SUPREME COURT OF QUEENSLAND

CITATION:	*Bartercard Ltd v Myallhurst P/L & Anor* [2000] QCA 445
PARTIES:	**BARTERCARD LTD** ACN 050 542 544 (plaintiff/respondent) **v** **MYALLHURST PTY LTD** ACN 051 094 387 (first defendant/appellant) **DAVID KHOURY** (second defendant/appellant)
FILE NO/S:	Appeal No 9273 of 1999 DC No 203 of 1997
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	27 October 2000
DELIVERED AT:	Brisbane
HEARING DATE:	8 August 2000
JUDGES:	Davies and Thomas JJA, Ambrose J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs to be assessed.**
CATCHWORDS:	CONTRACTS – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – PENALTIES AND LIQUIDATED DAMAGES – GENERAL PRINCIPLES - respondent operated business facilitating trade bartering between members – appellant company's membership terminated in circumstances where it had a negative trade dollar balance – whether contractual provision requiring payment of negative trade dollar balance in actual currency amounted to a penalty – where appellant received goods and services of substantial value – whether windfall to respondent – whether 30 day period for trading out of debt inadequate – genuine pre-estimate of the loss when precise estimation impossible *Acron Pacific Limited v Offshore Oil NL* (1985) 157 CLR 514, cited *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170, considered *Campbell Discount Co v Bridge* [1962] AC 600, cited

CRA Ltd & Anor v New Zealand Goldfields Investments & Anor [1989] VR 873, considered
Dunlop Pneumatic Tyre Company Ltd v New Garage and Motor Company Ltd [1915] AC 79, considered
Esanda Finance Corporation Ltd v Plessnig (1988) 166 CLR 131, cited
Export Credits Guarantee Department v Universal Oil Production Co [1983] 2 All ER 205, cited
O'Dea v Allstates Leasing System (WA) Pty Ltd (1983) 152 CLR 359, considered

COUNSEL: M D Martin for the appellants
A J H Morris QC for the respondent

SOLICITORS: Morgan Conley for the appellants
Legal Services Bartercard Ltd for the respondent

[1] **DAVIES JA:** I have had the advantage of reading the reasons for judgment of Thomas JA. I agree with him that the appeal must be dismissed for the reasons which he gives and for the additional reasons referred to below. There are two related matters upon which I would like to make some further comments.

[2] The first is that this case, on one view, illustrates the arbitrary nature of the doctrine of penalties as now understood. It now appears to be accepted that where a right to terminate a contract and to receive a payment arises on the happening of any of a number of events some only of which are breaches of contract[1] it is only where the termination is in consequence of breach that the question of penalty can arise.[2] It may also be accepted that, in the present case, it was terminated for breach; that is clear from the respondent's letters of 7 May and 4 September 1996. But it is at least as likely that the real reason for the respondent terminating the agreement, thereby making the total sum claimed payable, was not so much default in payment of transaction fees of a few thousand dollars but because the appellant's negative trade balance was over $130,000.[3] Had the respondent terminated the agreement upon five days notice because of that, or for no reason at all, as it could have under r 34, no question of penalty would have arisen because having a negative trade balance was not a breach of the agreement and the termination consequently could not have been for breach.[4]

[3] If the application of the doctrine of penalties to the facts of the case has the consequence that the question is whether the contingent obligation under r 34(a) to

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1 As may occur under r 34.

2 *Campbell Discount Co v Bridge* [1962] AC 600; *Export Credits v Universal Oil* Co [1983] 1 WLR 399; *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359 at 367, 390; *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 at 184 – 185, 211.

3 It was unnecessary to determine whether that was so in the present case.

4 Cf the paradox identified by Lord Denning in *Campbell Discount Co v Bridge* [1962] AC 600 at 629. But see *AMEV-UDC* at 199. It was not contended for the appellant in this Court that there was anything in the relationship between the parties giving rise to unconscionability.

pay the amount of any negative trade balance was a genuine pre-estimate of damages for breach that is, in my view, to characterize that provision in a way which was not intended. When looked at in the context of the scheme as a whole its true character was, as I shall endeavour to show, consideration contingently payable by a departing member, in the event that the value of its purchases exceeded that of its sales, in order to depart from the scheme. The obligation thus recognized the need for such payments if the scheme as a whole were to continue successfully notwithstanding such departures.

