

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**CREDIT LIST**

VCAT REFERENCE NO M264/2007

**CATCHWORDS**

Credit – application to strike out/dismiss claim – whether Consumer Credit Code applies – whether business purpose declaration ineffective – whether doctrine of *non est factum* applies – relevant principles on strike out application where many aspects of claim contested – *Consumer Credit (Victoria) Code* ss6, 11, 70 and 176 and Sched 1; *Consumer Credit (Victoria) Regulations* r10; *Victorian Civil and Administrative Tribunal Act 1998* s75

<b>APPLICANT</b>	Concetta Naturani
<b>RESPONDENT 1</b>	Perpetual Trustees Victoria Ltd (A.C.N. 004 027 258)
<b>RESPONDENT 2</b>	PG Walton Investments Pty Ltd (A.C.N. 079 328 251)
<b>JOINED PARTY 1</b>	Steven Naturani
<b>JOINED PARTY 2</b>	Real Estate Mortgage Services Pty Ltd (A.C.N. 100 505 137)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	C. McKenzie, Deputy President
<b>HEARING TYPE</b>	Strike-out Hearing
<b>DATE OF HEARING</b>	4 August 2008
<b>DATE OF ORDER</b>	14 October 2008
<b>CITATION</b>	



**ORDER**

- 1 The Second Respondent's application under s75 of the *Victorian Civil and Administrative Tribunal Act 1998* (the VCAT Act) is dismissed.
- 2 The costs of the Applicant in the substantive proceeding of and incidental to the application under s75 of the VCAT Act are reserved. The Applicant has liberty to apply for those costs on reasonable notice to the Second Respondent and the Tribunal.

3 This proceeding is listed for a directions hearing at 11.00 am on 30 October 2008 at 55 King Street, Melbourne.

  
C. McKenzie  
Deputy President



**APPEARANCES:**

For the Applicant	Mr C. Johnson of Counsel
For the Second Respondent	Mr J. Catlin of Counsel

## REASONS

### Outcome

- 1 I dismiss the application made by the Second Respondent company, which I call 'PGW'. That application was made under s75 of the *Victorian Civil and Administrative Tribunal Act 1998* (the VCAT Act) to strike-out or dismiss the claim. My orders make provision as to application for costs and lists the matter for a directions hearing.

### Introduction

- 2 Ms Naturani, by her administrator State Trustees Limited (State Trustees) applies under s70 of the *Consumer Credit (Victoria) Code* (the Code) to have reopened a transaction which she claims gave rise to a credit contract between her and PGW and to have that credit contract set aside as unjust. There is another respondent to this claim, and two other parties have been joined. In these reasons, I deal only with Ms Naturani's application and the other material insofar as it relates to the claim against PGW.
- 3 PGW then applied to have the proceeding struck out or dismissed as against it under s75 of the VCAT Act. It says that the Code does not apply to the credit contract because the credit was provided wholly or predominantly for business or investment purposes. Accordingly, the Tribunal has no jurisdiction to entertain that part of the claim. Ms Naturani, by her administrator, opposes the application.
- 4 I first deal with the law. I then summarise the material before me. Finally, I consider whether this part of the claim should be struck out or dismissed.

### The law

#### The Code

- 5 PGW does not deny that it is a credit provider which provided credit to Ms Naturani in the ordinary course of a credit business or another business carried on by it. It does not deny that, when Ms Naturani entered into the contract, she was ordinarily resident in Victoria. Apart from one matter, s6(1) of the Code would apply to the credit contract. But PGW says that the Code does not apply because s6(1)(b) does not apply to the contract. This requires that, at the time that the credit contract was entered into, the credit was 'provided or intended to be provided wholly or predominantly for personal, domestic or household purposes'. PGW says that this loan was not wholly or predominantly for those purposes. Accordingly, the Code does not apply to the provision of credit, the credit contract or related transactions.
- 6 The effect of s6(4) is that 'investment by the debtor' is not a personal, domestic or a household purpose. Section 6(5) relevantly provides –

(5) For the purposes of this section, the predominant purpose for which credit is provided is—

(a) the purpose for which more than half of the credit is intended to be used;

7 Section 11 contains some important presumptions about when the Code does and does not apply. It provides -

### 11 Presumptions relating to application of Code

(1) In any proceedings (whether brought under this Code or not) in which a party claims that a credit contract, mortgage or guarantee is one to which this Code applies, it is presumed to be such unless the contrary is established.

