SUPREME COURT OF QUEENSLAND

CITATION:	*Australian and New Zealand Bank Group Ltd v Beamond & Anor* [2017] QSC 208
PARTIES:	**AUSTRALIAN AND NEW ZEALAND BANKING GROUP LIMITED ABN 11 005 357 522** (plaintiff) **v** **ADRIAN PETER BEAMOND** (first defendant) **DEBORAH MARIE SMITH** (second defendant)
FILE NO/S:	No 6241 of 2015
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 September 2017
DELIVERED AT:	Brisbane
HEARING DATES:	19, 20, 21, 24, 25, 26, 27, 28 and 31 October 2016, 1 November 2016; 12 December 2016; supplementary submissions of the defendants received 22 December 2016; supplementary submissions on behalf of the plaintiff received 22 December 2016; further supplementary submissions on behalf of the plaintiff received 14 September 2017
JUDGE:	Burns J
ORDER:	**1. The defendants deliver up, and the plaintiff recover, possession of the following properties:** **(a) Lot 14 on Building Units Plan 71029 in the County of Cardwell, Parish of Rockingham, Title Reference 21434248, being the lot more commonly described as Unit 14/69 Banfield Parade, Wongaling Beach in the State of Queensland; and** **(b) Lot 80 on Registered Plan 807822 in the County of Nares, Parish of Hull, Title Reference 21476087, being the land more commonly described as Lot 80, Bicton Close, Bingil Bay in the State of Queensland;** **2. The second defendant deliver up, and the plaintiff recover, possession of Lot 73 on Registered Plan 807824 in the County of Nares, Parish of Hull, Title**

Reference 21476092, being the land more commonly described as Lot 73, Bicton Close, Bingil Bay in the State of Queensland;

3. **The defendants pay the sum of $1,989,534.02 to the plaintiff;**
4. **The counterclaim is dismissed;**
5. **The defendants pay the plaintiff's costs of the proceeding (including reserved costs) to be calculated on the standard basis.**

CATCHWORDS: MORTGAGES – MORTGAGEE'S REMEDIES – POSSESSION – UNDER CLAUSE ENTITLING MORTGAGEE TO POSSESSION UPON DEFAULT OF MORTGAGOR – where the defendants entered into a series of five loan agreements with the plaintiff bank, each secured by registered bills of mortgage over properties owned by one or both of the defendants – where the defendants repaid one of the loans – where the defendants defaulted on the remaining four loans – where the plaintiff seeks payment of the sums due under the unpaid loans as well as possession of the mortgaged properties – whether the bank is entitled to recover possession of the properties – whether the bank is entitled to judgment on the unpaid loans

BANKING AND FINANCE – BANKS – LIABILITIES OF BANKS – FRAUD, UNDUE INFLUENCE AND UNCONSCIONABLE CONDUCT MORTGAGOR – where the defendants entered into a series of five loan agreements with the plaintiff bank, each secured by registered bills of mortgage over properties owned by one or both of the defendants – where the defendants repaid one of the loans – where the defendants defaulted on the remaining four loans – where the plaintiff seeks payment of the sums due under the unpaid loans as well as possession of the mortgaged properties – where the defendants counterclaimed for damages based on allegations of fraud, forgery, unconscionability and breach of fiduciary duty – whether the plaintiff engaged in fraud, forgery, unconscionability or breach of fiduciary duty – whether the defendants have suffered loss and damage in consequence of any acts of fraud, forgery, unconscionability and breach of fiduciary duty on the part of the plaintiff

Land Titles Act 1994 (Qld), s 184, s 184(3), s 184(3)(b), s 187
Uniform Civil Procedure Rules 1999 (Qld), r 5(2), r 5(3)

Bahr v Nicolay (No. 2) (1988) 164 CLR 604; [1988] HCA 16, cited
Breskvar v Wall (1971) 126 CLR 376, cited
Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd

(2016) 90 ALJR 770; [2016] HCA 26, cited
Davis v Williams [2003] NSWCA 371, cited
Elroa Nominees Pty Ltd v Registrar of Titles & Ors [2003] QCA 165, cited
Mbuzi v Hall & Anor [2010] QSC 359, cited
Robertson v Hollings [2009] QCA 303, cited
Robinson v Laws [2003] 1 Qd R 81, cited
Russo v Bendigo Bank Limited [1999] 3 VR 376; [1999] VSCA 108, cited
Tomasevic v Travaglini (2007) 17 VR 100; [2007] VSC 337, cited
Young & Ors v Hoger & Ors [2001] QCA 453, cited

COUNSEL: J Peden for the plaintiff
First and second defendants appeared on their own behalf

SOLICITORS: Gadens Lawyers for the plaintiff

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Introduction

[1] Over a period of approximately three years commencing in early 2007, the plaintiff bank loaned a total of $1.5 m to the defendants, Adrian Beamond and Deborah Smith. The money was advanced in a series of five separate loans, and each was secured by registered bills of mortgage over properties owned by one or both of the defendants and located near Mission Beach in North Queensland. Only one of the loans has been repaid.

[2] The bank sues on the unpaid loans and seeks payment of $2,413,403.76 plus interest from 3 October 2016 as well as possession of three of the properties that were used to secure the loans.

[3] It was not in issue that the defendants applied for each loan, or that each was made. Nor was it in issue that the last repayment they made to the bank with respect to any of the loans occurred in March 2012. Notices of default and demand were issued by the bank in November 2014, but they were ignored.[1]

[4] No real defence to the recovery of possession claim was mounted by the defendants. Indeed, part of the relief sought by them is an order that the bank "take back and assume possession" of one of the secured properties.[2] Instead, the defendants maintain by way of defence that they should be absolved from any liability to repay the four loans because of various acts or omissions they allege occurred in connection with the approval of those loans. Further, relying on some of those acts or omissions along with the bank's refusal to advance any more money after the last loan in the series was made, the defendants counterclaim for many millions of dollars in damages. Thus, their essential complaint was that five loans were approved when they should not have been and that a sixth loan was not approved when it should have been.[3] This conduct on the part of the bank, the defendants contended, caused their financial demise.

[5] The acts and omissions relied on by the defendants had a focus on the bank officer with whom they dealt, Andrew Eather, but they also contended that the same acts and omissions have the legal consequence that the bank's claim must fail and their counterclaim must succeed. In broad terms, they asserted that Mr Eather fraudulently manipulated the figures (for assets, liabilities, income or expenses) on a number of the loan applications so as to secure approval for loans when they should have been declined, that there were irregularities (including, they maintained, the forging of their signatures and the unauthorised insertion of the incorrect attestation date on one of the bills of mortgage) and, more generally, that their dealings with the bank were marked by maladministration.

[6] The defendants also alleged that Mr Eather represented to them that additional borrowings would be made available to them in the future and that, when application was later made, it was refused and that he also made a representation about the legal effect of a second-ranking bill of mortgage. They assert that they relied on these representations when entering into the second, third and fourth loan transactions, and much to their loss.

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1 Exhibit 15.

2 Amended Defence and Counterclaim filed on 19 November 2015, par 110(f).

3 See the exchange at T. 7-39.

[7] For the reasons that follow, there is no defence to the bank's claim and no substance to the counterclaim; it is misconceived from start to finish.