[4] The second related matter upon which I wish to comment is the appellant's primary submission that r 34, in the circumstances of this case, amounted to a penalty against the appellant because the respondent suffered no loss or at least so little that payment to it of the amount of the appellant's negative trade balance constituted a windfall to the respondent. That submission, in my opinion, involved a misconstruction of the agreement in the context of the barter scheme as a whole.

[5] The successful operation of the scheme, and consequently the financial success (perhaps even survival) of the respondent, depended on the continuing capacity of its members to trade with each other within and with others outside the scheme. This, in turn, required that members' trade sales within the scheme be more or less balanced by their trade purchases; for those who maintained, for any sustained period, a substantial positive trade balance would have their liquidity to trade outside the scheme substantially reduced and those who maintained, for any sustained period, a substantial negative trade balance would have their liquidity to trade inside the scheme thereby substantially reduced. There were, consequently, provisions in the agreement aimed at preventing those occurrences: for example that requiring the respondent to use its best endeavours to solicit trade for its members and that requiring members to honour and accept purchases from other members, in the latter case acknowledging that failure to honour such purchases resulted in damage accruing to the respondent.

[6] More importantly there would be a real loss to continuing members of the scheme, to the financial viability of the scheme and consequently to the respondent if a member were permitted to depart from the scheme without paying its negative trade balance. At first sight that might appear to be a loss to that member or those members who sold the departing member goods or services and thereby acquired corresponding positive trade balances. But that is to assume that relevant events would have stood still after those transactions occurred, an assumption which in most cases is unlikely. Those persons and others would have continued to trade, those persons by the time of the above departure might themselves have acquired negative trade balances and the likelihood is that it would by then have been extremely difficult to identify those persons to whom corresponding positive trade balances could be traced. If the rules had provided for some complex tracing mechanism, which would no doubt have required the keeping of much more complex accounts than were apparently kept – a simple running account for each member with the respondent – and payment to those persons so traced, no question of penalty could have arisen. If it arose at all, it did so only because payment was required to be made to the respondent.

[7] There are obvious practical reasons why the parties chose the course which they did when a member was to depart from the scheme; that is that the amount of its

negative trade balance be paid to the respondent. In the first place the keeping of accounts sufficient to enable the tracing of those who, at the time of the person's departure would have positive trade balances which together accounted for the negative trade balance of the departing member would be very time consuming and expensive thereby adding a substantial cost burden to the scheme. Secondly treating that negative balance as a liability owed in part to each of a number of members, assuming them all to be continuing members, leaving it to them to recover their proportionate share would be plainly unwielding and unsatisfactory. And thirdly it may be that some of the members, to whom a corresponding positive trade balance could be traced, might also have left the scheme. So the solution chosen by the parties, of providing that it be a debt owing to the respondent and leaving it to the respondent in turn to ensure that the scheme would continue satisfactorily, was a sensible practical solution. It would have been as unacceptable to the continuing members, especially those with positive trade balances, as it would have been to the respondent, to permit a member with a negative trade balance to depart the scheme without being liable to repay that balance in cash.

[8] As already mentioned, it was plainly in the respondent's self-interest to keep the scheme going successfully. One way in which it sought to achieve this, unsuccessfully in the case of the appellant, was to extend trade credit to members, within the scheme, to permit them to commence or continue to trade. Another was provision in the rules for the establishment of a bad debt reserve fund although there was no evidence before the Court as to whether any such fund had been established or the basis upon which it would be. But it was not unreasonable to think that those entering the scheme were prepared to take the risk that, because it was in the respondent's self-interest to do so, it would ensure as best it could that there was both sufficient liquidity within the scheme and a sufficient variety of traders within it to enable it to continue successfully notwithstanding the departure, from time to time, of members; and it was in their interest to ensure that the respondent was sufficiently funded to achieve this.

[9] Consequently any amount which might become payable pursuant to r 34(a) is more readily characterized as part of the consideration contingently payable by a member to ensure the continuity of the scheme than as a pre-estimate of damages for breach. But on no view does the respondent receive a windfall by payment of the amount due under that clause because, if it is not paid, the respondent's business is at risk of failing. Looked at as a pre-estimate of that contingent loss it is impossible to say that it is out of all proportion to it.[5]

[10] **THOMAS JA:** This is an appeal by a company ("Myallhurst") and its guarantor against a money judgment in favour of Bartercard Ltd ("Bartercard"). The main point at issue is whether the judgment against Myallhurst, and in turn against the guarantor, was based upon a contractual term that amounted to a penalty.