(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).

(3) However, such a declaration is ineffective for the purposes of this section if the credit provider (or any other relevant person who obtained the declaration from the debtor) knew, or had reason to believe, at the time the declaration was made that the credit was in fact to be applied wholly or predominantly for personal, domestic or household purposes. For the purposes of this subsection, a relevant person is a person associated with the credit provider or a finance broker (or a person acting for a finance broker) through whom the credit was obtained.

(4) A declaration under this section is to be substantially in the form (if any) required by the regulations and is ineffective for the purposes of this section if it is not.

8 Regulation 10 of the *Consumer Credit (Victoria) Regulations 1995* (the Regulations) deals with the form of declaration for the purposes of s11(2). It makes requirements about where certain words are to be placed, which is also part of that form. Under r10(1), the declaration must state –

‘I/We declare that the credit to be provided to me/us by the credit provider is to be applied wholly or predominantly for business or investment purposes (or for both purposes).’

Under r10(2), if the declaration is not in electronic form, it must contain ‘immediately below’ the words I have just quoted, the following warning –

#### IMPORTANT

You should **not** sign this declaration unless this loan is wholly or predominantly for business or investment purposes.

By signing this declaration you may **lose** your protection under the Consumer Credit Code.

- 9 Regulation 10(3) requires the declaration to be signed by each maker of the declaration and to bear either the date on which the declaration was signed or the date on which the declaration is received by the credit provider.
- 10 Schedule 1 and s176 cast more light on who is taken to be associated with a credit provider or an agent of a credit provider for the purposes of the Code, and what a credit provider is to be taken to know in those circumstances. Under clause 1(2) of Schedule 1, one person is associated with another if they are related bodies corporate, or if the person is an agent, officer or employee of a credit provider or of a related body corporate acting in that capacity.
- 11 The effect of s176 is relevantly this. The conduct of an agent, officer or employee of a credit provider acting within actual or ostensible authority is imputed to and taken to be the conduct of the credit provider. For the purposes of the Code, a credit provider is not taken to know or have reason to believe something because an agent, officer or employee of the credit provider does so, unless the knowledge or reason to believe that thing is acquired by that agent, officer or employee acting in that capacity and in connection with the transaction concerned.
- 12 I now say something about ss6 and 11. In *Slaveska v Commonwealth Bank of Australia*<sup>1</sup> I considered the effect of the provisions about the purpose for which credit is provided, in the light of two lines of cases. The first line emphasised the purpose of the credit provider or a reasonable person in the credit provider's shoes. The second line emphasised how the debtor used or intended to use the credit provided. I said that s6 was written in the context of a contract. This meant that the purpose of the contracting parties was relevant. The transaction must be looked at in substance and in the context of its performance. The purpose of s6(2) to (5) was to provide clarification where the application of the general rules about the application of the Code in s6(1) gave an uncertain result. So, as far as concerns the purpose for which credit is provided, s6(4) and (5) provide clarification where the application of s6(1)(b) gives an uncertain result. The question which they answer is – was the credit wholly or predominantly provided for personal, domestic or household purposes? Section 6(4) makes it clear that investment by the debtor (emphasis added) is not such a purpose. Section 6(5) looks at the intended use of the credit by the debtor<sup>2</sup>.
- 13 Caution must be exercised before drawing analogies between the facts of one case and another in this area. PGW sought to draw an analogy between this case and cases such as Taylor's case and Neuendorf's case. The purpose of the credit must be determined according to the particular facts of each case, including a particular transaction and the knowledge of the parties. Analogies are only of general help.

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<sup>1</sup> [2008] VCAT 110

<sup>2</sup> Generally to these matters see also *Taylor v Third Szable Holdings Pty Ltd* [2001] VCAT 2219; *Neuendorf v Rengay Nominees Pty Ltd* [2003] VCAT 1732; and *Linkenholt Pty Ltd v Quirk* [2000] VSC 166

- 14 In Taylor's case, I considered the meaning of s11. I said that when it speaks of a declaration under s11(2) (which I call a 'business purpose declaration') being ineffective 'for the purposes of the section', it means that the declaration is ineffective to found the conclusive presumption that credit is not provided predominantly for personal, domestic or household purposes, and so the Code does not apply. But this does not mean the declaration is void. It is still a part, and must be considered together with, all the other evidence in the case.

