraft limit so as to enable her to remain in employment.

32. I am prepared to accept the fundamental factual proposition that underscores Ms Dennis’s argument namely that on a proper assessment of her financial circumstances and her situation, the respondent could not have come to the conclusion that the credit contract that she was seeking to enter into with the respondent was unsuitable for her for the purposes of the Act.

1. His Honour noted that s 178(1) of the NCCPA provides for orders for compensation, however only where a defendant has contravened a civil penalty provision or has committed an offence against the NCCPA. In this respect his Honour observed, in summary:

* whilst Part 3-2 of the Act contains a number of civil penalty provisions, none of them were engaged in this case (at [35]);
* section 128 was not engaged by conduct of the Bank (at [36]-[38]); and
* section 133 (1) was not engaged by conduct of the Bank (at [39]-[40]).

1. Importantly, his Honour continued:

41, Leaving aside the question of s.160D(1) which I will address later in these reasons, absent being able to demonstrate that the respondent breached a civil penalty provision of the Act, to succeed in her present proceedings Ms Dennis must demonstrate that Chapter 3 of the Act creates some general obligation on the part of the respondent to:

a) undertake any assessment about the unsuitability of a credit contract or an increase in the credit limit of a credit contract in good faith; and

b) if the credit contract or an increase in the credit limit of a credit contract is not assessed as unsuitable for her, offer to enter into the credit contract or increase the limit of her credit contract as she requested.

42. Even assuming that there is an obligation on the part of the respondent to undertake any unsuitability assessment in good faith, the difficulty with Ms Dennis’s argument is that whilst the responsible lending rules set out in Chapter 3 of the Act prevent a lender such as the respondent entering into an unsuitable credit contract with a consumer such as Ms Dennis, it does not oblige a lender to enter into a suitable credit contract with a consumer. That is to say, there is nothing in the responsible lending rules set out in Chapter 3 of the Act that obliged the respondent to offer any financial accommodation or credit contract or loan, however it might be described, to Ms Dennis. It was not obliged to enter into a contractual arrangement with her even though the financial accommodation she sought might not have been assessed against the responsible lending criteria as unsuitable for her.

43. That is not surprising. As a matter of general law, the relationship between banker and customer is contractual and consensual…

44. It can be seen from those principles that even an existing customer of the bank has no basis for an expectation that the bank will extend credit to the customer without the bank’s agreement. The bank has a discretion to extend further credit to the customer. The bank is not obliged to extend the credit in the absence of a pre-existing agreement between the customer and the banker.

45. Nothing in the Code of Banking Practice 2013 changes that position, in my view. As can be seen from the text of clause 27 of the Code extracted above, the focus of that clause is upon the assessment of the ability of the borrower to repay the credit facility and the clause imposes an obligation on the bank to exercise the care and skill of a diligent and prudent banker in selecting and applying the credit assessment methods to do that. Nothing in clause 27 obliges a credit provider such as the respondent to make an offer for the provision of credit to a consumer that even if it assesses that the consumer is able to repay the credit facility. It does not create such an obligation.

46. Further, it is plain from the text of clause 28 generally, and clause 28.2 more particularly, that the object of the clause is to create an obligation on a credit provider to communicate with a consumer about financial difficulties that the consumer might be having “with any credit facility [the consumer] has with us”. However, there is nothing in clause 28 which obliges a credit provider, as part of that process, to extend further credit to the consumer.

1. Finally his Honour referred to s160D(1) of the NCCPA, which provides that a person must not in the course of engaging in a credit activity give information or a document to another person if the giver knows or is reckless as to whether the information or document is false in a material particular or materially misleading. Subsection 160D(1) is a civil penalty provision. His Honour referred to allegations by Ms Dennis that a representative of the Bank provided her information that was false in a material particular or was materially misleading: in summary she claimed that she was told the Bank could not provide her with any financial assistance simply because her income had temporarily ceased, and that the Bank was “prohibited from considering [Ms Dennis’] individual circumstances because of its legal lending obligations under the Lending Code of Practice implemented by the Australian government.”
2. His Honour noted that there was no such thing as the “Lending Code of Practice”, however cl 28 of the Code of Banking Practice permitted the Bank to take into account Ms Dennis’ individual circumstances when deciding upon a request for financial assistance by her. Further, Chapter 3 of the NCCPA required a credit provider or licensee to take into account a consumer’s individual circumstances when assessing whether the particular credit contract or credit limit increase under consideration would be unsuitable for the consumer (in particular referable to s 130(1)).
3. His Honour observed:

52. Taking Ms Dennis’s case at its highest, if a statement in the terms she alleges or to the effect of what she alleges was made to her, was in fact made, she may arguably make out a case for a contravention of s.160D(1) of the Act. However, a finding that the respondent had contravened s.160D(1) would not lead to the making of an order for compensation as Ms Dennis seeks because the contravention occurred after she had resigned from her employment which, according to her case is the cause of the deterioration in her financial circumstances. There remains the possibility of the imposition of a pecuniary penalty for the contravention.

53. To succeed, the respondent bears the onus of demonstrating that Ms Dennis has no reasonable prospect of successfully prosecuting her application.

1. His Honour further found at [54] that Ms Dennis had failed to substantiate her claim that the Bank failed to deal with her complaints in a way she expected.
2. His Honour concluded:

55. The National Consumer Credit Protection Act and the Code of Banking Practice 2013 do not impose, separately or collectively, an enforceable obligation on a bank to lend a customer money in the event that the bank assesses that a particular credit contract or extension to the limit on a credit contract is suitable for its customer. That they do not impose such an obligation means, and I find, that Ms Dennis has no reasonable prospect of successfully prosecuting her proceeding based upon the respondent contravening the responsible lending criteria set out in the Act and the Code. She also has no reasonable prospect of successfully prosecuting her claim based upon the failure of the respondent to deal with her complaints in the way in which she anticipated or desired.

56 I have found that her claim relating to a contravention of s.160D(1) of the National Consumer Credit Protection Act is arguable, taking her case at its highest.

57. In those circumstances, it is appropriate that her proceedings, save for the claim for a contravention of s.160D(1), be summarily dismissed pursuant to rule 13.10(1) of *Federal Circuit Court Rules 2001* (Cth).

1. By Orders dated 26 May 2020, the primary Judge granted the Bank’s application for summary judgment in the following terms:
2. Save for the claim for a contravention of s.160D(1) of the *National Consumer Credit Protection Act 2009* (Cth) the application filed on 19 January, 2018 be dismissed pursuant to rule 13.10(1) of the *Federal Circuit Court Rules 2001* (Cth);
3. The remainder of the application is adjourned to 26 June 2020 at 9.30am for directions.
4. Subsequently, both Ms Dennis and the Bank separately appealed the primary decision on separate grounds.

# First appeal QUD172/2020

1. Ms Dennis’ grounds of appeal in the first appeal, as amended and filed on 19 March 2021, are as follows:

1. The primary Judge displayed bias against me and denied me procedural fairness.

Examples: The primary Judge ignored my oral submissions on 3 February 2020 and misrepresented the legal basis of my case.

2. The primary Judge erred in his reasoning of Section 128 *Obligation to assess unsuitability* of the National Consumer Credit Protection Act 2009.

3. The primary Judge erred in his wording of the first part of court order (1) *Save for the claim for a contravention of s. 160D(1) of the National Consumer Credit Protection Act 2009 (Cth)* because two contraventions of Section 160D Prohibition on giving misleading information etc. occurred on 4 November 2015 and 16 November 2015.