Snapshot of the loans and securities

[8] The five loans were made between January 2007 and February 2010. Each was advanced to, or for the benefit of, both defendants. The properties over which security was granted were:

(a) a penthouse apartment situated at 14/69 Banfield Parade, Wongaling Beach owned by the defendants ("**the Penthouse**");[4]

(b) a vacant block of land situated at Lot 80, Bicton Close, Bingil Bay ("**Lot 80 Bicton**") owned by the defendants;[5]

(c) another vacant allotment at Bicton Close, being Lot 73 ("**Lot 73 Bicton**") owned by Ms Smith;[6] and

(d) a townhouse situated at 28B Mitchell Street, South Mission Beach ("**Mitchell Street**") owned by the defendants.[7]

[9] The loans and securities may be summarised as follows:

(a) the *first loan agreement*[8] was dated 15 January 2007 and was for the sum of $150,000 secured by a bill of mortgage over Lot 73 Bicton which was registered on 19 February 2007;[9]

(b) the *second loan agreement*[10] was dated 2 July 2008 and was for the sum of $930,000 secured by bills of mortgage over the Penthouse and Lot 80 Bicton which were registered on 10 September 2008 and a second-ranking bill of mortgage over Lot 73 Bicton which was registered on the same day;[11]

(c) the *third loan agreement*[12] was dated 1 August 2008 and was for the sum of $70,000 secured by the second-ranking bill of mortgage over Lot 73 Bicton;[13]

(d) the *fourth loan agreement*[14] was dated 25 August 2009 and was for the sum of $270,000 secured by a registered bill of mortgage over Mitchell Street and the bill of mortgage over the Penthouse;

(e) the *fifth loan agreement* was entered into on or about 1 February 2010 and was for the sum of $80,000 secured by the bill of mortgage over Mitchell Street.

[10] In May 2010, the defendants obtained partial refinancing from the Bendigo Bank. This was concentrated on the Mitchell Street debt. To facilitate this, the bank released its bill

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4 Lot 14 on Building Unit Plan 71029 in the Country of Cardwell, Parish of Rockingham, Title Reference 21434248.

5 Lot 80 on Registered Plan 807822 in the County of Nares, Parish of Hull, Title Reference 21476087.

6 Lot 73 on Registered Plan 807824 in the County of Nares, Parish of Hull, Title Reference 21476092.

7 Lot 2 on Building Units Plan 71143 in the County of Cardwell, Parish of Rockingham, Community Titles Scheme 492.

8 Exhibit 1.2.

9 Exhibit 7.2.

10 Exhibit 2.3

11 Exhibits 7.3 and 8.1.

12 Exhibit 3.5.

13 Exhibit 7.3.

14 Exhibit 4.17.

of mortgage over that property in exchange for a payment of approximately $120,000.[15] In the result, the fifth loan was repaid and the security over Mitchell Street was released.

[11] The files for the first to fourth loans, containing the original signed loan agreements for the first to fourth loans as well as other documents, were proved in evidence, as were the bank's security packets which contain the original signed duplicate bills of mortgage[16] and a copy of the registered bills of mortgage lodged in the Land Titles Office.[17]

[12] Before turning to the facts as I find them to be and my decision on the claim and counterclaim, it is necessary to say something about some matters of procedure, as well as my assessment of the witnesses.

Procedural considerations

[13] The trial commenced on 19 October 2016 and ran for ten days. Another day was then devoted to submissions. Mr Beamond and Ms Smith were not legally represented, although it became clear during the course of the trial that they had access to legal advice from a firm of solicitors. For the most part Mr Beamond conducted the case on their behalf, with Ms Smith assisting where necessary, and this included the making of brief submissions.

[14] Where one or more of the parties is not legally represented, the conduct of the trial in a way that is fair to all parties presents its own challenges. As Applegarth J remarked *Mbuzi v Hall & Anor*:[18]

> "The purpose of the rules of civil procedure is to 'facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense'.[19] The just resolution of the real issues in civil proceedings may on occasions require a judge to give proper assistance to self-represented litigants to ensure that the proceedings are conducted fairly and to avoid 'undue delay, expense and technicality'.[20] The proper scope for assistance depends on the particular litigant and the nature of the case.[21] The judge cannot become an adviser to the self-represented litigant, for the role of the judge is fundamentally different to that of a legal adviser. Further, the judge must maintain the reality and appearance of judicial neutrality at all times and to all parties, represented and self-represented.[22]"[23]

[15] After observing that the "court is entitled to extend some latitude to a self-represented litigant who is not familiar with forms and procedure, provided in doing so injustice and prejudice is not occasioned to other parties, and also provided the court is able to achieve a just and expeditious resolution of the real issues of the proceeding at a minimum of expense",[24] his Honour continued:

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15 T. 6-41.
16 Exhibits 5.7, 5.8 and 5.11.
17 Exhibits 7, 8 and 9
18 [2010] QSC 359.
19 UCPR r 5(3).
20 UCPR r 5(2).
21 *Tomasevic v Travaglini* (2007) 17 VR 100; [2007] VSC 337, [141].
22 Ibid, [142].
23 [2010] QSC 359, [25].
24 Ibid, [27].

> "A self-represented litigant should not be permitted to disregard rules and to conduct litigation in a manner which is unjust to other parties and contrary to the interests of justice. As Keane JA (as his Honour then was) observed in *Robertson v Hollings*:[25]
>
> > '… litigation is not a learning experience. The Courts do not permit litigants, even unrepresented litigants, to prosecute claims which cannot proceed fairly to the other parties'.[26]"[27]

[16] In this trial, the defendants were afforded considerable latitude in the conduct of their case, but they failed to comply with a number of critical pre-trial directions made by Flanagan J during the course of a supervised case review held on 1 September 2016. Chief among these were directions for the provision of any expert reports on which the defendants intended to rely at trial along with disclosure of all documents in support of their claim for loss and damage by 22 September 2016.[28] The defendants did not comply with either direction, whether by 22 September 2016 or at all.[29] Their failings in these two respects had consequences for the defendants, and they were for the most part held to them.[30]

Assessment of the witnesses

[17] It is necessary to make some observations about the witnesses called in the respective cases and I do so in accordance with the observations I noted at the time each gave evidence together with my review of the transcript of that evidence.

The bank's case

[18] *Melinda Chapman* is a senior case manager employed by the bank. She gave evidence with respect to each of the transactions in question on behalf of the bank and a number of documents from the bank's files were tendered through her. I accept her evidence in all respects.

[19] *Mr Eather* impressed me as an honest witness. He was thoughtful and considered. He readily conceded the mistakes he made in his dealings with the defendants. Wherever his evidence conflicted with the evidence of either defendant, I prefer his evidence.

The borrowers' case

[20] I do not doubt that *Mr Beamond* and *Ms Smith* have lived and breathed their dispute with the bank, and this litigation, for what now is a period in excess of five years. Because of that, perhaps, they may have become so fixated by what they perceive is wrongdoing on the part of the bank that they have convinced themselves of the truth of many of the facts in issue. But not all of the evidence each gave is capable of being rationalised in this way because, in a number of important respects, they did not tell the

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25 [2009] QCA 303, [11].
26 Ibid, [13].
27 [2010] QSC 359, [27]. And see *Robinson v Laws* [2003] 1 Qd R 81, [56] per de Jersey CJ.
28 The transcript of the review is MFI 13.
29 Some limited disclosure of secondary material in relation to domain names was provided after the trial commenced, as to which, see TT. 1-4, 3-38, 3-48 and 3-51
30 For example, despite being directed to confine their submissions to the evidence adduced in the case (T. 9-120), the defendants attempted to adduce expert and other evidence through supplementary written submissions received after the conclusion of the trial. Leave to do so was refused.

truth. Indeed, much of what they said in evidence was contrived to fit with a case theory they must have believed would absolve them of all liability to the bank and reward them with success on the counterclaim.

[21] Mr Beamond is a dominant personality and gave numerous speeches during the course of the trial. He obfuscated when cornered, and was quick to cast blame. Ms Smith did her best to engender the sympathy of the court. Although their case theory was entirely misconceived, Mr Beamond strained when giving evidence to promote it. Ms Smith was not much different although she was clearly not the author of the theory; that was almost certainly Mr Beamond. In the result, their evidence seemed to me to be often the product of what they believed would fit with their theory rather than their honest recollection.