#### Applications to strike-out or dismiss proceedings – s75 of the VCAT Act

- 15 Section 75 permits the Tribunal to strike-out or dismiss all or part of a proceeding if it is satisfied (among other things) that the proceeding is misconceived. Effectively, this is what PGW says. It argues that the Code does not apply, and the Tribunal does not have jurisdiction to entertain the claim.
- 16 The principles which the Tribunal applies to applications under s75 are relevantly these<sup>3</sup>. Section 75 permits the summary termination of a proceeding, usually before any evidence has been heard. The Tribunal should be cautious before bringing a proceeding to an end in this way and so depriving the litigant of the chance to have the proceeding heard in the ordinary course. It should only do so where satisfied that, for a reason mentioned in the section, the case is manifestly hopeless, undoubtedly untenable, doomed to fail, or on no reasonable ground can justify relief.
- 17 In this case, by applying under s70 of the Code, Ms Naturani has asserted that the Code applies and, under s11(1) the Code is then presumed to apply. It is for PGW, who wants the claim dismissed because the Code does not apply, to establish that this is so. The application under s75 must be determined in the light of s11(1) of the Code.

#### **Material before the Tribunal**

- 18 I have before me, as well as the original application, affidavits on behalf of PGW by its former solicitor Mr Hayes, and by its director Mr Walton. For Ms Naturani, I have two affidavits from Mr Mah, a solicitor employed by State Trustees. I have written and oral submissions from the parties. There is also a large amount of documentary material exhibited to the various affidavits.
- 19 The parties agreed that I could also look at medical material on a VCAT Guardianship List file in relation to an application for the appointment of an administrator for Ms Naturani. The parties agree that I might mention any medical material on that file that was relevant to this case, without giving them a further opportunity to make submissions about that material. I have looked at that file and later mention relevant material on it.

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<sup>3</sup> See *Rabel v State Electricity Commission* [1998] 1 VR 102; and *Norman v Australian Red Cross Society* [1998] 14 VAR 243

- 20 Many of the facts are not in dispute. Where a dispute exists, I indicate this in my summary. I now summarise the material.
- 21 As I have said, Mr Walton is the director of PGW. PGW lends money to potential borrowers. Its practice is not to liaise directly with these potential borrowers. Brokers approach PGW and seek loans from it for potential borrowers.
- 22 In July 2005, Nell Thompson of Boulevard Finance Pty Ltd (Boulevard) telephoned Mr Walton and told him that Ms Naturani was seeking second mortgage finance to pay for 'renovations' to a property which Mr Walton later came to know was located at 48 Glencairn Avenue, Coburg (the Coburg property). Ms Naturani was at that time registered as the sole proprietor of that property. An historical title search for the property is included in the material before me. It shows that, on 23 January 2002, a mortgage was registered over the property in favour of the Commonwealth Bank of Australia. Initially, Ms Naturani and her husband were registered proprietors of the property jointly, but Ms Naturani became sole proprietor on her husband's death.
- 23 According to Mr Walton, Ms Thompson also told him that the Coburg property was a 'rental property'. She and another representative of Boulevard, Judy Riordan, told him that Ms Naturani was applying for a 'low doc' loan. They told him the amount required, the amount of the valuation of the Coburg property over which the loan was to be secured, the amount due under the first mortgage of that property, and a suggested interest rate. Mr Walton (who acted as agent for PGW in this matter) did not, at that time, read or receive a copy of the loan application or of any supporting material. His practice in relation to applications received from Boulevard was only to see the loan application and supporting material after the loan had settled. In relation to the application, he corresponded only with Boulevard, and not the loan applicant. He says that he relied on Boulevard to do all that was necessary. He did not know or meet, and had never previously dealt with, Ms Naturani or her son Steven, and did not know their family circumstances or Ms Naturani's legal capacity. He assumed Ms Naturani to have full legal capacity to understand the transaction.
- 24 In assessing the loan application, Mr Walton used only the details given to him by Boulevard. Although in an affidavit in the material before me he says that he had regard to a certificate prepared by the solicitor Jane Wilson and a business purpose declaration in relation to this transaction, both dated 5 August 2005, it appears from all the material before me that he received neither of these documents until long after the loan had settled. He had no discussions with Ms Wilson. According to Mr Walton, neither Boulevard nor its representatives gave him any information which might have led him to infer that the loan was not for business or investment purposes. He says that neither Xenium (which I shall mention later) nor Boulevard were his or PGW's agents or employees.