## Ms Dennis’ submissions

1. Ms Dennis’ submissions in support of her appeal were lengthy and largely repetitive. In relation to ground 1, she submitted, in summary, that:

* the primary Judge ignored her oral submissions, the evidence contained in her affidavits sworn on 19 January 2018 and 6 April 2018, and the other evidence provided by her in reaching his decision, as demonstrated by:
  + the primary Judge accepted “at face value without any supporting evidence the oral submissions of Gadens counsel and his written submissions handed up at the hearing…”;
  + the primary Judge was biased against Ms Dennis, and consequently his judgment was “riddled with significant legal and factual errors according to the evidence…” and that he additionally “misrepresented the legal basis of [Ms Dennis’] case because the question he decides upon in paragraph 1 which underpins his Judgment is not the reason the CBA refused to increase the $2,000 limit of my overdraft facility on 4 November 2015.”;
  + the Bank’s summary dismissal application was without merit;
  + the affidavits relied upon by the Bank in support of its summary dismissal application were incorrect as Ms Dennis’ case did not concern irresponsible lending given that she was not in financial distress;
  + the submissions of the Bank were not supported by evidence;
  + the primary Judge ignored “important wording” in Ms Dennis’ application;
  + the primary Judge failed to list the Bank’s contraventions of its obligations under the loan agreement with Ms Dennis;
  + the primary Judge misapprehended the nature and substance of Ms Dennis’ complaint to the Bank dated 5 November 2015; and
  + the primary Judge made multiple factual errors in his judgment.

1. In relation to ground 2, Ms Dennis submitted, in summary, that:

* the primary Judge erred in his reasoning referable to s 128 of the NCCPA by relying on the question he posed at [1] of his reasons and later determined, namely that the NCCPA and the Code of Banking Practice did not impose an enforceable obligation on a bank to lend a customer funds in the event that the bank assesses that a particular credit contract or extension to the limit on a credit contract is suitable for its customer;
* the primary Judge erred in reaching the conclusion that the Bank was not required to take into account Ms Dennis’ financial position, requirements or objectives which is contrary to s 128(d), and the inquiry requirements it imposes referable to s 130 of the NCCPA;
* the primary Judge relied “upon a Judgment that according to the evidence has nothing to do with the reason for the CBA’s lending decision or any aspect of my case because this Judgment only mentions Schedule 1 National Credit Code of the Act concerning fees charged to deposit and credit card accounts”; and
* the Bank’s conduct resulted in Ms Dennis finding herself in financial distress and in an unsuitable financial position contrary to the NCCPA.

1. In the context of ground 3, Ms Dennis submitted in summary that:

* the primary Judge recognised, at [2] of his reasons, that the contraventions of s 160D of the NCCPA of which Ms Dennis complained took place on 4 November 2015, and that these contraventions include “the CBA Upper Coomera Manager cannot legitimately claim that he was unaware that the reason given to me for the CBA’s Refusal i.e. “as your income is stopping while you are taking leave” on 4 November 2015 is false in a material particular and materially misleading which is a contravention of Section 160D(1) of the Act”;
* the primary Judge erred at [49] of his reasons by relying on an affidavit filed by Ms Dennis on 13 February 2018 when no such affidavit of this date exists;
* the primary Judge erred by relying on, at [49]–[50], the “Lending Code of Practice” given to Ms Dennis by the Bank, and by confirming that “the reason for its lending decision i.e. “as your income is stopping while you are taking leave”” and asserting that such a finding was in line with responsible lending obligations under the NCCPA, when in reality he Bank breached s 160D of the NCCPA; and
* the primary Judge erred at [52] by finding that even if the Bank had breached s 160D of the NCCPA, this would not allow Ms Dennis to receive the compensation she sought under s 178 of the NCCPA.

## The Bank’s submissions

1. The Bank submitted, in summary, that:

* the primary Judge displayed no bias in his conduct of the primary proceedings, but rather allowed Ms Dennis ample opportunity to present her case, was familiar with her material, and undertook to re-read her material prior to making a decision;
* it is unclear in what sense Ms Dennis contended she was denied procedural fairness in the primary proceedings. In any event it was clear that Ms Dennis was afforded procedural fairness by the primary Judge as evidenced by the primary Judge allowing Ms Dennis to make her submissions largely uninterrupted, and only intervening when required to do so;
* the primary Judge did not err in his application of s 128 of the NCCPA, and in finding that the Bank had not breached its obligations under that section. Further, given the Bank declined to provide Ms Dennis with additional credit, or increase her existing credit facilities, s 128, and the inquiry requirements of s 130, of the NCCPA has not been enlivened;
* the primary Judge correctly identified all relevant factors and dates referable to Ms Dennis’ arguments under s 160D(1) of the NCCPA; and
* in any event, the conduct of which Ms Dennis complained as breaching s 160D of the NCCPA did not amount to such a breach given that it did not occur in the course of engaging in a credit activity as is defined by sections 6 and 160D(1) of the NCCPA, as it did not occur in the course of advancing Ms Dennis funds under the relevant loan agreement.

