SUPREME COURT OF QUEENSLAND

CITATION:	*Appleyard & Anor v Westpac Banking Corporation* [2017] QCA 316
PARTIES:	**KENNETH ARNOLD APPLEYARD** (first appellant) **ROSEMARIE MAGRET APPLEYARD** (second appellant) **v** **WESTPAC BANKING CORPORATION** ABN 33 007 457 141 (respondent)
FILE NO/S:	Appeal No 9432 of 2016 DC No 142 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Southport – Unreported, 19 August 2016 (Wall QC DCJ)
DELIVERED ON:	19 December 2017
DELIVERED AT:	Brisbane
HEARING DATE:	23 March 2017
JUDGE:	Fraser and Philippides and McMurdo JJA
ORDERS:	**1. The appeal be allowed to the extent only of varying paragraph 4 of the order made in the District Court on 19 August 2016 by omitting the text ", on the indemnity basis".** **2. Otherwise, the appeal should be dismissed with costs.**
CATCHWORDS:	APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – POWERS OF COURT – ORDERS SET ASIDE OR VARIED – where the appellant appealed against an order made by a judge of the District Court that they deliver to the respondent bank possession of land – where the bank made a contract either with Mr and Mrs Appleyard or with Mr Appleyard – where the bank later extended credit to Mr Appleyard under another contract – where it was common ground that the National Credit Code applies to the former, but not to the latter – where the bank also entered into a contract for a business overdraft with Mr Appleyard – where Mrs Appleyard had guaranteed one of the earlier contracts, but not the contract for the business overdraft – where Mr Appleyard fell into default under each of the contracts – where Mrs Appleyard defaulted under her guarantee – whether the National Credit Code precludes the bank from

enforcing its mortgage in circumstances in which the mortgage secures obligations under different loan contracts

National Consumer Credit Protection Act 2009 (Cth), schedule 1, *National Credit Code*, s 5, s 7(2), s 88

Bahadori v Permanent Mortgages Pty Ltd (2008) 72 NSWLR 44; [2008] NSWCA 150, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, cited

COUNSEL: The first appellant appeared on his own behalf and on behalf of the second appellant
E J Goodwin for the respondent

SOLICITORS: The first appellant appeared on his own behalf and on behalf of the second appellant
Kemp Strang Lawyers for the respondent

[1] **FRASER JA:** Mr and Mrs Appleyard have appealed against an order made by a judge of the District Court that they deliver to the respondent bank possession of land of which they are the registered owners as joint tenants.

[2] The principal issue in the appeal is whether the National Credit Code[1] precludes the bank from enforcing its mortgage in circumstances in which the mortgage secures obligations under different loan contracts, only one of which is regulated by the Code, and the bank relies upon a default only under a loan contract that is not regulated by the Code. Mr Appleyard, a solicitor, who appeared for himself and Mrs Appleyard argued that the primary judge erred in rejecting his argument that the restrictions in the Code upon enforcing mortgages apply in such circumstances.

The Code

[3] Section 88 of the Code specifies requirements a credit provider must fulfil before it enforces a credit contract or a mortgage against a defaulting debtor or mortgagor and before it begins enforcement proceedings against a mortgagor, including proceedings for possession of the mortgaged property; relevantly, the debtor or mortgagor must be given a notice that allows a specified period within which to remedy the default.

[4] That and other restrictions in the Code upon enforcement of a mortgage apply only in relation to a "credit contract". Section 4 provides that for the purposes of the Code, "a ***credit contract*** is a contract under which credit is or may be provided, being the provision of credit to which this Code applies." The term "contract" is defined in s 204 as including "a series or combination of contracts, or contracts and arrangements".

[5] As s 4 indicates, the Code does not apply in relation to every contract for the supply of credit. Section 5 identifies the supplies of credit in relation to which the Code applies:

> "(1) This Code applies to the provision of credit (and to the credit contract and related matters) if when the credit contract is

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[1] The Code is scheduled to the *National Consumer Credit Protection Act* 2009 (Cth). These reasons refer to the version of that Act cited by the parties, Compilation No 14 of 1 March 2017, which includes amendments up to Act No 11, 2016.

entered into or (in the case of pre-contractual obligations) is proposed to be entered into:

(a) the debtor is a natural person or a strata corporation; and

(b) the credit is provided or intended to be provided wholly or predominantly:

(i) for personal, domestic or household purposes; or

(ii) to purchase, renovate or improve residential property for investment purposes; or

(iii) to refinance credit that has been provided wholly or predominantly to purchase, renovate or improve residential property for investment purposes; and

(c) a charge is or may be made for providing the credit; and

(d) the credit provider provides the credit in the course of a business of providing credit carried on in this jurisdiction or as part of or incidentally to any other business of the credit provider carried on in this jurisdiction.