[11] Bartercard operates a business which facilitates trade bartering between its members. Myallhurst was a member which between 1993 and 1995 used Bartercard's facilities to sell its products or services to other members, and to buy

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5 *AMEV-UDC Finance Ltd* at 190; *Esanda Finance Corporation Ltd v Plessnig* (1989) 166 CLR 131 at 141.

products or services from members. It bought items of considerably greater value than it supplied to other members.

[12] The nature of Bartercard's activity has been considered in rulings of the Commission of Taxation and a Practice Direction from the Office of State Revenue Queensland. The following short extract from the latter conveniently describes the general nature of the activity:

> "Barter trade, also known as reciprocal trading or countertrade, is the exchange of goods or services for other goods or services without the need for cash. Bartering between businesses is emerging as a popular method of conducting trade with businesses accepting payment for goods or services in 'trade dollars' (eg Bartercard dollars) or 'credit units'. Businesses wanting to take part in reciprocal trading must subscribe as a member to a trade exchange which acts as a clearing house for trade transactions and promotes the members' goods and services."

[13] The system is not confined to one on one bartering. It permits credit obtained by one member in relation to another to be used in payment of goods or services provided by other members. Bartercard in effect provides a credit entitlement to permit trading to commence and this was described in evidence as a type of overdraft facility. Myallhurst which ran the furniture business of "Dumaze Lounges" applied for and was granted increases in this facility from time to time. In September 1994 it desired to increase its current credit limit to $150,000, and this was done upon the execution by the second appellant of a guarantee in respect of debts and liabilities of Myallhurst to Bartercard.

[14] The use of transaction vouchers other than between members is discouraged by cl 15 of the rules. The evidence suggests however that some money value attaches to credit entitlements, and that a credit entitlement of $130,000 might be sold for up to $78,000 in real currency.

[15] Bartercard's claim consisted of three components –

Payment required under r 35	$ 250.00
Bartercard transaction fees etc	$ 9,754.94
Payments owing under r 34	$131,087.81
Total	$141,092.75

There was and is no issue in relation to Bartercard's entitlement to payment of the first two items. The sole point of defence is the allegation that cl 34(a) of the rules (which are incorporated into the contract) is void as a penalty.

[16] As earlier indicated, Myallhurst used the bartering facilities in such a way that it obtained considerably more benefits from other members than it supplied to other members. By November 1995 its "purchases" had exceeded its "sales" by $130,907.80.

[17] After that time Myallhurst engaged in no further transactions either of sale or purchase with Bartercard members under the Bartercard system. It also failed to

pay the Bartercard fees that had fallen due. A demand for the payment of such fees in May 1996 produced no result. Finally on 4 September 1996 Bartercard issued a termination notice in reliance upon cl 34 of the rules. That clause states:

> "**34. Termination**
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> Either party may terminate the Agreement upon five (5) days written notice to the other party. Immediately upon termination, with or without cause, all cash and trade dollar service fees outstanding become due and payable and:
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> (a) If the Member has a negative trade balance (purchase exceed sales) Member must balance the account with trade dollars within thirty (30) days of the termination date and, after the (30) day period immediately pay BCL any remaining negative balance in cash; or
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> (b) If Member has a positive trade account balance (sales exceed purchases) Member may spend the balance after paying BCL, in advance, the cash service fees on the positive balance. After receipt of cash, BCL Gift Certificates will be issued to the terminated account with a ninety (90) day expiration date. The Gift Certificates may be redeemed with BCL Members in the normal manner of Transaction Vouchers, excepting that each and every transaction must have an authorisation number upon redemption issued from BCL Credit Clearance.
>
> BCL reserves the right in its sole discretion to terminate this Agreement without notice for a material singular or cumulative breach of the Agreement.
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> BCL Plastic Bartercards and unused trade Transaction Vouchers, and any Script and Gift Certificates must be returned immediately upon termination, and no initiation or service or transaction fees will be refunded. Upon termination of the association with BCL, Member shall promptly return to BCL all originals and copies of documents, and property of BCL relating in any way to BCL's, business and/or BCL Barter Programme."

[18] Myallhurst did not take advantage of the opportunity to eliminate or even reduce the debit balance by earning credits through the supply of goods to other members during the ensuing 30 days. In the event the account remained as it was prior to the notice of termination and Bartercard sued in reliance upon cl 34.