[22] On the whole, neither Mr Beamond nor Ms Smith gave testimony on which the court can safely rely.

[23] *Mr Simpson* is a senior investigator employed by the bank. He was called by the defendants to establish certain things in relation to the bank's investigation of their complaints. He was an impressive witness. I have no hesitation in accepting the evidence he gave to the court.

Facts

[24] These are the facts as I find them to be.

The first loan – $150,000

[25] In early November 2006, Mr Beamond first made contact with Mr Eather for the first time. The defendants were residing in South Mission Beach, approximately 150 km to the south of Cairns. Mr Eather was employed as a "mortgage specialist" in the retail banking section of the Grafton Street branch of the bank in Cairns.[31] Mr Beamond spoke with Mr Eather by telephone. The defendants were wanting to refinance a debt away from the Commonwealth Bank of Australia.

[26] Following their conversation, Mr Eather sent a loan application form to Mr Beamond under cover of an email dated 9 November 2006.[32] After completing the form, Mr Beamond returned it (together with a copy of some bank statements and documents of identification for both he and Ms Smith) to Mr Eather via facsimile.[33] It is worth recording that part of the information supplied by the defendants in this, their first application to the bank for a loan, was a signed statement of financial position and that, in it, they are recorded as having $13,273,000 in assets, liabilities of $1,346,000, net monthly income of $20,100 and "uncommitted monthly income" (after payment of all expenses including interest on the loan in relation to which he was making application), of $8,800 per month.[34] The amount of refinancing sought was $150,000.

[27] The application was approved, and this resulted in an offer from the bank to advance the amount sought in the form of a home loan. This offer was recorded in a loan offer

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31 Exhibit 25.
32 Ibid.
33 Exhibit 26 and T. 5-47.
34 Exhibit 26.

document dated 21 December 2006[35] which was sent to the defendants. The defendants accepted the offer, and this was evidenced by each signing the loan offer document on 15 January 2007.[36] In consequence, on that day, the bank as lender and the defendants as borrowers entered into the first loan agreement by which the bank agreed to loan $150,000 to them.

[28] Under the first loan agreement, the term of the loan was to be 30 years. Repayments were to be interest only for five years followed by monthly payments of principal and interest over the remaining term. To secure the loan, the defendants agreed that Ms Smith would execute a mortgage in favour of the bank over Lot 73 Bicton. The parties also agreed that this agreement would be regulated by the Consumer Credit Code. The agreement incorporated (by reference) what are described as the "Consumer Lending Terms and Conditions"[37] which, relevantly, provided that, in the event of default, the bank had the right to require immediate repayment of all money owing to it.[38]

[29] On 16 January 2007, Ms Smith executed a mortgage in favour of the bank over Lot 73 Bicton. It incorporated a number of standard terms.[39] The mortgage was subsequently lodged and then registered in the Land Titles Office on 19 February 2007.[40] The loan was drawn down on 12 February 2007,[41] and the funds were immediately deposited to the credit of an off-set account.[42]

[30] To be clear, I find that the defendants entered into the first loan agreement and that Ms Smith later executed the mortgage over Lot 73 Bicton in favour of the bank.

The second loan - $930,000

[31] On 5 June 2008, the defendants entered into a contract to buy the Penthouse for a purchase price of $800,000.[43] Six days later (11 June 2008), Mr Beamond emailed a copy of the contract, a valuation for that property and what is described as an "information handout" to Mr Eather.[44] In the covering email, he advised Mr Eather that the defendants sought finance in the amount of $930,000 to fund the purchase, acquisition costs, renovations to the apartment and furniture.[45]

[32] The bank subsequently obtained valuations with respect to the Penthouse, Lot 73 Bicton and Lot 80 Bicton from Herron Todd White. These were completed on 23 June 2008,[46] after which Mr Eather contacted Mr Beamond to arrange for the defendants to attend on him to sign the necessary documents to facilitate the loan.[47] This, the defendants did, on 2 July 2008 when they attended on Mr Eather at the Grafton Street branch.

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35 Exhibit 1.2.
36 T. 5-50.
37 Exhibits 1.2 (p 7) and 13.
38 Exhibit 13.
39 The bill of mortgage was allocated registration number 710348105 and the standard terms document was allocated registration number 701295631.
40 Exhibit 7.2.
41 Exhibit 16.
42 Ibid.
43 Exhibit 2.7.
44 Exhibit 24.
45 Ibid. And see T. 5-53.
46 Exhibits 2.17, 2.18 and 2.19.
47 T. 5-56.

[33] When the defendants attended on Mr Eather, he was ready with a suite of documents requiring execution so as to facilitate the loan. These included a joint statement of financial position.[48]

[34] Like the first loan, the bank's offer was recorded in a loan offer document but, unlike the first loan offer document, it was dated on the day when it was signed by the defendants (2 July 2008). The defendants accepted the offer, and this was evidenced by each signing the loan offer document on the same day. Thus, in this way, the bank as lender and the defendants as borrowers entered into the second loan agreement.

[35] Under the second loan agreement, the bank agreed to loan to the defendants the sum of $930,000. Repayments were agreed to be by way of monthly payments of interest for five years followed by monthly payments of principal and interest over the remaining term of the loan, that being 30 years. It was agreed that the defendants would execute a mortgage over the Penthouse and Lot 80 Bicton in favour of the bank to secure this loan. It was further agreed that Ms Smith would execute a second-ranking mortgage over Lot 73 Bicton in favour of the bank as additional security. The parties agreed that this second loan agreement would not be regulated by the Consumer Credit Code.

[36] Again, the second loan agreement incorporated (by reference) "Consumer Lending Terms and Conditions" which, relevantly, provided that, in the event of default, the bank had the right to require immediate repayment of all money owing to it.[49]

[37] In accordance with the second loan agreement, and at the same meeting, the defendants executed a bill of mortgage in favour of the bank over the Penthouse and Lot 80 and Ms Smith executed a second-ranking bill of mortgage over Lot 73 Bicton, each of which was subsequently lodged in the Land Titles Office and registered on 10 September 2008.

[38] Settlement of the purchase of the Penthouse, and the drawdown of the second loan for $930,000, occurred on 3 September 2008.[50]

[39] Again, to be clear, I find that the defendants entered into the second loan agreement, executed the mortgage over the Penthouse and Lot 80 Bicton and that Ms Smith executed the mortgage over Lot 73 Bicton during their meeting with Mr Eather on 2 July 2008. In that regard, Mr Beamond initially denied having signed the documents on that date (or, indeed, at all) because of what he believed were suspicious markings on his copy of those documents.[51] However, during cross-examination, he came to the realisation that he had been mistaken for several years.[52] In any event, Mr Eather said in evidence that the documents were executed by the defendants at his meeting with them on 2 July 2008, and I accept his evidence in this regard.[53]

The third loan – $70,000

[40] During the same meeting between the defendants and Mr Eather on 2 July 2008, there

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48 Exhibit 2.
49 Exhibit 13.
50 Exhibit 16.
51 T. 5-57-58.
52 T. 5-65-66.
53 T. 8-37.

was a discussion about another loan, ostensibly to pay for further renovations to the Penthouse, but in reality, it was intended as "emergency funds".[54] In consequence, Mr Eather opened a file two days later (4 July 2008).[55] When giving evidence, Mr Beamond said that he had not sought this additional loan but, although I am prepared to accept that neither he nor Ms Smith initiated any discussion about the need for any further funds, Mr Beamond said in evidence that they accepted the offer when it was made by Mr Eather.[56] The bank investigators spoke with Mr Beamond and recorded this account:

> "'Andrew asked him if he needed money to start renovations – He agreed it would be a backup' and 'Adrian believes the $70K was a buffer loan as he wouldn't have income from the penthouse for months. He didn't want it but thought it would be a good idea to have the extra money."[57]

[41] Be that as it may, on 1 August 2008, the Bank as lender and the defendants as borrowers entered into the third loan agreement pursuant to which the bank agreed to loan to the defendants $70,000 under what was described as an Equity Manager Facility. Under it, there was no set term, although it was repayable in full on demand. The parties agreed that this third loan agreement would not be regulated by the Consumer Credit Code.