- 25 On the material before me, the circumstances surrounding the loan were these. Ms Naturani was born in Sicily on 23 January 1925. Her first language is Italian. At the time of applying for the loan from PGW, she was more than eighty years old. The original application alleges that her communication skills were poor.
- 26 At some time in about June 2005, Robert Rigon, an officer of Mortgage Centre Pty Ltd t/as Xenium (Xenium), was approached by Ms Naturani and her son Steven. They wanted to 'refinance' the Coburg property. The application to Xenium shows Ms Naturani's address as 863 Brunswick Street, North Fitzroy and her status as 'board'. It shows Steven Naturani as the guarantor, and his address is at the Coburg property. He is also shown as 'board'. No income is shown for Ms Naturani. Mr Naturani's income is shown as \$115,000. Various assets are shown (although it is clear that the Coburg property belonged to Ms Naturani) it is unclear to whom the others belong. The loan application mentions that the loan purpose is 'refinance'. Steven Naturani is shown as the contact person for the loan. Strangely, the application includes on the same page a business purpose declaration which states that the loan is for business or investment purposes, and directly above it the form required to be completed under the Consumer Credit Code where a number of debtors wish to nominate one of them to receive notices on their behalf.
- 27 The application is dated 7 June 2006, but, on all the material this must be an error and should read '2005'. It was conditionally approved on 22 June 2005. However, Steven Naturani then told Mr Rigon that the loan was not being proceeded with. It is clear from the material before me that PGW was approached for a loan after this initial application.
- 28 The PGW loan was for a principle sum of \$45,000 on security of a second mortgage over the Coburg property, and for a term of 12 months. I have in the material before me the business purpose declaration and the certificate of the solicitor Ms Wilson in relation to the PGW loan, both dated 5 August 2005.
- 29 The business purpose declaration is, except for one matter, in the form required by r10 of the Regulations. The exception is where the warning appears. This is the warning that the debtor may lose his or her protection under the Code if he or she signs the declaration. Instead of appearing immediately below the declaratory words (as r10 requires), it appears after the signature and date of the declaration. In the declaration, Ms Naturani's address is shown as 863 Brunswick Street, North Fitzroy.
- 30 I also have before me a settlement authority in relation to the loan. That authority is addressed to PGW. It authorises PGW to pay out of the loan to Ms Naturani amounts including \$2603.10 to Boulevard, \$1760.00 to Xenium, the first month's interest of \$581.25 to PGW, and the balance into a Commonwealth Bank account in the names of 'Cettina' Naturani and Steven Naturani. 'Cettina' is another name by which Ms Naturani is

known. The balance paid into the joint account of Ms Naturani and her son was \$39,405.65.

- 31 The material also contains a Law Institute of Victoria pro-forma certificate completed by Jane Wilson, solicitor and dated 5 August 2005. It sets out the documents provided to Ms Wilson. They include the loan offer, mortgage documents, the settlement authority, and the business purpose declaration. The certificate states that Ms Wilson explained to Ms Naturani, before she signed them, 'the nature and effect' of the documents required to be signed by her including the risk of loss of the security property and other assets. The certificate goes on to state that Ms Wilson informed the borrower that she was not providing any opinion on the viability of the transaction or the borrower's ability to make repayments, and that if any doubt existed the borrower ought to seek her own independent financial advice. The certificate then states that the borrower stated to Ms Wilson that she understood the nature and effect of the explanations given and that she signed the loan documents without pressure from any person, and that the borrower had been handed a copy of the certificate and had read it. The part of the certificate which states that an interpreter has been used is crossed out. I take this to mean that no interpreter was used.
- 32 On 9 August 2005, a caveat was lodged in the name of PGW claiming an interest in the Coburg property as mortgagee. That caveat was lodged by Boulevard. PGW's mortgage was registered on 15 September 2005.