[19] It was submitted on behalf of Myallhurst that a member with a positive balance in its account cannot, upon terminating its membership, convert this to cash. The member is instead provided with "Gift Certificates" which must be used within a period of 90 days. A contrast is then drawn with the position of a member who leaves the organisation with a negative trade balance. If the member fails to trade out within 30 days so as to bring the balance back to zero, the negative trade balance in Barter dollars must be paid in cash. However this is so whether the

termination is effected by the member or by Bartercard. A member knows upon joining that before leaving it will have an opportunity of redeeming its debits by barter, but that if it fails to do so the debit balance will be payable in ordinary currency. In the context of a scheme based on the notion of barter, instability would arise unless an ultimate balance between supply and purchase could be maintained. There is nothing immediately surprising in the system which has been described, or in the particular provisions to which reference has been made.

[20] The submissions on behalf of Myallhurst however are that the contract was terminated for Myallhurst's breach in failing to pay fees, and that the only loss suffered by Bartercard in respect of such breach was that loss of fees. Bartercard's entitlement to what is in effect the redemption by Myallhurst of its debits in cash was said to be a complete windfall. The submission is that such a provision is "out of all proportion, extravagant, exorbitant or unconscionable"[6], and that it is not a genuine pre-estimate of damage[7].

[21] On the other hand, so far as the notion of windfall is concerned, it must be noted that it is far clearer that Myallhurst would be the beneficiary of a complete windfall if it were able to depart from its relationship with Bartercard without having to pay for the $131,087.81 value of goods obtained from other members. It was not indebted to those other members because it had paid for such goods by means of the overdraft facility granted by Bartercard. If it does not have to redeem the credits by real payment, it will have obtained substantial benefits without having had to pay for them.

[22] The learned trial judge, Forde DCJ, held that it could not be said, in circumstances where Myallhurst had received these substantial benefits that the clause operated in a way that was oppressive to it. That is obviously correct.

[23] For as long as Myallhurst remained a member and for a further 30 days after notice of termination it could discharge the balance of its account by bartering within the system. By 1995 it had received goods and services of considerable value and it was obliged to pay for them. It cannot complain that by reason of its failure to pay its cash fees its membership was terminated. It was only the manner in which Myallhurst was entitled to discharge its obligation that was affected by Bartercard's eventual termination of the relationship. Even then, Myallhurst could have traded out the debit in the agreed period after termination. Counsel for Myallhurst however submitted that the 30 day period in which to do so was too short. When asked if 12 months would have been enough he responded that a question of degree was involved, but that 30 days was too short a time. There is in my view nothing illusory or unrealistic about an opportunity to redeem debits by sales over a 30 day period, and there is no sound basis for a court to condemn cl 34(a) as penal on the basis that the opportunity for Myallhurst to redeem was inadequate.

[24] If the positions of the respective parties are examined in isolation, it is possible to see an element of windfall for Bartercard in the result. But that circumstance is not conclusive of the question whether the clause which enables that result to be obtained is a penalty. A windfall is the possible product and often the deliberate

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6 *Esanda Finance Corporation Limited v Plessnig* (1988) 166 CLR 131, 141.

7 *AMEV-UDC Finance Limited v Austin* (1986) 162 CLR 170, 185.

product of a contract, and such a consequence is not of itself determinative of the question whether a term is a penalty. The many cases[8] on this subject suggest that the court is concerned with proper construction "to be decided upon the terms and inherent circumstances of each particular contract, judged of (sic) as at the time of the making of the contract"[9], although Deane J has expressed a reservation about the use of subjective intention[10]. Commonly and naturally the question of unreasonableness in the burden that the term imposes is heavily influenced by analysis of the situation or viewpoint of the payer. To the extent to which this viewpoint is examined in the present case, Myallhurst's burden is no more than paying for the value of the goods which it obtained from its membership in the system.

[25] It is true that the contract does not place Bartercard under a converse liability to account in cash to a member who has a positive trade balance. However the business survival of Bartercard depends upon the scheme continuing to function. The scheme would inevitably fold up if members could join, obtain benefits, and then submit to termination of membership without having paid or being obliged to pay for the benefits. Bartercard of course did not supply the goods, but it has a genuine interest in maintaining the scheme and its own entity. It is a difficult matter to put a price on the maintenance of such an interest, but I am unable to say that clause 34(a) demands an unreasonable price. In the final analysis, in order to maintain equilibrium Bartercard must be in a position from which it can top up deficits of this kind. The conversion of a barter dollar deficit to a cash deficit in the event of a member failing to provide sufficient barter dollar credits in 30 days may fairly be described as a genuine pre-estimate of loss. Even if it is the maximum in the available range of estimates, it is within the available limit within which parties may contract without interference from the courts. As Lord Dunedin observed in the leading decision which is still referred to with substantial approval[11]:

> "It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties (*Clydebank Case* [1905] AC 6 at p 11 per Lord Halsbury; *Webster v Bosanquet* [1912] AC 394 at p 398 per Lord Mersey)."