1. I will examine each of Ms Dennis’ grounds of appeal in turn.

### Ground 1

1. The concept of apprehended bias was explained by the High Court in *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; 205 CLR 337 where Gleeson CJ and McHugh, Gummow and Hayne JJ observed:

6. Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror), as here, the governing principle is that, subject to qualifications relating to waiver (which is not presently relevant) or necessity (which may be relevant to the second appeal), a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. That principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial. It is convenient to refer to it as the apprehension of bias principle.

7. The apprehension of bias principle may be thought to find its justification in the importance of the basic principle, that the tribunal be independent and impartial. So important is the principle that even the appearance of departure from it is prohibited lest the integrity of the judicial system be undermined. There are, however, some other aspects of the apprehension of bias principle which should be recognised. Deciding whether a judicial officer (or juror) might not bring an impartial mind to the resolution of a question that has not been determined requires no prediction about how the judge or juror will in fact approach the matter. The question is one of possibility (real and not remote), not probability. Similarly, if the matter has already been decided, the test is one which requires no conclusion about what factors actually influenced the outcome. No attempt need be made to inquire into the actual thought processes of the judge or juror.

8. The apprehension of bias principle admits of the possibility of human frailty. Its application is as diverse as human frailty. Its application requires two steps. First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an "interest" in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.

(footnotes omitted)

1. For more recent affirmation of these principles see *Charisteas v Charisteas* [2021] HCA 29, *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* [2021] HCA 2, and *Kumar v Secretary, Department of Social Services* [2022] FCAFC 95.
2. Specifically in relation to statements by a Judge, and questions by a Judge of a party or Counsel, in the course of a hearing, I note the following comment by Gleeson CJ, Gaudron, McHugh, Gumnow and Hayne JJ in *Johnson v Johnson* [2000] HCA 48:

13. Whilst the fictional observer, by reference to whom the test is formulated, is not to be assumed to have a detailed knowledge of the law, or of the character or ability of a particular judge, t**he reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice**. The rules and conventions governing such practice are not frozen in time. They develop to take account of the exigencies of modern litigation. At the trial level, modern judges, responding to a need for more active case management, intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx. In *Vakauta v Kelly* Brennan, Deane and Gaudron JJ, referring both to trial and appellate proceedings, spoke of "the dialogue between Bench and Bar which is so helpful in the identification of real issues and real problems in a particular case." Judges, at trial or appellate level, who, in exchanges with counsel, express tentative views which reflect a certain tendency of mind, are not on that account alone to be taken to indicate prejudgment. **Judges are not expected to wait until the end of a case before they start thinking about the issues, or to sit mute while evidence is advanced and arguments are presented.** On the contrary, they will often form tentative opinions on matters in issue, and counsel are usually assisted by hearing those opinions, and being given an opportunity to deal with them.

(**emphasis added**)

(footnotes omitted)

#### Consideration of ground 1

1. Taking into consideration relevant principles and the submissions of the parties, I am not satisfied that the primary Judge displayed bias in his conduct of the primary proceeding, nor that Ms Dennis was denied procedural fairness by his Honour. As Ms Dennis contended at the hearing before me, ground 1 of her appeal solely took issue with the primary Judge’s “conduct towards [her] after the hearing”, namely in the form of his Honour’s written judgment. Ms Dennis further explained that this alleged bias on the part of his Honour and denial of procedural fairness manifested itself in such a way as:

…when (the primary Judge) ignored my oral submissions which are supported by evidence, and instead relied upon information the Commonwealth Bank’s representatives, Gadens counsel, made up at the hearing, which is not supported by any evidence in the preparation of his judgment.