[42] All of the documents for this, the third, loan were signed on 1 August 2008. The funds were then made available to the defendants in an Equity Manager loan account. Security for the loan was provided in the form of a second-ranking mortgage over Lot 73 Bicton.

A new application – a tourism venture

[43] In March 2009,[58] the defendants made an application to the bank for finance to enable them to purchase, through a series of companies, two resorts situated at Bedarra Island and Dunk Island, North Queensland, and a rainforest lodge north of Cairns known as Silky Oaks Lodge.

[44] The purchase did not proceed, and so the application was not pressed any further.

The fourth loan – $270,000

[45] On 25 August 2009, the Bank as lender and the defendants as borrowers entered into an agreement pursuant to which the Bank agreed to loan to the defendants $270,000 to purchase Mitchell Street. The idea behind this purchase was to re-develop the townhouse into two independent living areas; one for Mr Beamond's mother to reside in and the other to be rented out.

[46] Under this agreement, the defendants agreed to make monthly repayments of interest only for five years followed by monthly payments of principal and interest over the remaining term of the loan, being 30 years. The defendants also agreed that this loan would be secured by a second mortgage over the apartment. The parties agreed that this fourth loan agreement would not be regulated by the Consumer Credit Code.

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54 T. 3-63.
55 Exhibit 3.
56 T. 3-63.
57 Exhibit 44. And see T. 3-63.
58 T. 5-75 and Exhibits 82 and 83.

[47] Subsequently, the Bank advanced the sum of $270,000 to the defendants.

The fifth loan – $80,000

[48] In late 2009, the defendants made application for further funding from the bank. This, they again did through Mr Eather. The amount sought was in excess of $400,000 but, despite significant efforts on the part of Mr Eather, only $80,000 was approved. This sum was advanced on 10 February 2010.

[49] This fifth loan is not the subject of any claim by the bank although it is referred to by the defendants in their counterclaim. As earlier discussed, the loan was paid out in full as part of the Bendigo Bank refinance in May 2010.[59]

Another new application – a DVD rental business

[50] In late 2011, the defendants (through Mr Beamond) approached the bank with a proposal to borrow further funds for the establishment of a DVD rental store in Mission Beach. The business plan in support of their application is sophisticated.[60]

[51] Like the tourism venture, this purchase did not proceed.

Default and demand

[52] In March 2012, the defendants ceased making any payments under the facilities[61] and defaulted on each of the loans and associated securities in question.[62] However it was not until November 2014 that demands were made under the facilities because, on 27 April 2012, the defendants made a complaint about the bank to the Financial Ombudsman. Also, the bank commenced its own investigation into the defendants' complaints.

[53] On 21 November 2014, the Bank through its solicitors gave the defendants notice of exercise of power of sale with respect to the three properties.

This proceeding

[54] The bank commenced this proceeding by the filing of the claim and statement of claim on 24 June 2015.

[55] It is important to a consideration of the issues that follow to keep in mind that the following allegations in the statement of claim are admitted in the defence:

(a) the defendants executed each of the loan agreements;[63]

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59 Ibid.
60 Exhibit 93.
61 T. 5-38.
62 T. 2-32 and Exhibit 16.
63 First loan (statement of claim, par 4 and defence, par 4(g)(iii)), second loan (statement of claim, par 12 and defence, par 12(g)(iv)), third loan (statement of claim, par 24 and defence, par 24(g)(iv)) and fourth loan (statement of claim, par 28 and defence, par 28(g)(iv)).

(b) the bank advanced the loan amounts to the defendants pursuant to the loan agreements;[64] and

(c) the defendants executed bills of mortgage in favour of the bank over the three properties the subject of the bank's recovery claim (Penthouse, Lot 73 Bicton and Lot 80 Bicton).[65]

[56] I turn now to a consideration of the claim and counterclaim.

The Claim

[57] The bank's claim is straightforward, and no positive defence is pleaded in defence of it. Thus, if the counterclaim is dismissed, the bank's claim succeeds.

[58] The bank's claim is for payment of the sums due under the unpaid loans and recovery of possession. The defendants failed to comply with the demands and the bank asserts an entitlement to recover possession of the three properties and payment of the amount outstanding to it under the four facilities.

The money claim

[59] The total amount proved to be owing across the four loans as at 3 October 2016 was $2,413,403.[66] However, the total must be reduced by $506,120.54, which sum is made up of:

(a) legal costs ($481,704[67]) that were not pressed at trial;[68]

(b) local authority rates ($20,000[69]) that were not proved at trial; [70] and

(c) Mediation travel expenses ($4,416.54) that were also not proved at trial.[71]

[60] The proven debt as at 3 October 2016 was therefore $1,907,282.46. In addition, the bank is entitled to contractual interest on that amount from 3 October to the date of judgment. The applicable interest rates across the four loans are different, with the lowest being 4.5% and the highest being 4.97%.[72] I will allow interest on the debt at the lowest of those four rates for 11.5 months. The calculation is – $1,907,282.46 x .045 x (11.5 / 12) = $82,251.56.

[61] The total for which judgment may be entered is therefore $1,989,534.02.

The claim for possession

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64 First loan (statement of claim, par 4 and defence, par 4(g)(vi)), second loan (statement of claim, par 12 and defence, par 12(g)(viii)), third loan (statement of claim, par 24 and defence, par 24(g)(vi)) and fourth loan (statement of claim, par 28 and defence, par 28(g)(vii)).

65 Lot 73 Bicton (statement of claim, par 7 and defence, pars 4(g)(v) and 7(a)), Penthouse and Lot 80 Bicton (statement of claim, par 15 and defence, pars 12(g)(vi) and 15) and Lot 73 Bicton (statement of claim, par 19 and defence, pars 12(g)(vii) and 19(a)).

66 Exhibit 16 (Certificates of indebtedness) and MFI 3 (Summary of loan account balances as at 3 October 2016 and interest accrual).

67 Exhibit 20.

68 T. 3-10.

69 Exhibit 21.

70 T. 3-34.

71 T. 3-35.

72 The interest rates are summarised in MFI 3.

[62] Pursuant to the bills of mortgage, in the event of default, the bank is entitled to recover possession of the real properties and sell them in order to apply the proceeds of sale towards the indebtedness.[73]

[63] Again, there being no defence to the bank's claim, and for the reasons that follow, no substance in the counterclaim, orders for the delivery up and recovery of possession cannot be resisted.

Conclusion on the claim

[64] Judgment shall be entered for the bank in the sum of $1,989,534.02 and orders for possession made with respect to the Penthouse, Lot 73 Bicton and Lot 80 Bicton.

The Counterclaim

[65] As counsel for the bank submitted, the essence of the defendants' counterclaim, as expressed in paragraphs 86 to 88 of the pleading, is that:

(a) the bank fraudulently created and forged documents which led to them borrowing money;

(b) (despite the first claim) the bank gave them four loans and indicated a preparedness to consider a further advance in the future, which didn't eventuate but had the preparedness not been indicated, they would not have borrowed any money at all;

(c) this wrongdoing has caused loss and damage to the defendants; and

(d) the loss and damage includes an inability to renew domain names and invest in a particular shares.