#### The medical evidence

- 33 My summary of this evidence is based on material exhibited to Mr Mah's two affidavits and the medical material on the Guardianship List file for Ms Naturani.
- 34 From 22 October 2002 to 31 May 2006, Ms Naturani was a resident of Casa Elda Vaccari Hostel at 863 Brunswick Street, North Fitzroy (Casa Elda). From 31 May 2006, she was a resident at Fred Cambridge House in Campbell Road, Northcote. Casa Elda is a hostel operated by Southern Cross Healthcare. I have in the material before me various care plans and progress notes made by staff at that hostel, including registered nurses and personal care attendants. The material is not a continuous record, but gives a snapshot of Ms Naturani's condition at various times. There are also records and letters from various doctors. The submissions made for PGW suggested that I should disregard, or give less weight to, the material from personal care attendants and registered nurses as to the nature of Ms Naturani's condition. For diagnosis of that condition, I should only have regard to material from doctors.
- 35 My approach to the medical material is this. This is a strike-out application which, if granted, will have the effect of terminating the claim against PGW. I should have regard to all the material before me and take the

Applicant's case at its highest. All the medical material is relevant to Ms Naturani's condition. Some of it directly relates to what she does, and some of it relates to her diagnosis. The material about what she does puts the various diagnoses in context.

- 36 Case Elda records from December 2002 note that Ms Naturani has various physical conditions such as hypertension and epilepsy, but also note memory confusion. By May 2004, she was assessed as high level care. The records note that her level of confusion has increased over recent months and that she wanders aimlessly around the hostel unable to remember where she is or what she is doing. They note that on different days her long term memory 'may or may not' be affected. They note that, while before this time she was able to shower and dress herself with minimal assistance, she now requires maximum help in these tasks. They note that she speaks Italian at home and has very limited English. They note that, with help, she can manage some 'day to day buying' but needs help with managing a cheque book and paying bills. They say that her son is her main support and makes financial decisions for his mother. They answer 'no' to the question whether she is capable of making decisions. The records indicate that Ms Naturani's speech is slow, that she has dementia, that she has difficulty putting two or three words together at times, needs prompting, rephrasing and repetition, and that (when speaking to her) simple sentences and slow and clear speech should be used. She should be allowed time to comprehend and respond.
- 37 The Casa Elda records from January 2005 onwards indicate that Ms Naturani is becoming more and more confused and continues to wander around the hostel unable to remember where she is. She is unable to remember where she has left her belongings. The records from January 2005 note 'memory impairment', that she is slow to form words and needs an interpreter for 'medical/legal issues'. They state that she is able to comprehend simple spoken sentences.
- 38 In a letter to Ms Naturani's then treating general practitioner Dr Morales dated 10 August 2004, Dr Seal (a consultant physician) states that Ms Naturani has a 'past history of longstanding dementia', as well as various other physical conditions.
- 39 Dr Pemberton was Ms Naturani's treating general practitioner from May 2005 onwards. Writing in January 2008, he mentions a diagnosis of dementia characterised by intrusive behaviour to staff and other patients of Casa Elda. He notes that, after a period of hospitalisation in April 2006, and after a hip operation, Ms Naturani was transferred to Fred Cambridge House because she required a facility providing a higher level of care. He notes that due to her cognitive decline Ms Naturani no longer speaks English, 'of which she had a good command'. He suggests that Ms Naturani's dementia is of the combined Alzheimer's/vascular type.

- 40 Writing in July 2008, Dr Pemberton again notes Ms Naturani's gradual decline. He did not fully assess Ms Naturani in 2005, but states that his notes indicate that she had 'poor short term memory with a diagnosis of dementia'. He states that he suspects that she had 'at least moderate dementia', that her comprehension, decision-making and rational thinking 'could be impaired' but that this could vary on almost a day-to-day basis. He also states that any previous experience of Ms Naturani in dealing with legal and financial matters 'would also impact'. He notes that, in early 2005, Ms Naturani's mental condition deteriorated and, although retrospectively, doubted if she would have been able to understand the meaning and impact of documents supplied to her by a solicitor.
- 41 The medical material on the Guardianship List file in relation to Ms Naturani is consistent with the material I have just summarised. Application for an administration order was made dated 27 April 2006. It was made by a social worker at St Vincent's Hospital (where Ms Naturani then was) and names Ms Naturani's disability as dementia. It notes that she will not attend the hearing.
- 42 The file includes a brief report from Dr Marriott dated 18 April 2006. Dr Marriott was a geriatrics registrar at St Vincent's Hospital. The report diagnoses dementia, notes that Ms Naturani had undergone a mini mental state examination (MMSE) and scored seven out of a possible thirty. It states that the disability has been evident for 'years', but does not specify how many. It states that it is progressive and has 'worsened considerably recently over the last... months'. The number of months is either 'few' or 'four'. The writing is unclear. The registrar is not Ms Naturani's treating practitioner and has known her only for a month (that is, since she first attended St Vincent's). The doctor's report notes that Ms Naturani was assisted by an interpreter. In the doctor's opinion, Ms Naturani did not understand the nature of a power of attorney, could not quantify her assets or the amount of her pension, had poor short term memory and an ability to retain information.
- 43 Ms Waldengren's letter which accompanies her application states that Ms Naturani had been assessed at St Vincent's as requiring nursing home care. Ms Waldengren had found it difficult to discuss with Ms Naturani aspects of her care because (due to dementia) Ms Naturani found it difficult to comprehend and could not express a point of view.
- 44 Ultimately, the Tribunal made an order appointing an administrator for Ms Naturani in June 2006. The Tribunal's order records that it is satisfied that she has a disability by reason of which she is unable to make reasonable judgments about her estate.