1. Ms Dennis went on to submit:

The CBA’s claim that my first ground of appeal concerns the conduct of [the primary Judge] during the hearing is ridiculous, **because [the primary Judge] only spoke once during my oral submissions, and this was to clarify the section of the Act I was referring to**. When I had completed my oral submissions, [the primary Judge] mentioned his prior judgment, a**nd advised me that he would review this in the preparation of his judgment**.

[The primary Judge] **did not say anything inappropriate while I was present at the hearing**, and this is confirmed in the transcript of the proceeding and the wording of every court form I have filed concerning my first ground of application and appeal.

(**emphasis added**)

1. It is trite to note that there is a clear distinction between a decision of a judicial officer with which a party to litigation may disagree, and one that is *actually tainted* by judicial bias or procedural unfairness. The primary Judge’s decision referable to Ms Dennis plainly falls in the former category.
2. Allegations of bias, and allegations of denial of procedural unfairness, are very serious. They go to the very heart of the impartiality and morality required of judicial officers. Such allegations should not be made without significant evidence to support them, and should never be used as a catch-all criticism referable to a decision with which a party simply disagrees.
3. The decision of the primary Judge was not tainted by either bias or procedural unfairness. By her own admission, Ms Dennis was afforded every opportunity to present her case. In the course of presenting her case Ms Dennis filed a large volume of supporting material, which was, in turn, discussed at length by the primary Judge. Ms Dennis has not identified any aspect of the hearing before his Honour where his Honour acted in any way other than impartially, nor has she identified any absence of procedural fairness to her in the course of the proceedings.
4. Ground 1 of the first appeal fails.

### Ground 2

1. Relevantly, ss 128-130 of the NCCPA provide:

**128 Obligation to assess unsuitability**

A licensee must not:

(a) enter a credit contract with a consumer who will be the debtor under the contract; or

(aa) make an unconditional representation to a consumer that the licensee considers that the consumer is eligible to enter a credit contract with the licensee; or

(b) increase the credit limit of a credit contract with a consumer who is the debtor under the contract; or

(ba) make an unconditional representation to a consumer that the licensee considers that the credit limit of credit contract between the consumer and the licensee will be able to be increased;

on a day (the ***credit day***) unless the licensee has, within 90 days (or other period prescribed by the regulations) before the credit day:

(c) made an assessment that:

(i) is in accordance with section 129; and

(ii) covers the period in which the credit day occurs; and

(d) made the inquiries and verification in accordance with section 130.

**129 Assessment of unsuitability of the credit contract**

For the purposes of paragraph 128(c), the licensee must make an assessment that:

(a) specifies the period the assessment covers; and

(b) assesses whether the credit contract will be unsuitable for the consumer if the contract is entered or the credit limit is increased in that period.

Note: The licensee is not required to make the assessment under this section if the contract is not entered or the credit limit is not increased.

**130 Reasonable inquiries etc. about the consumer**

Requirement to make inquiries and take steps to verify

(1) For the purposes of paragraph 128(d), the licensee must, before making the assessment:

(a) make reasonable inquiries about the consumer’s requirements and objectives in relation to the credit contract; and

(b) make reasonable inquiries about the consumer’s financial situation; and

(c) take reasonable steps to verify the consumer’s financial situation; and

(d) make any inquiries prescribed by the regulations about any matter prescribed by the regulations; and

(e) take any steps prescribed by the regulations to verify any matter prescribed by the regulations.

1. As the primary Judge noted at [37] of the primary decision, in the circumstances of the present case the Bank did not engage in any conduct referable to Ms Dennis that would have enlivened the operation of s 128 of the NCCPA. In particular, in refusing to increase Ms Dennis’ existing credit facility with the Bank, the Bank did not:

* enter into a credit contract with Ms Dennis;
* make an unconditional representation that the Bank thought Ms Dennis was eligible to enter a credit contract with it;
* increase the credit limit of an existing credit contract between Ms Dennis and the Bank; or
* made an unconditional representation that the credit limit of an existing credit contract between Ms Dennis and the Bank would be able to be increased.