[66] The defendants' complaints are framed in broad allegations of forgery, fraud,[74] unconscionable conduct[75] and breach of fiduciary obligation.[76]

[67] At trial, a new claim was presented based on the bank's failure to pay a settlement sum to the defendants, which the defendants allege has caused them loss and damage, but the claimed losses appear to be the same.

Manipulation of the figures?

[68] One of the defendants' core allegations[77] was that Mr Eather entered data in the bank's computer system to gain approval for the subject loans without their "knowledge, consent or agreement".[78] The approvals system in place at the time was automated. It involved the loan officer completing an online form with details of the applicant's assets, liabilities, income and expenses, which details were required to be obtained from the applicant. Once those details were entered, the system would apply an algorithm to assess the application, after which the loan would be approved or declined and a notification as to which would be provided to the loan officer. In theory, the loan officer

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73 Exhibits 10 and 11.
74 Counterclaim, par 86.
75 Counterclaim, par101.
76 Counterclaim, par 105.
77 Counterclaim, pars 15-78, 86 and 87.
78 Ibid, par 86.

could enter deliberately false data to secure an approval for any loan (up to a monetary limit that is not relevant in this case), but I do not accept that this occurred in the case of any of the subject loans. In this regard, the evidence reveals a number of errors in the details that were entered,[79] but I am not in the least bit persuaded that any of these errors were deliberate, let alone fraudulent.[80] Furthermore, I am satisfied that the details of the defendants' assets, liabilities, income and expenses entered by Mr Eather with respect to each of the loan applications were wholly based on information supplied to him by Mr Beamond on behalf of the defendants and that he did his best to faithfully enter those details in the computer system in the case of each application.

[69] It is, however, to be observed that Mr Eather cut corners in the loan approval process, and that this was contrary to the bank's procedures. For example, in all but the first of the subject loans, Mr Eather failed to obtain a signed applicant guarantor declaration and signed statement of financial position *before* processing the loan application. Instead, what he did was speak with Mr Beamond over the telephone to ascertain whether any of the defendants' details had changed.[81] Once that was ascertained, he would enter the required details in the bank's computer system and, if the relevant application was approved and a loan offer generated, arrange for the defendants to attend on him to execute the documents to facilitate the loan, including the applicant guarantor declaration and statement of financial position. In the result, all of the documents required to be signed for each loan were signed but, in the case of the applicant guarantor declarations and statements of financial position for the second, third and fourth loans, they should have been signed before Mr Eather submitted the applications for computer assessment.

[70] The only matter of real concern in the loan approvals process was that, when entering data with respect to the second, third and fourth loans, Mr Eather indicated (by entering a "Y" in the relevant data box) that a signed statement of financial position was held. Had he not done that, the computer system would not have allowed that those applications to be processed. Nevertheless, to proceed in this way was contrary to the bank's procedures. However, I am satisfied that Mr Eather did so because he was under pressure from Mr Beamond to process each application as quickly as possible. As earlier mentioned, the bank's senior investigator, Mr Simpson, interviewed Mr Eather during the course of his investigation. When he was called by the defendants to give evidence at the trial, he was asked for his "impression" of Mr Eather.[82] This is the answer Mr Simpson gave:

> "My impression when we met with Mr Eather was that he had encountered a difficult customer. He'd had a bit of pressure placed on him, and he'd made some errors due to that pressure, but he was trying to do the right thing by the customer."[83]

[71] In any event, accepting, as I do, that the details of the defendants' assets, liabilities, income and expenses entered by Mr Eather with respect to each of the loan applications were wholly based on financial information supplied by Mr Beamond on behalf of the

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79 The inaccuracies are summarised in the submissions for the bank dated 11 December 2015, par 66.

80 For example, Mr Eather did not include on the statement of financial position for the third loan details of the second loan that had been approved, but not yet drawn down. He believed that, because the second loan had not been drawn down, he did not need to include it (T. 8-38-39).

81 T. 8-27.

82 T. 6-129.

83 Ibid. And see T. 6-119 and Exhibit 9.

defendants, nothing of any consequence to the proper disposition of the claim and counterclaim can be said to arise from any of the matters discussed in the preceding two paragraphs. Regardless of any shortcomings in the approvals process, the defendants were not bound to accept the offers of finance generated in consequence of each approval or, for that matter, execute any of the securities. In addition, they had the opportunity to review their statements of financial position before signing them. Each of the first, second, third and fourth applications were for "lo doc" loans which relied on the accuracy of the financial information supplied by the defendants. It was therefore important that the statements of financial position accurately recorded that information, and that the defendants signed off on each of them. This, they did, declaring in each instance that the information "on this form is true and correct".[84]

[72] For much the same reasoning, the criticisms made by the defendants during the trial of the amounts calculated by Mr Eather from information supplied by Mr Beamond and inserted in the statements of financial position regarding such variables as the defendants' uncommitted monthly income cannot, on any view, be regarded as fraudulent or, indeed, as unauthorised given that both defendants signed the relevant statements and declared their contents to be "true and correct".[85]

[73] In the end, I am satisfied that there is nothing Mr Eather did to deliberately distort the financial information which the defendants (through Mr Beamond) supplied. Shortly stated, he did not "manipulate" the figures to obtain approvals for loans that should not have been obtained.

Forgery?

[74] The defendants presented a broadly pleaded,[86] but ultimately incoherent, case by which it was alleged that Mr Eather or "an unknown person"[87] had completed documents without their authority, forged their signatures and improperly attested (or altered the execution date on) the bill of mortgage over the Penthouse and Lot 80 Bicton and the bill of mortgage over Lot 73 Bicton. At least so far as the mortgages are concerned, as the case proceeded at trial, the defendants retreated from many (if not all) allegations concerning the forging of signatures to a position whereby they asserted that the duplicate original bills of mortgage had not been executed by them on the date they bear (2 July 2008) but, instead, were executed about a month later (1 August 2008).[88] This in turn gave rise to an allied allegation to the effect that the mortgages had not been properly attested because they had not been witnessed in their presence.[89]

[75] The starting point is that Mr Eather denied ever forging the signature of either defendant,[90] and I have no hesitation in accepting his evidence in that regard.

[76] The next point is that the defendants did not claim that the original bills of mortgage which were lodged at the Land Titles Office and subsequently registered had not been signed by them; their allegation seemed to be confined to the duplicate bills of mortgage

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84 Exhibits 2, 3 and 4.
85 Ibid.
86 Counterclaim, pars 86-88.
87 See, for example, paragraph 42A(b) of the Counterclaim as amended during the trial (MFI 15).
88 TT. 6-65-66, 7-79.
89 Counterclaim, pars 42A and 66A.
90 T. 8-23.

filed with the bank. Even if such an allegation was true (which, in light of the concession the defendants made at trial, it was not), nothing could be said to turn on it.

[77] Third, Mr Beamond conceded that he was mistaken in the theory underlying the defendants' allegation that the duplicate original copy of the mortgages referred to in the preceding paragraph had been forged. In particular, after pleading and then maintaining in his earlier evidence that their signatures had been forged,[91]Mr Beamond finally agreed during cross-examination that he probably signed the security.[92] Ms Smith also agreed with the same proposition when it was put to her.[93] After those concessions were made, the defendants' case became one where it was alleged that the duplicate original bills of mortgage had not been executed by them on 2 July 2008 but, rather, were executed on 1 August 2008.[94] It is impossible to clearly discern from the evidence or arguments of the defendants whether such an allegation was also intended to extend to the date of execution of the original bills of mortgage which were lodged at the Land Titles Office but, even if it was so intended, and for the reasons that immediately follow, the allegation cannot be accepted.

