ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.

Human Appeal International Australia v Beyond Bank Australia Ltd (No 2) [2023] NSWSC 1161

Supreme Court of New South Wales, Parker J, 27 September 2023

Whether a Bank could close the bank account of a charity.

Key words: Banking, New South Wales, Muslim Charity, Customer Owned Banking Code of Practice, Contract, Good Faith

1. Previously in Human Appeal International Australia v Beyond Bank Australia Limited [2023] NSWSC 382 two interlocutory matters were considered, and the Court imposed a strict time-limited set of procedures.

2. Human Appeal International Australia (Human Appeal) is registered as a charity with the Australian Charities and Not for Profits Commission. It is an endorsed tax-deductible, public benevolent institution. Its objects are to improve and relieve the effects of poverty and social injustice. It performs a wide range of charitable works both within Australia (including bushfire and drought relief and assistance to the elderly and high achieving students in Muslim schools) and overseas in developing countries. It claims to be the largest Muslim charity in Australia.

3. Human Appeal receives and holds funds (approx. $6.1 m) from donors and campaign fundraising drives in two transaction accounts with Beyond Bank. These accounts were the subject of the proceedings.

4. Beyond Bank is a publicly listed, customer-owned mutual bank providing personal, business and community banking services to not-for-profit and community organisations, as well as providing wealth management and financial planning. Beyond Bank is registered with the Australian Prudential Regulation Authority (APRA) as an Authorised Deposit-taking Institution (ADI).

5. Beyond Bank advised Human Appeal that it was closing the accounts and refused to give any reasons other than that after a review it had decided that its business was unsuitable.

6. A consent injunction was granted prior to the proceeding that the services continue to be provided.

7. Human Appeal argued that:

    - Under Beyond Bank's contractual obligations to Human Appeal as customer, there was a duty of cooperation and good faith generally implied in commercial contracts.

- Under Beyond Bank's trading terms, the Code of Practice adopted by the Customer Owned Banking Association, (an industry group consisting of representatives of Australia's credit unions, building societies and mutual banks) provides that members should fairly balance the interests of the Bank and its customers and this had not been done.

8. Human Appeal sought production of documents in relation to the closure from Beyond Bank, but no record of a review of the account or decision was produced. At trial, Beyond Bank claimed that under the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) (Commonwealth laws) the Bank was prevented even from saying whether or not there were additional documents caught by the notice that had not been produced.

9. The Court remarked that (at [76]):

> I find it difficult to accept that, if in fact the Bank decided to terminate Human Appeal's banking facilities because of that administrative burden, none of the documents produced in the review, and none of the records recording the decision, could be disclosed at all, even in partially redacted form. Nor was there any evidence that, if the terms of the Act did prevent disclosure, partial or total, the CEO of AUSTRAC had been asked (under s 248) to modify its application, so as to permit such disclosure.

10. And (at [83]):

> As already noted, it is troubling to think that this case might have to be decided in circumstances where not all of the relevant documents have been produced to the Court. But for practical purposes this is a matter for the Bank and its legal representatives. All that the Court (and the legal representatives for Human Appeal) can do is to proceed on the basis of what the Bank has actually produced in answer to the notice.

11. The Court noted evidence in the prior proceeding as to the cost of monitoring the accounts of Human Concern to comply with Commonwealth laws, but pointed out that no new evidence was produced to the Court which proved this issue directly and justified termination of the accounts. An application to produce evidence in proper form was rejected by the Court as being too late.

12. Beyond Bank conceded that the Bank was only entitled to terminate Human Appeal's banking facilities if it had a valid commercial reason for doing so.

13. The Court concluded (at [135]):

> In summary, the Bank was, from the outset, challenged by Human Appeal as to its reason for terminating the facilities. Initially, the Bank took the position that it was entitled to terminate without having a reason. Belatedly, the Bank raised the alternative argument, that if it was not entitled to terminate without having a reason, it might have had one. I think that such an argument is quintessentially one which attracts an evidentiary onus. How else could it be evaluated by the Court? But the Bank has propounded no admissible evidence in support of it. Instead, the Bank has contented itself with submitting that I should infer that the Commonwealth Act prevented the reason from being put before the Court. I have rejected that submission. I find myself driven to the conclusion that the Bank did not have reasons for termination which would sustain scrutiny. The purported termination was therefore invalid.