1. It necessarily follows that, given none of the preconditions of s 128 of the NCCPA were met, and s 128(d) was not enlivened, there was no requirement that the Bank undertake relevant assessments and inquiries under ss 129 and 130.
2. Contrary to the submissions of Ms Dennis, there is no obligation under the NCCPA for a lender to provide an individual with credit, or increase an existing credit limit under an existing contract. There is similarly no positive obligation on the part of the Bank to make inquiries or an assessment under ss 129 and 130 of the NCCPA in the event that credit is not provided, or an existing credit limit is not increased, to a consumer.
3. This reading of the NCCPA is clearly supported by the Revised Explanatory Memorandum to that statute, which provides that the purpose of the types of inquiries and assessments outlined in ss 129-130 is “to ascertain a reasonable understanding of the consumer’s ability to meet *all* the repayments, fees, charges and transaction costs of complying with the proposed credit contract” (cl 3.69). In light of justification, it is illogical to suggest that these inquiries and assessments are required to be made in the event that no activity outlined in s 128 of the NCCPA actually occurs.
4. It follows that ground 2 of the first appeal does not succeed.

# Ground 3, and second appeal in qud177 of 2020

1. As I noted earlier in this judgment, the primary Judge’s findings with respect to the application of s 160D of the NCCPA form the basis of ground 3 of the first appeal, as well as the second appeal of the Bank in QUD 177 of 2020.
2. It is convenient to examine the application of s 160D in relation to ground 3 and the second appeal together at this juncture.

## Relevant law

1. Section 160D of the NCCPA provides:

**160D Prohibition on giving misleading information etc.**

*Prohibition on giving misleading information etc.*

1. A person (the giver) must not, in the course of engaging in a credit activity, give information or a document to another person if the giver knows, or is reckless as to whether, the information or document is:

(a) false in a material particular; or

(b) materially misleading.

Civil penalty: 5,000 penalty units.

*Offence*

(2) A person commits an offence if:

(a) the person gives information or a document to another person; and

(b) the person does so in the course of engaging in a credit activity; and

(c) the information or document is false in a material particular or materially misleading.

1. Definitions relevant to s 160D of the NCCPA are set out in ss 6-8:

**6 Meaning of *credit activity***

1. The following table sets out when a person engages in a ***credit activity***.

|  |  |  |
| --- | --- | --- |
| **Meaning of *credit activity*** | | |
| **Item** | **Topic** | **A person engages in a *credit activity* if:** |
| 1 | credit contracts | 1. the person is a credit provider under a credit contract; or 2. the person carries on a business of providing credit, being credit the provision of which the National Credit Code applies to; or 3. the person performs the obligations, or exercises the rights, of a credit provider in relation to a credit contract or proposed credit contract (whether the person does so as the credit provider or on behalf of the   credit provider); or |
| 2 | credit service | the person provides a credit service; or |
| 3 | consumer leases | 1. the person is a lessor under a consumer lease; or 2. the person carries on a business of providing consumer leases; or 3. the person performs the obligations, or exercises the rights, of a lessor in relation to a consumer lease or proposed consumer lease (whether the person does so as the lessor or on behalf of the lessor); or |
| 4 | mortgages | 1. the person is a mortgagee under a mortgage; or 2. the person performs the obligations, or exercises the rights, of a mortgagee in relation to a mortgage or proposed mortgage (whether the person does so as the   mortgagee or on behalf of the mortgagee); or |
| 5 | guarantees | 1. the person is the beneficiary of a guarantee; or 2. the person performs the obligations, or exercises the rights, of another person who is a beneficiary of a guarantee or proposed guarantee, in relation to the guarantee or proposed guarantee (whether the person does so on the person’s own behalf or on behalf of the   other person); or |
| 6 | prescribed activities | the person engages in an activity prescribed by the regulations in relation to credit, being credit the provision of which the National Credit Code applies to, or would apply to if the credit were provided. |

(2) A subclass of any of the conduct referred to in the table in subsection

(1) is also a ***credit activity***.