[78] Like the allegations of forgery, the contention that the mortgages were executed on 1 August 2008 was based on another complicated theory. However, the evidence is that the defendants attended on Mr Eather at the Grafton Street branch on both dates, that is to say, on 2 July 2008 and 1 August 2008.[95] Moreover, Mr Beamond accepted that they signed documents on the first of those occasions.[96] The mortgages for the second loan, and all associated documents, bear the same date – 2 July 2008. Mr Eather said in evidence that he witnessed the defendants' signatures on the mortgages that day, and then returned them to the section of the bank in Brisbane where they had been prepared.[97] I accept that evidence and, to the extent it requires any support, there is in evidence an email from the "Mortgage Documents and Settlements Team" to Mr Eather dated 27 June 2008 attaching the security documents[98] and a printout from the bank's Integrity System recording the receipt of documents by the MDS Team at 09.25 on 3 July 2008.[99]

[79] Last, part of the relief sought by the defendants is for orders pursuant to s 187 of the *Land Titles Act* 1994 (Qld) discharging the bills of mortgage and rectification of the register.[100] By s 184 of the Act, a registered proprietor of an interest in land holds the interest subject to registered interests affecting the lot but free from all other interests, save for a limited number of exceptions: s 184(3). As counsel for the bank correctly submitted, "it is well established that regardless of any forgery or shortcoming in the mode of execution such as to render the document void at common law, once registered, the bills of mortgage in favour of the bank mean that the bank has indefeasible title".[101]

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91 See, for example, T. 5-58.
92 T. 5-65-66.
93 T. 7-79.
94 TT. 5-67, 7-79. Although, in written submissions, the defendants oddly reverted to the case as originally put by them.
95 T. 5-66.
96 Ibid.
97 T. 8-36-37.
98 Exhibit 49.
99 Exhibit 51.
100 Counterclaim, par 110(c).
101 Citing *Breskvar v Wall* (1971) 126 CLR 376, 385-386; *Elroa Nominees Pty Ltd v Registrar of Titles* [2003] QCA 165, [40]-[41].

The only exception of any potential relevance to the defendants' *pleaded* case arises if there "has been fraud by the registered proprietor, whether or not there has been fraud by a person from or through whom the registered proprietor has derived the registered interest": s 184(3)(b).[102] However, in circumstances where I have rejected the defendants' allegations of fraud and, further, where it cannot be doubted that both defendants intended to grant a mortgage to the bank over the Penthouse and Lot 80 Bicton and that Ms Smith intended to grant a mortgage to the bank over Lot 73 Bicton, there is no room for operation of the exception.

[80] For completeness, I find there to be no substance in any of the other allegations by which it was alleged that Mr Eather or any other person completed documents without the defendants' authority or forged their signatures.

Were actionable representations made about the availability of future funding?

[81] The defendants alleged, in effect, that they only entered into the second, third and fourth loans on the basis of representations made by Mr Eather that, after the Penthouse was renovated, the bank would advance them further funds in the amount of approximately $500,000. These representations were said to have been made prior to the entry into of the second loan. When, in late 2009, the defendants applied through Mr Eather for this "second tranche financing", the bank declined the application (save to the extent of agreeing to advance $80,000) on serviceability grounds.

[82] The representations were expressed in various ways in the counterclaim,[103] but the deep flaw in the proposition that Mr Eather made some sort of actionable representation in this respect is exposed in paragraph 41(d) where the following is alleged:

> "Mr Eather said that 'the second loan [the second tranche] **could not be 100% guaranteed** as no loan application had been made'; upon which Mr Beamond asked 'do you see any possible issues or reasons why the refinance would not occur' to which Mr Eather said 'he could not see any issues and posed no problems provided we had our tax returns'." [Emphasis added]

[83] It will be immediately seen that even on the defendants' pleaded case, Mr Eather said that any further funding was "not 100% guaranteed". Elsewhere, it is pleaded that Mr Eather told Mr Beamond that the bank had "agreed in principle" but that it would require another valuation of the Penthouse (post-renovation) along with the defendants' "personal and business tax returns". [104]

[84] Mr Beamond gave this evidence at trial about the representations:

> "On top of the $150,000 and on top of the $530,000, in roughly 12 months' time they'd give you another $500,000 by way of loan? --- The [bank] were to provide it. Yes.
>
> So Mr Eather was – he said that would be okay as well, did he? --- He certainly didn't say it wouldn't be forthcoming. He gave us no impression that – what he did, he gave us the impression that he had – it was a – let's – I don't remember ever meeting him. He was a senior banker that had things like credit discretion

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102 As to which, see *Bahr v Nicolay (No. 2*) (1988) 164 CLR 604 at 614, 631-632; *Davis v Williams* [2003] NSWCA 371; *Russo v Bendigo Bank Limited* [1999] 3 VR 376; *Young v Hoger* [2001] QCA 453.

103 Counterclaim, pars 19, 22, 37, 38, 41, 42, 49, 54 and 57.

104 Ibid, par 19(f).

> authorities and was able to authorise the loans on a business plan and so that such speakers were putting up."[105]

[85] On the following day, there was this exchange:

> "You can … tell the court what you told Mr Eather? --- That it will be for 500,000 previously. That's what we told him. We discussed that amount. Okay.
>
> All right? --- So clearly the loan would have been on an interest only basis and it would have been at the prevailing interest rate that was available at that particular time. The only thing that was in doubt at that particular time was going to be the eventual value of the penthouse and when we would complete the renovations and get ---
>
> Yes? --- get it done. So I asked him the question – I'll just repeat it again so now we're up to – so it flows better. I said to him we'd be in dire S if the second tranche renovation money – the refinance moneys didn't come through or eventuate. Mr **Eather came back to us and said it couldn't be 100 per cent guaranteed because we hadn't made an application.** I then went straight back to him and said is there any reason that you know of why it will not be forthcoming? Mr Eather then – I'm looking at him directly in the eyes at that point and he then came back to me and said that he could see no reason why it wouldn't be approved provided we provided our tax returns.
>
> In other words, verified your income? --- He – he just said to provide the tax returns.
>
> But that's what – there had been no verification of your income up to this point; is that right? --- There would be no – there would be no verification of it. There was no discussion with Mr Eather – had with us about the level of income we'd be required to qualify for this loan or for the second tranche loan, the ---
>
> No, but I'm just trying to get this clear in my head. There had been no verification of your income? --- None.
>
> - - - up to this point? --- None, your Honour. No."[106] [Emphasis added].

[86] Ms Smith did not give any evidence-in-chief about this issue but, under cross-examination, it was put to her that Mr Eather had said words to the effect that the second tranche loan "could not be 100 per cent guaranteed as no loan application has been made", and she agreed.[107]

[87] Mr Eather said in evidence that there was "no promise or guarantee that [second tranche

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105 T. 3-77.

106 TT. 4-17-18. And see the note of the interview conducted by the bank's investigators (Exhibit 44) of Mr Beamond on 19 June 2013, where the following account from him is recorded:

> "He needed an interest only loan for about $400,000 to $500,000 (2nd tranche loan). He told Andrew all of this. He didn't need the penthouse as a long term investment.
>
> He wasn't getting tax return done for another 12 months. He asked Andrew whether there should be a problem getting this other loan done … based everything on getting this second loan. Andrew didn't guarantee this loan. He said he couldn't guarantee it because he didn't have the valuations or the tax returns."

