

The definition of a contract for s.11 (2) of the Code

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ON 26 JUNE 2008 THE NSW Court of Appeal in *Bahadori v Permanent Mortgages Pty Ltd* [2008] NSWCA 150 considered whether a declaration pursuant to s.11(2) of the Consumer Credit Code was effective in circumstances where it was executed several days *before* the mortgage documents but several days *after* the execution of a non-binding 'indicative letter of offer'.

Section 11 of the Code sets out a number of presumptions relating to when the Code applies to a loan. Those provisions include:

"(2) Credit is presumed conclusively for the purposes of this Code not to be provided wholly or predominantly for personal, domestic or household purposes if the debtor declares, before entering into the credit contract, that the credit is to be applied wholly or predominantly for business or investment purposes (or for both purposes)."

Pivotal to the dispute was whether the extended definition of 'contract' in Schedule 1 to the Code applied to s.11(2): "Contract includes the series or combination of contracts, or contracts and arrangements".

Case

At first instance before the Consumer Trader and Tenancy Tribunal, the borrowers argued that the 'indicative letter of offer' they signed was a contract for the purposes of s.11 of the Consumer Credit Code, basing their argument on the applicability of the extended definition.

The lender argued, and the Tribunal member accepted, that the indicative letter

of offer was not a contract because in the event that the lender declined to advance the amount of the loan, the borrower could not have "gone to Equity" and obtained an order for specific performance. This was because:

□ the offer was expressed to be indicative only and there were several circumstances which could have changed between the date of the indicative letter of offer and final settlement; and,

□ the appellants would have had to provide a valuation of the property which was satisfactory to the lenders and such an obligation would have been unenforceable in Equity.

Appeal

In the Court of Appeal, Tobias JA, with whom Giles JA and Campbell JA agreed, formed the opposite view, noting:

"[168] In these circumstances, the acceptance by the appellants of the letter of offer ... resulted in a contract coming into existence whereby ... [the solicitor firm] warranted that it had authority from an undisclosed but identified lender to provide a loan of \$52,000 in accordance with the terms of the offer. That contract was followed two days later by the tender ... of the mortgage documentation ... By executing those documents ... there thereby came into existence a 'credit contract' within the meaning of s.5 of the Code.

"[169] In these circumstances it cannot be gainsaid that there was other than a series of contracts or arrangements within the meaning of the extended definition of 'contract'. It was not disputed that if the extended definition applied to the expression 'credit contract' in s.11(1) and (2), then that contract came into existence ... prior to the making of the s.11(2) declaration by the appellants.

"[170] In my opinion Conway's submission that the

extended definition of 'contract' has no application to s.11 should be rejected."

It follows that any contract which results in there eventually coming into existence a 'credit contract' within the meaning of s.5 of the Code will nullify the effect of a s.11(2) declaration if it is executed prior to the declaration.

Non-contractual documents

Although his Honour's decision turned upon the indicative letter of offer being a contract of sorts, he left open the possibility that a non-contractual document, such as an application form or a telephone inquiry from a finance broker, falls within the arrangements limb of the definition if it ultimately results in the formation of a credit contract from which the operation of the Code is sought to be excluded.

If this is the case, it is difficult to see how a lender can effectively avail itself of the advantages of a s.11(2) declaration.

Lenders relying on s.11(2) declarations should also note that his Honour in obiter dictum opined: "Even where a loan is 'rolled over' at the end of its initial term, there is much to be said for the view that a new credit contract is entered into at the time of rollover which, if the credit provider wishes to avoid the application of the provisions of the Code thereto, would require it to obtain a s.11(2) declaration prior to any such rollover being effected." □

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