Note: For example, ASIC could impose a condition on a licence under subsection 45(6) that provides that a person is authorised to be a credit provider only under particular types of credit contracts (such as credit card contracts).

**7 Meaning of *credit service***

A person provides a ***credit service*** if the person:

(a) provides credit assistance to a consumer; or

(b) acts as an intermediary.

**8 Meaning of *credit assistance***

A person provides ***credit assistance*** to a consumer if, by dealing directly with the consumer or the consumer’s agent in the course of, as part of, or incidentally to, a business carried on in this jurisdiction by the person or another person, the person:

(a) suggests that the consumer apply for a particular credit contract with a particular credit provider; or

1. Section 160D was considered by O’Callaghan J in *ASIC v Financial Circle Pty Ltd* [2018] FCA 1644. His Honour observed at [70]-[71]:

[70] Some distinguishing features of the sections are as follows:

…

**(4) s 160D of the National Credit Act requires that the representation be made in the course of engaging in a credit activity; and**

**(5) s 160D of the National Credit Act requires that the giver of the information or document knows or is reckless as to whether the information or document is false in a material particular or materially misleading.**

[71] Conduct is misleading or deceptive if it has a tendency to lead a person into error: *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304; 257 ALR 610; 73 ACSR 1; [2009] HCA 25 at [25] per French CJ. Conduct is likely to mislead or deceive if there is a real or not remote chance or possibility of it doing so: *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82 at 87; 55 ALR 25 at 30. It is sufficient if the conduct is prone, or has a propensity, or is liable to mislead or deceive, even though there is less than a 50% chance that this will, in fact, happen: *Rupert Co Ltd v Imperial One Ltd* (2003) 45 ACSR 18; [2003] NSWSC 217. Whether conduct is, or is likely to be, misleading or deceptive is determined objectively: *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592; 212 ALR 357; [2004] HCA 60 at [109]–[110] per McHugh J. The attributes and knowledge of the person or persons at whom the relevant conduct was directed may be taken into account: *Weitmann v Katies Ltd* (1977) 29 FLR 336 at 340–3 per Franki J.

(**emphasis added**)

## Ms Dennis’ submissions

1. As I have previously briefly noted, Ms Dennis contends that the Bank breached s 160D of the NCCPA on two occasions. The first concerns the Bank’s written communication, dated 4 November 2015, “to not to increase the $2,000 credit limit of [Ms Dennis’] personal overdraft” on the basis that “i.e. [Ms Dennis’] income is stopping while [Ms Dennis] [is] taking leave (temporarily).” Ms Dennis contended that this conduct of the Bank was “false in a material particular and materially misleading”, and therefore in breach of s 160D of the NCCPA, because:

* the Bank did not inform Ms Dennis that “it had a primary legal obligation under the Act to consider [her] financial position, [her] requirements and [her] objectives at the time to ensure its lending decision did not place [her] in the unsuitable position prohibited by the Act”; and
* the Bank did not inform Ms Dennis that “its legal obligations in its loan contracts with [her] include, for instance, taking into account [her] personal situation in order to provide [her] with financial hardship assistance so that [her] family and [her] could continue to live until [she] could return to work full-time in the near future”.

1. The second contravention of s 160D of the NCCPA alleged by Ms Dennis concerned a conversation Ms Dennis had with an employee of the Bank on 6 November 2015. Ms Dennis contended that during that conversation the employee “verbally confirmed that the reason for its lending decision on 4 November 2015 i.e. [her] income is stopping while [she was] taking leave was its only consideration to meet its legal obligations under the Act”.