[26] The surveillance of courts over contracts is not based upon any underlying approval or disapproval of incentives or disincentives, which are a natural part of commercial arrangements. The Victorian decision of *CRA Limited & Anor v New Zealand Goldfields Investments and Anor*[12] instances the upholding of a clause entitling the non-defaulting party to buy out the interest of the defaulting party at less than fair

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8 Including *Dunlop Pneumatic Tyre Company Limited v New Garage and Motor Company Limited* [1915] AC 79; *O'Dea v Allstates Leasing System (WA) Proprietary Limited* (1983) 152 CLR 359; *Acron Pacific Limited v Offshore Oil NL* (1985) 157 CLR 514; *AMEV-UDC Finance Limited v Austin* (1986) 162 CLR 170.

9 *Dunlop Pneumatic Tyre Company Limited v New Garage and Motor Company Limited* (above) at 86-87; *O'Dea v Allstates Leasing System (WA) Proprietary Limited* (above) 368, 399.

10 *O'Dea* (above) at 400.

11 *Dunlop Pneumatic Tyre Company* case above at pp 87-88.

12 [1989] VR 873.

market value. It was held that no penalty was involved, as the purpose of the clause was neither to compensate the non-defaulting party nor to punish the defaulting party, but simply to deal with a default in a fashion most conveniently suited to overcoming it in the interests of the progress of the joint venture project[13]. There is in any event nothing in the present case in the nature of a punishment for non-observance of a contractual stipulation. Neither is the pre-estimate extravagant, unconscionable or "judged as at the time of making the contract, … unreasonable in the burden which it imposes in the circumstances which have arisen"[14].

[27] In the *AMEV-UDC Finance* case[15] Mason and Wilson JJ recognised the desirability of courts allowing parties greater latitude in determining the terms of their contract than had been permitted at various times during the evolution of this part of the law. Their Honours observed:

> "Equity and the common law have long maintained a supervisory jurisdiction, not to rewrite contracts imprudently made, but to relieve against provisions which are so unconscionable or oppressive that their nature is penal rather than compensatory. The test to be applied in drawing that distinction is one of degree and will depend on a number of circumstances, including (1) the degree of disproportion between the stipulated sum and the loss likely to be suffered by the plaintiff, a factor relevant to the oppressiveness of the term to the defendant, and (2) the nature of the relationship between the contracting parties, a factor relevant to the unconscionability of the plaintiff's conduct in seeking to enforce the term."

Their Honours continued:

> "The courts should not, however, be too ready to find the requisite degree of disproportion lest they impinge on the parties' freedom to settle for themselves the rights and liabilities following a breach of contract. The doctrine of penalties answers, in situations of the present kind, an important aspect of the criticism often levelled against unqualified freedom of contract, namely the possible inequality of bargaining power. In this way the courts strike a balance between the competing interests of freedom of contract and protection of weak contracting parties."[16]

The present case reveals no aspect of unconscionability, oppression or undue advantage. The learned judge at first instance correctly declined to identify the relevant contractual term as a penalty.

[28] It is unnecessary to discuss the matter at greater length. The above considerations are in my view the essential ones that lead to the conclusion that cl 34(a) is not void as a penalty. It is also unnecessary to deal with an alternative point raised below

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13 Ibid 875.

14 Per Deane J in *O'Dea v Allstates Leasing System (WA) Proprietary Limited* (1983) 152 CLR 359, 400.

15 (1986) 162 CLR 170, 193.

16 Ibid pp 193, 194.

and only faintly argued here on behalf of Bartercard to the effect that the right to the payment arose not by reason of Myallhurst's breach, but by reason of termination of the contract, which, it submitted was a provision for payment of money on the occurrence of a specified event rather than upon breach[17]. There is authority that such provisions are not penalties because they do not provide for an agreed payment in advance in respect of a breach[18].

[29] The appeal should be dismissed with costs to be assessed.