#### The Supreme Court proceeding and the sale of the Coburg property

- 45 On 18 September 2006, Boulevard wrote to Ms Naturani advising her that her payments under the mortgage were in arrears and, if the arrears were

not brought up to date, the mortgagee would take legal action. On 21 December 2006, PGW commenced proceedings in the Supreme Court of Victoria (No 9329 of 2006) against Ms Naturani seeking (among other things) payment of the loan balance, interest and costs. Ultimately, by arrangement between the parties, the Coburg property was sold on 21 April 2007. All the mortgagees (including PGW) were paid out of the proceeds of sale. The amount paid to PGW was \$61,937.20. All mortgages were discharged, and the purchasers were registered on title on 23 July 2007.

## **Issues and submissions**

### Does the Code apply?

- 46 PGW submits that the Code does not apply to this loan. First, it says that the business purpose declaration is substantially in the form prescribed by the Regulations and founds the conclusive presumption that the loan was not for personal, domestic or household purposes. Second, it says that, even if the business purpose declaration was ineffective, all the material before PGW indicated that the loan was not for personal, domestic or household purposes, and there was nothing to put PGW on inquiry that the loan purpose might have been otherwise. PGW initially made some submissions about estoppel, but abandoned these at the hearing of oral submissions.
- 47 For Ms Naturani, it was submitted that the business purpose declaration is ineffective, either because it was not substantially in the required form, or because PGW or a relevant person who obtained the business purpose declaration knew or had reason to believe that the loan was in fact to be applied for personal, domestic or household purposes. It was also submitted that, on the basis of *non est factum*, the business purpose declaration was void from the outset. In its turn, PGW argued that the doctrine of *non est factum* does not apply to business purpose declarations and, even if it did apply, there was insufficient evidence that Ms Naturani had the requisite mental incapacity.

### Is the business purpose declaration ineffective?

- 48 By applying under the Code, Ms Naturani has triggered the presumption under s11 that the Code applies to her credit contract and mortgage with PGW. To displace this presumption, PGW must 'establish' that the Code does not apply. In my view, it is strongly arguable that the business purpose declaration is ineffective, and I am therefore not satisfied that that declaration displaces the presumption that the Code applies.
- 49 First, in my view, it is strongly arguable that the declaration substantially departs from the form required by the Regulations. The warning appears after the date and signature of the maker of the declaration. The warning is a critical part of the document. It alerts the debtor to the serious consequences that might follow from the signing of the declaration. The

Code's protection might be lost. It is essential that the maker of the declaration reads the warning before signing the declaration. This is why the warning must, according to the Regulations, be placed between the declaratory words and the signature. If it is placed elsewhere, and particularly below the signature, the likelihood of it being read before signing is substantially lessened. On this basis, I am not satisfied that the declaration is effective to found the conclusive presumption that the loan is not for a purpose to which the Code applies.