## The Bank’s submissions

1. The crux of the Bank’s submissions in the context of s 160D of the NCCPA appeared to be that, as ss 128-130 of the NCCPA were not enlivened by the Bank’s decision not to provide Ms Dennis with additional credit, any conversation alleged to have occurred on 16 November 2018 was not conduct that occurred “in the course of engaging in a credit activity” within the meaning of s160D(1).
2. Mr Alexander went on to submit as follows:

One then needs to consider, well, what were the section 160D arguments or the misrepresentations that Ms Dennis says existed, and those are summarised by [the primary Judge] from paragraph 49 of the reasons for judgment, which is found at page 31 of the appeal book, your Honour. And, in effect, w**hat Ms Dennis says is that she was told by the bank representative that they were prevented from lending money to her because of a lending code of practice, that there was no need for the CBA Upper Coomera Branch Manager to allow her to make an appointment to talk to her about an individual situation because of – and she goes on.**

In my respectful submission, the error here by the learned primary judge is that those representations are relevant – that those representations may be relevant to the provision of credit activity in section 128 through to 130, and I accept that there is no trial decision or appeal court decision on the application of this point, but I come back to the analogy earlier, that if it was the National Australia Bank with the primary loan and the Commonwealth Bank now, there could be no challenge to the fact that the application of one – that section 160D(1) could not apply.

…

The further error, in my respectful submission, and final error in respect of the application of 160D(1) is that it’s materially misleading, and there is no evidence led, and indeed, none exists as to how a statement in circumstances where – which is why these submissions in relation to both appeals are inextricably linked – upon your Honour finding, or accepting the submission, **rather, about the application of 128 through 130, that is, that there is no positive obligation to provide finance, then how can, one asks rhetorically, a misrepresentation by the bank as to a refusal to provide finance be materially misleading?**

(emphasis added)

## Consideration

1. In my view the primary Judge erred in not summarily dismissing Ms Dennis’ claims against the Bank referable to s 160D (1) of the NCCPA.
2. Section 160D(1) is enlivened only when a person – in this case, the Bank – gives relevant information or a document to another person *in the course of engaging in a credit activity*.
3. Even if the conversation Ms Dennis alleged occurred on 16 November 2015, the Bank had already refused to extend her credit – it was not information given to Ms Dennis by the Bank in the course of providing credit to her.
4. I further accept the submission of the Bank that, again, if the conversation did occur, it was not false or materially misleading within the meaning of s160D(1) for the Bank to have informed Ms Dennis that it was preventing from lending further funds to her when she was not working and had no income to service any such loan.
5. Finally, in determining in a civil proceeding whether the Court is satisfied that a case has been proved on the balance of probabilities, 140(2) of the *Evidence Act 1995* (Cth) requires the Court to take into account (*inter alia*) the gravity of the matters alleged. Section 160D(1) of the NCCPA is a civil penalty provision, allowing the imposition of monetary penalties on the Bank should it be found to have contravened. In the circumstances as explained by his Honour, this aspect of Ms Dennis’ claim relied solely on an unsupported assertion of a communication to her by the relevant Bank employee. A letter by Ms Dennis to the Financial Services Ombudsman Service almost eighteen months after the alleged conversation, repeating the assertion, was plainly not evidence of substance.
6. Rule 13.10 of the *Federal Circuit Court Rules 2001* (as relevant in the present case) provide that the Court may order a proceeding be dismissed generally if satisfied that, *inter alia*, the party prosecuting the claim has no reasonable prospect of successfully prosecuting it. Speculative consideration of a claim of breach of s 160D(1) by reference to the applicant’s case “at its highest”, in circumstances where no evidence is adduced other than an unsupported assertion, does support a finding of satisfaction of reasonable prospects of successful prosecution of the case.
7. In my view the Bank’s appeal in QUD 177 of 2020 ought be allowed. It follows that ground 3 of Ms Dennis’ appeal fails.

# CONCLUSION

1. For the reasons I have outlined, none of Ms Dennis’ grounds of appeal in the first appeal are successful. Her appeal is dismissed.
2. The Bank’s appeal is allowed.
3. It is appropriate that Ms Dennis pay the Bank’s costs, to be taxed if not otherwise agreed.

|  |
| --- |
| I certify that the preceding sixty-five (65) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Collier. |

Associate:

Dated: 11 November 2022