[30] **AMBROSE J:** I have had the advantage of reading the draft Reasons for Judgment of Thomas JA with which I agree.

[31] I wish only to make some additional remarks.

[32] Thomas JA has dealt with the terms of clause 34(a) of the Trading Rules and Regulations of Barter Card Ltd.

[33] At the outset of the Barter Card Trading Rules and Regulations booklet, their purpose is stated in the following terms:-

> "*The purpose of the following Rules and Regulations is to facilitate trading among members by promoting a system of good business practice and understanding of the guidelines*."

[34] Under Clause 7, BCL may make trade dollar credit lines available to any member and take collateral security for the member's indebtedness.

[35] Under Clause 9, BCL is required to maintain "bad debt reserve funds". It may elect to take the surplus of any fund which holds more than the anticipated need either as income for itself or for redistribution to its "members in good standing".

[36] I draw attention also to Clause 14 which inter alia provides:-

> "*14 SPECIAL TRADE PROCEDURE*
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> *The following procedures apply to transactions involving special orders, construction jobs, service work or long term leases and other work-in progress transactions.*
>
> *A Buyers should obtain a written estimate before authorising work to begin.*
>
> *B Before starting if appropriate seller should obtain a deposit or down payment in trade dollars in the same manner as a cash transaction. This is done with a completed BCL transaction voucher and authorisation number from BCL Credit Clearance if the amount exceeds $100.00. Seller should include in its contract that if buyer does not have*

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17 cf. *O'Dea v Allstates Leasing System (WA) Pty Ltd* (above) at 367 per Gibbs CJ.

18 *O'Dea (above*) at 367*; Export Credits Guarantee Department v Universal Oil Products Co* [1983] 2 All ER 205; Meagher Gummow and Lahane *Equity Doctrines and Remedies* 3rd edition para 1817.

> *sufficient trade dollars in its account when authorisation is requested, the difference must be paid in CASH TO THE SELLER. BCL will only issue an authorisation for the amount in the account and remaining useable credit line facility.*"

[37] I draw attention also to:-

> "17 SURCHARGE
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> *As an exception to the rule that trades will be made at prevailing prices (defined as normal or customary cash price), surcharges may be authorised by BCL in certain categories such as food, petrol, appliances, electronics and others where the gross margin of profit is relatively low. BCL will arrange the surcharge with each individual member. Members will be informed of any applicable surcharges."*

[38] These provisions indicate that the agreement on its face seems not to differentiate between cash and BCL credit in trade dollars.

[39] The fact that some members may (contrary to the Rules and Regulations) sometimes transfer BCL trade dollars to others for a sum in cash less than their dollar currency equivalent, to my mind is of no assistance in determining the issues debated upon appeal.

[40] The conclusion to which Thomas JA has come, is supported in my view, by the terms of clause 42 of the Rules and Regulations which reads as follows:-

> *"42 DISSOLUTION*
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> *If the BCL Barter Programme terminates or BCL otherwise ceases to do business all members in a negative trade dollar position will pay amounts they owe in cash (one trade dollar being equal to one dollar in cash in Australian currency) into a fund. The fund less expenses will be distributed pro-rata to all members who are in a positive trade dollar position. Thus, all members having a positive balance will receive cash for their trade dollars to the extent that the funds permit. BCL shall not be liable to any member for cash or trade dollars beyond the distribution of such funds as aforesaid.*"

[41] The essential contention of the appellant is that in effect it cost the respondent nothing to extend credit to the appellant because it was the members of the Barter Card system who provided the services on the Barter Card credit extended by the respondent at no cost to it. On the other hand, the respondent necessarily had an interest in maintaining the integrity of its Barter system and would be prone to financial loss in the event that members did not provide services in exchange for the credit which they were extended – albeit that the respondent would not suffer any direct or immediate loss should the credit be used up by a member who then failed to provide reciprocal services to other members of the Association. Non payment

of the cash value of services rendered upon the credit extended to the appellant by the respondent might involve eventual resort to the "bad debt reserve funds" maintained by BCL under Clause 9.

[42] I agree with the observations of Thomas JA on this point that indeed, if the integrity of the system be not preserved in accord with clause 34(a) it would put the maintenance of the whole barter scheme at risk.

[43] In the event that a member had its membership terminated with a negative trade balance any consequent resort to "the bad debts reserve funds" would or might deprive BCL of a profit to which it might otherwise be entitled under Clause 9.

[44] I agree that the appeal should be dismissed with costs to be assessed.