- 50 Second, even if the declaration were substantially in the required form, it is strongly arguable that s11(3) makes it ineffective. On the material, it appears that Mr Walton (PGW's agent) never saw the business purpose declaration or the loan documentation before signing the loan contract. It is hard to see how a business purpose declaration which the credit provider has not read before the loan was entered into could be used to found the conclusive presumption that the Code does not apply to the relevant loan. The purpose of the parties at the time of entering into the contract is critical. At the time of entering into the contract, it appears that all PGW knew about the loan's purpose came from the statement made by Boulevard's representative about 'renovations' and 'rental property'. This information is so scant that it would put any reasonable credit provider on inquiry as to the real loan purpose. What is more, it is by no means clear from the material (and contrary to the submissions for PGW) that Boulevard, or indeed Xenium, was not PGW's agent. Boulevard seems to have been entrusted by PGW to prepare the loan documentation and procure the borrower's signature. Boulevard wrote to Ms Naturani when her loan to PGW was in arrears, and lodged a caveat under which PGW claimed an interest in the Coburg property as mortgagee. Both Boulevard and Xenium were paid commission or fees out of the loan proceeds. If Boulevard's representatives had seen the original application through Xenium which claimed that the loan was for refinance, and if that refinance was to pay out a loan which funded the purchase of the Coburg property, then the refinance would take the character of the original loan and would be for personal, domestic or household purposes. If Boulevard knew Ms Naturani's age, or knew or should have known of Ms Naturani's difficulties with English or her memory impairment, these are matters which might bear on whether she could form any purpose for the borrowing.
- 51 Some of the material before me suggests that Steven Naturani had some part in the circumstances that led to the loan. In the Xenium application, he was a contact person. The balance of the PGW loan proceeds were paid into a joint account in the names of him and his mother. From this material one might infer that the loan was for his benefit and not his mother's. If his mother's sole purpose was to assist her son, this would, in my view, be a personal, domestic or household purpose. Whether these inferences can be drawn must depend on the evidence at the full hearing.

- 52 A number of the submissions for PGW relied on the distance between PGW (the lender) and Ms Naturani (the borrower). In my view, the placing of a number of intermediaries between a lender and a borrower, and the avoidance by the lender of contact with the borrower, and limiting by the lender of what he or she knows about the loan application, is not enough to absolve a lender of the need to inquire about loan purpose and does not of itself found a presumption that the loan purpose is not regulated by the Code. Real and reasonable inquiry about the loan purpose needs to be made.
- 53 I note that Mr Walton states that he (and PGW) relied on the solicitor Ms Wilson's certificate. But, from the material before me, it appears that Mr Walton did not see this certificate until well after the loan was settled. There is some material to suggest that, at the time of signing the certificate, Ms Naturani would have needed an interpreter and that none was used. It is not clear whether anyone else was present at the discussions between Ms Wilson and Ms Naturani. If it transpired that, when she signed the certificate and stated that she understood the solicitor's explanations, and when she signed the business purpose declaration under the contract, Ms Naturani was (because of dementia) unable to understand any of these documents, it is hard to see how these documents can be of any evidentiary value. Putting *non est factum* to one side, it could not be said, in my view, that Ms Naturani was somehow bound by statements in the loan contract, the solicitor's certificate and the business purpose declaration which (because of dementia) she was wholly unable to understand. If it were otherwise, a person who signed in those circumstances would be deprived of the protection of the Code. This would be to undermine one of the Code's objectives, which is (in various ways) to provide protection to debtors. A number of provisions of the Code make the extent of a debtor's understanding of the terms of a contract or of explanations of those terms a relevant factor. Section 70(2), which concerns the factors to be taken into account in determining whether to reopen a transaction which led to an unjust credit contract, is one of these. I doubt that Parliament would have intended that one could take into account factors such as this under s70 but ignore them under s11.
- 54 Finally, I agree with PGW that *non est factum* does not apply to statutory instruments such as the business purpose declaration. It applies to contracts and deeds. However, it may well be that one of the issues at hearing might relate to *non est factum* and the credit contract itself<sup>4</sup>. I also note that s70 of the Code is expressed in broader and quite different terms to the doctrine of *non est factum*. My conclusion makes it unnecessary for me to say more about this matter.

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<sup>4</sup> As to *non est factum* generally see *PT Limited v Maradona Pty Ltd* (1992) 25 NSWLR 643; 12 Halsbury's Fourth Edition at para 1365 and following

## Conclusion

- 55 Ms Naturani, by applying under the Code, has triggered the presumption in s11(1) that the Code applies to the relevant credit contract. I am not satisfied that PGW has displaced that presumption. Put another way, I am not satisfied that Ms Naturani's case is manifestly hopeless.
- 56 As my summary of the medical and other material before me shows, this case will turn on the evidence given at hearing and on testing of that evidence by cross-examination. There are many contested questions. The application should be dismissed.

C. McKenzie  
Deputy President