107 T. 8-8.

finance] would ever … be made available".[108] He went on to state:

> "I don't believe the wording second tranche mortgage … was used as such. It was always … a discussion around increasing their lending, plus a 60 per cent threshold up to 80 per cent. However … we wouldn't even consider that until they were able to provide financial documents – tax returns.
>
> …
>
> I don't remember specific conversations. But … I don't know the specific wording. But there were discussions quite a lot around the fact that the bank was withholding directly from them and they wanted to increase the – that lending up to 80 per cent threshold. But without the provision of documentation, we wouldn't go [past] 60 per cent with lo doc".[109]

[88] I accept that there was a conversation or conversations around the time of the second loan during which the defendants (or, at least, Mr Beamond) enquired about the possibility of borrowing a greater amount from the bank once the Penthouse had been renovated. However, as the defendants pleaded and then accepted when giving evidence, they were by no means given an unqualified promise by Mr Eather that the bank would loan a greater amount of money at that point in time. Whether that came to pass would necessarily depend on a revaluation of the Penthouse (post-renovation) as well as the provision of personal and business income tax returns (at least) to verify what had not to that point in time been verified, that is to say, their income.

[89] After all, all of the lending to that point in time had been on a "lo doc" basis under which verification of the defendants' income was not required but the amount that could be loaned under the lending guidelines was limited to 60% of the loan to value ratio ("**LVR**"). On the other hand, if their income was verified, up to 80% of the LVR could be borrowed provided the defendants were also able to demonstrate that they could service the higher debt. In addition, the contemporaneous documents make it clear that the defendants must have been only too well aware that the fate of any future application would depend on, in addition to another valuation of the Penthouse, verification of their income and an assessment of their capacity to service the increased borrowings.[110]

[90] As such, the best that can be said is that Mr Eather gave the defendants an assurance that the bank would consider a further application, when made, on its merits. There was no promise that any such application would be successful. Nothing was said by Mr Eather that could on any sensible view have given rise to an actionable representation.

The complaint that the defendants were let down by the bank

[91] As just discussed, when the defendants sought further funding from the bank in late 2009, their application was unsuccessful save to the extent of $80,000. This, the fifth loan, was then advanced on 1 February 2010.

[92] The defendants complained that, by refusing to advance the higher amount sought, they were, in effect, let down by the bank. They maintained that, had the bank provided them

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108 T. 8-39.
109 T. 8-40.
110 See, eg, Exhibits 31, 32, 40, 60 and 62.

with the higher amount,[111] they would not have been left exposed to the vagaries of the economy when they were already saddled with a considerable overall debt. In particular, Mr Beamond said that, if this further funding had been provided, the defendants would have deposited that sum to their line of credit facility with the Westpac Bank, thereby reducing that debt and providing them with a significant buffer. He said:

> "The reason was … to say we had half a million dollars in cash sitting in the bank in case the shit hit the fan, to put it bluntly."[112]

[93] Mr Beamond asserted that the defendants were by that time "overcommitted" with borrowings, and that this had come about because loans had been approved that should not have been approved if the "bank's computer" had not been manipulated by Mr Eather.[113] Mr Beamond emphasised that the refusal of further funding left them exposed when that should not have been the case:

> "[We] owed a terrific amount of money, and poddling [sic] around with 50 grand in the bank was certain suicide."[114]

[94] There are two fundamental problems with this complaint.

[95] The first problem is that, for the reasons just discussed, the bank had no obligation to provide further funding to the defendants. There was certainly no legal obligation to do so and nor can it be said that the bank, through Mr Eather or otherwise, had given an unqualified assurance of future assistance. The best that can be said is that Mr Eather undertook to attempt to assist the defendants with their future needs to the extent that was possible on a proper assessment of the merits of any future application, and that is precisely what occurred.

[96] The second problem is that I do not accept there is any validity in the assertion that the defendants were left exposed by the bank's refusal to loan any more than $80,000. In February 2010, the defendants received $80,000 under the fifth loan and, three months later, refinanced Mitchell Street through the Bendigo Bank. Under that refinancing, the defendants received approximately $162,000, which sum they deposited to the credit of their facility with the Westpac Bank.[115] Then, in the middle of 2010, they left on holidays, travelling around the World for almost three months. This included a 52 day cruise, rail travel across Europe and a stay (including more rail travel) in Japan.[116] Although Mr Beamond emphasised that the deposit had already been paid with respect to the trip, that it was a "bargain basement holiday" and that the "actual net cost … wasn't that great at all",[117] the fact is that, by May 2010, they had at their disposal a significant cash buffer ($262,000) and the wherewithal in any event to spend three months overseas. Indeed, in the middle of the following year, and only a matter of months prior to the cessation of payments on any of the facilities with the bank, the defendants left on another trip, this time to take their sons to New Zealand, although Mr Beamond explained that this was something of a "last hurrah":

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111 T. 6-41.
112 T. 5-92.
113 Ibid.
114 Ibid.
115 T. 6-41 and 6-47 and Exhibits 88 and 90.
116 T. 6-49.
117 Ibid.

> "I took my sons on holiday before the shit hit the fan, if you really want to know. Right? And that was what I took them across there, because I knew that the end was very near because of what had actually happened, because we were over-committed, we were paying the money to [the bank], and we were making the payments as – at – when the money was running out fast. So I took them on a holiday, and they paid for over half of it. Okay? And the other money, we were lucky to get from the government because we had – we had a couple of thousand dollars each come in from the government because we had damaged floors. And I took my sons on holiday because I could see that we weren't going to be able to do – we weren't – never going – likely not to be able to do it again because the dark clouds were coming in financially. So that's what actually happened."[118]

[97] This complaint must be rejected.

Were actionable representations made concerning Lot 73 Bicton?

[98] Another representation alleged by the defendants on the part of Mr Eather concerned Lot 73 Bicton. The effect of what is pleaded is that Mr Eather told them that the second-ranking bill of mortgage over that property would only secure an additional sum of $15,000.[119]

[99] When giving evidence, Mr Beamond said, with reference to the second loan:

> "The credit contract … said that they were going to take a mortgage over lot 73, lot 80 and the penthouse, but the way Mr Eather sold it was that only 15,000, because that was the shortfall, would be on Deb's property of the total debt."[120]

[100] He went on to say that it was not until the middle of 2012 when he discovered that the second mortgage over Lot 73 Bicton was an "all monies mortgage".[121] Ms Smith gave no evidence on the topic.

[101] Properly considered, Mr Beamond's complaint seems to be that what Mr Eather allegedly told them was contrary to the terms of the mortgage which Ms Smith executed. Indeed, the relevant allegation is made in the context of a wider complaint about Mr Eather having acted "perfunctorily" when the defendants attended on him to sign the documents for the second loan.[122]

[102] Even if Mr Eather said what is attributed to him by Mr Beamond, there are obvious difficulties confronting a party alleging that a representation as to the legal effect of a document he or she has signed gives rise to a cause of action unless it can be established that the parties intended the promise to be contractually binding[123] or that what was said was capable of misleading a reasonable person in the way that the party relying on the statement claims he or she has been misled.[124] However, I do not accept that the statement relied on was made by Mr Eather or that Mr Beamond was in any doubt that the second-ranking mortgage over Lot 73 Bicton was an "all monies mortgage".

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118 T. 6-64.
119 Counterclaim, par 41(e).
120 T. 3-75.
121 T. 3-76.
122 Counterclaim, par 41(a).
123 *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* (2016) 90 ALJR 770, [22]
124 Ibid, [35].

[103] The loan offer document for the second loan which was signed by both defendants to signify their acceptance of the offer could not have been clearer; the second-ranking mortgage over Lot 73 Bicton was part of the overall security to be provided for the loan of $930,000 and was not expressed to be limited in any way. Moreover, the defendants had a firm of solicitors acting for them on the conveyance[125] and therefore could have obtained legal advice if they were in any doubt as to the effect of any of the securities, although Mr Beamond was at pains to make the point when giving evidence that the defendants had not sought "any legal advice" from that firm.[126]

[104] But, regardless of whether that is true or not, the content of the email correspondence between Mr Beamond and Mr Eather in the second half of 2009 leaves me no doubt that Mr Beamond well-appreciated that the relevant mortgage was not a "stand-alone mortgage".[127] Indeed, a restructuring of the securities so that "each of the [four properties had] their own stand-alone mortgage" was part of a proposal for change advanced by Mr Beamond in an email to Mr Eather on 25 November 2009.[128] The feature that the second mortgage over Lot 73 Bicton was an "all monies mortgage" was not something Mr Beamond did not know until the middle of 2012; he knew that all along.