14. As to the argument by Human Appeal that the Code of Practice fair balance standard applied, the Court decided that (at [146]):

> …the termination provision in clause 25 of the terms and conditions does not strike a "fair balance" between the interests of the parties, as required by clause 4.2 of the Code. The Bank will need to modify the provisions to ensure that a fair balance is struck. But how that is to be done seems to me to be a matter for the Bank. As at present advised, I am not sure that I should defer the finalisation of these proceedings until it has happened (indeed I am not sure that I will be asked to do so).

15. It should be noted that the Court explained that (at [138]):

> It is unusual for the parties to a contract to agree make the reasonableness of their trading terms reviewable in this way. But counsel for the Bank did not argue that it was impermissible as an "agreement to agree". Nor did counsel argue that the fairness of the balance struck by the Bank's terms was not a justiciable issue. I think, therefore, that the Court has no alternative but to decide the issue as best it can.

16. The Court found that the purported termination of Human Appeal's account was invalid.

COMMENT

It appears that some points of law and arguments were not fully pursued in the proceedings, and this detracts from the authority of the case. For example, in an interesting aside the Court noted (at [117]-[119]):

> There is a further point which turns on the facts of the present case. Even though Human Appeal has not pursued the contention that the constitution of the Bank itself prevents it from terminating Human Appeal's banking facilities without cause, the constitution is part of the contractual context. It operates as a "statutory contract" binding on both the Bank and Human Appeal (along with the other members of the company): Bailey v New South Wales Medical Defence Union Ltd (1995) 184 CLR 399 at 433-436.
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> Under the Bank's constitution, a customer's member share is potentially valuable property which can only be taken away by the Bank in defined circumstances. Being able to maintain an account with the Bank is, in itself, a valuable right because it makes it harder for the share to be taken away. Furthermore, the provisions of rule 4.4, in particular sub-rules (2), (3) and (5), appear to have the effect that a member's bank account cannot be closed without the member's consent, even if the account is not being used. All of this seems difficult to reconcile with the Bank having a discretion to close any customer's account merely upon giving notice, and without cause.
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> It may therefore be that a customer of the Bank is in a stronger position to resist de-banking than the customer of a commercial bank. But this was not argued, and, having regard to the concession made by the Bank, it need not be furthered discussed in this judgment.

Although it was not pursued, the issue of the difference between a customer owned mutual bank such as Beyond Bank and a commercial bank may in fact be crucial. All commercial bank contracts have a clause in them permitting the closure of an account at any time. There is usually a period of notice, provided the customer is not in default. No reason need be given. Whether a customer owned mutual bank has a greater contractual duty to customers is perhaps an issue that needs to be considered further subsequent to this case.

However, unilateral commercial bank closures are coming under increasing scrutiny in the UK, New Zealand and Australia. In the UK, after a recent controversy surrounding bank closures of prominent individuals, the Financial Conduct Authority requested data from banks on account closures. Banks were given until 25 August 2023 to provide information on:

- the number of customers that had been terminated
- the number of customers suspended
- the number of customers denied services
- the reasons for all of the above
- the number of complaints banks have received on the issue of closure

This included asking if accounts had been closed because of expressions of political or other opinions. The FCA asked particularly about charities, political parties, and those associated with political parties or other organisations, all of whom had been newsworthy during 2023 because of closures and denials of service by banks. Its preliminary findings were published on 19 September 2023, but the FCA indicated that these findings might be unreliable and require further work because they did not reflect actual examples of controversial closures reported in the media, and were not clear as to closures related to reputational risk to banks.

Bank de-risking can result in charities being unable to fulfil their mission as in Bhaiyat v Charity Commission for England and Wales (Re Olive Grove Foundation) [2023] UKFTT 307 (GRC).

Refer also to the materials produced by International Center for Not for Profit Law (ICNL), in particular Understanding the Drivers of De-Risking and the Impact on Civil Society Organizations and Financial Action Task Force Toolkit.

VIEW THE CASE

This case may be viewed at: https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2023/1161.html
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