[105] There is no merit in this complaint.

Unconscionable conduct?

[106] The defendants also alleged that the bank had engaged in unconscionable conduct in relation to which they suffered loss and damage.[129] The allegations pleaded in support of this part of their claim rely on the alleged representations and allegations of fraud and forgery that I have already rejected.

[107] There was, in any event, nothing unconscionable about the bank's dealings with the defendants.

Breach of fiduciary duty

[108] The defendants also allege that Mr Eather and the bank owed fiduciary duties to them which were breached and causative of loss.[130] Part of what is pleaded in support of this claim is an allegation that Mr Eather "acted or purported to act" as their agent. That was of course never the case. Otherwise, the claim for breach of fiduciary duty relies on the same alleged representations and allegations of fraud and forgery that I have rejected.

[109] Like all other parts, there is no merit to in this part of the counterclaim.

Refusal to compromise

[110] Lastly, at trial, another claim was advanced which was said to be based on the bank's failure to see the error of its ways, negotiate a settlement with the defendants in terms

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125 Vandeleur & Todd (T. 3-76).
126 T. 3-76.
127 See, eg, Exhibits 54 and 60.
128 Exhibit 60.
129 Counterclaim, pars 101 and 102.
130 Ibid, pars 103- 105.

satisfactory to them and then pay it.[131] Much was said about the bank's persistent refusal to acknowledge any wrongdoing despite various investigative findings which were alleged to establish that very thing. This, in turn, was alleged to have caused the defendants loss.

[111] Apart from Mr Eather not following the bank's procedures in a number of respects, no wrongdoing has been established on his part, let alone wrongdoing for which the bank may be adjudged liable. The bank was, in any event, under no obligation to negotiate with the defendants.

Conclusion on the counterclaim

[112] There is no substance in any of the allegations (or complaints) advanced by the defendants. The counterclaim must be dismissed.

Loss and damage

[113] Despite my conclusions on the claim and counterclaim, it is still necessary to consider the question of the damages claimed by the defendants although, because of those conclusions, I shall do so in an abbreviated way.

Grossly deficient disclosure

[114] At the forefront of any consideration of the loss claimed by the defendants is the feature that, despite directions from Flanagan J to do so, the defendants failed to make proper disclosure and, in particular, failed to disclose any financial records apart from the records that were provided in support of their last application to the bank in 2009. This made it impossible for the bank to test at trial, or for the court to assess, their damages claim.

Causation

[115] No conduct on the part of the bank can be said to have caused the defendants any loss.[132] They sought the loans for which they applied and, when approved, accepted the offers when they were made and provided the securities. They well knew what they were doing.

[116] The failure of the defendants to disclose any financial records since 2009 also meant that the Court could not be satisfied that there was any causal link between any conduct of the bank and loss claimed in consequence.

[117] Furthermore, although it must have been the case that the defendants had a substantial income stream at their disposal up to 2009 or 2010, it is clear enough that, for a number

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131 Counterclaim, pars 83C-83E, 86A-86D; MFI 15. Allegations along the same line can, however, be found in an annexure to the counterclaim which is entitled, *History of ANZ Conduct Post 2012*.

132 As to which, see the propositions put to, and the answers given by, Mr Beamond in cross-examination at TT. 6-55 to 6-59.

of reasons, their income dramatically decreased.[133] Mr Beamond identified those reasons in the business plan he prepared on 7 December 2011 to support his application for finance to purchase the DVD business,[134] and none of them can be traced to any conduct on the part of the bank. By that time, the defendants were also significantly indebted to three other financial institutions,[135] with the combined debt owed to those institutions ($1.55 million) being approximately the same amount as that which was owed to the plaintiff bank ($1.48 million) in this case. At trial, Mr Beamond attempted to blame the bank for his declining revenues, but the evidence he gave was demonstrated through cross-examination to have been, in large part, concocted.[136] It is also a matter of some significance that no complaint was made to, or about, Mr Eather or any other officer of the bank until after the defendants ceased making payments on the facilities in March 2012.[137]

Loss and damage

[118] In one of the annexures to the counterclaim can be found a breakdown of the defendants' claim for loss and damage. In round terms, in excess of $50 million is claimed under different heads.[138]

[119] Again, the point must be made that the defendants failed to make anything like proper disclosure of documents in support of their damages claim. After directions were made following the commencement of the trial, some limited disclosure was made of a number of domain names and associated particulars, but even then, there was no other evidence to support a case for loss in connection with those domains, apart from the evidence of Mr Beamond. It was not even satisfactorily established who the owner of the domain names was, although the likely position is that they were owned by an associated entity, eGlobal Investments Pty Ltd, and not the defendants.[139] If that was in fact the position, it is difficult to understand how the defendants could be said to have suffered any loss. In addition, no evidence was adduced as to the value of the domains and, to the extent that Mr Beamond attempted to do so, the values he ascribed for the domains about which he was cross-examined were demonstrated to be 200 to 400 times their current value.[140] Mr Beamond's evidence in these respects was far-fetched.

[120] A similar position obtains in the case of the damages claimed on the basis of a loss of opportunity to acquire shares in a company referred to in the evidence as "Lynas Corp". The defendants pleaded that they would have purchased $100,000 worth of shares in this company in April 2010 had the bank approved the second tranche of borrowings[141] and then sold those shares for a profit prior to April 2011, after which the shares significantly declined in value.[142] Specifically, Mr Beamond said that he would have

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133 T. 6-84.

134 Exhibit 93.

135 As at December 2011, the defendants were also indebted to the Westpac Bank ($770,000), the Commonwealth Bank ($480,000) and the Bendigo Bank ($300,000): Exhibits 16, 90 and 93.

136 See, eg, T. 6-56-58 and Exhibit 84.

137 T. 6-69.

138 The Counterclaim of course also seeks declarations, a discharge of the bills of mortgage, a discharge of all liability to the bank and, in the case of the Penthouse, an order that the bank take back possession on a "non-recourse" basis.

139 See Exhibit 94 and T. 6-77-78

140 T. 6-88-90.

141 Counterclaim, par 88 and Annexure of Loss and Damage, page 6

142 T. 6-52,54.

applied $50,000 of the funds from the second tranche towards this purchase with the balance financed through a margin loan.[143] The problem though with this evidence is that when regard is had to the amount received by the defendants from the fifth loan ($80,000) and the amount received in consequence of the refinancing of Mitchell Street through the Bendigo Bank ($162,000), which sums were deposited to their line of credit account with the Westpac Bank, the defendants had more than enough money to purchase the shares had they wished to do so.

[121] In summary, there being no satisfactory proof of any of the other claimed heads of damage, even had the defendants proved some liability on the part of the bank, they have not proved any loss.

Disposition

[122] For these reasons, it will be ordered: (1) that the defendants deliver up, and the plaintiff recover, possession of the Penthouse and Lot 80 Bicton; (2) that Ms Smith deliver up, and the plaintiff recover, possession of Lot 73 Bicton; (3) that the defendants pay the sum of $1,989,534.02 to the plaintiff; (4) that the counterclaim be dismissed; and (5) that the defendants pay the plaintiff's costs of the proceeding (including reserved costs) to be calculated on the standard basis.

143 T. 6-52.