(2) If this Code applies to the provision of credit (and to the credit contract and related matters):

(a) this Code applies in relation to all transactions or acts under the contract whether or not they take place in this jurisdiction; and

(b) this Code continues to apply even though the credit provider ceases to carry on a business in this jurisdiction.

(3) For the purposes of this section, investment by the debtor is not a personal, domestic or household purpose.

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

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

(b) if the credit is intended to be used to obtain goods or services for use for different purposes, the purpose for which the goods or services are intended to be most used."

[6] The critical provision in this appeal is s 7(2). Section 7 provides:

"(1) This Code applies to a mortgage if:

(a) it secures obligations under a credit contract or a related guarantee; and

(b) the mortgagor is a natural person or a strata corporation.

(2) If any such mortgage also secures other obligations, this Code applies to the mortgage to the extent only that it secures obligations under the credit contract or related guarantee.

(3) The regulations may exclude, from the application of all or any provisions of this Code, a mortgage of a class specified in the regulations."

The credit contracts and the mortgage

[7] By a mortgage dated 26 May 1995 and registered on 11 September 1995 Mr and Mrs Appleyard charged their land with the payment of "Moneys Hereby Secured", the definition of which in the bank's standard terms included moneys owing or which became owing to the bank by either or both of Mr and Mrs Appleyard.

[8] In December 2003 the bank made a contract (which I will call the "Home Loan contract")[2] either with Mr and Mrs Appleyard[3] or with Mr Appleyard alone.[4] It is common ground that the Home Loan contract is a "credit contract" to which the Code applies.

[9] In September 2009 the bank extended credit to Mr Appleyard under a contract (which I will call the "Business Loan contract"). It is common ground that the Business Loan contract is not a "credit contract" to which the Code applies. Mrs Appleyard executed a limited guarantee in favour of the bank of Mr Appleyard's obligations under the Business Loan contract.

[10] Mr Appleyard did not challenge the bank's contention that his obligations under the Home Loan contract and the Business Loan contract and Mrs Appleyard's obligations as guarantor are secured by the mortgage.

[11] The bank also entered into a contract (which I will call the "Business Overdraft contract") with Mr Appleyard in September 2005. It is common ground that the Business Overdraft contract, like the Business Loan contract, is not a "credit contract" to which the Code applies. Mrs Appleyard did not guarantee Mr Appleyard's obligations under the Business Overdraft contract and Mr Appleyard argued that his obligations under the Business Overdraft contract are not secured by the mortgage. For those reasons, the Bank did not in this appeal rely upon Mr Appleyard's default under that contract as a justification for the order for possession.

[12] Mr Appleyard fell into default under each of the Home Loan contract, the Business Loan contract, and the Business Overdraft contract. Mrs Appleyard defaulted under her guarantee. (If she was a party to the Home Loan Contract she also defaulted under that contract.)

[13] By letter dated 16 July 2015 the bank demanded that Mr Appleyard pay overdue amounts under the Business Loan contract ($139,715.20) and the Business Overdraft contract ($152,180.99). By letters dated 27 July and 18 September 2015 the bank demanded that Mrs Appleyard pay the amount then overdue under her

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2 Reasons of the primary judge at p 2 lines 5-8. A general statement in paragraph 3 of Mr Appleyard's affidavit sworn on 11 July 2016 was the only evidence of the Home Loan contract, but counsel for the bank conceded that there was such a contract and invited the primary judge to decide the case on the basis that the Code applied to it.

3 In Mr Appleyard's affidavit he deposed in paragraph 3 that the mortgage secured "a housing loan obtained by the Respondents from the Applicant", the amount of which currently stood at about $256,000.00.

4 The bank's supplementary submissions in the District Court dated 12 August 2016, paragraph 23.

guarantee of Mr Appleyard's obligations under the Business Loan contract ($130,049.72). Mr and Mrs Appleyard did not comply with those demands.

[14] On 29 September 2015 the bank served on Mr Appleyard a default notice pursuant to s 88 of the Code. This notice related only to a default under the Home Loan contract.[5] The notice stated that Mr Appleyard had until 29 October 2015 to remedy the default, if that did not occur enforcement proceedings may begin, and the bank would begin enforcement proceedings and exercise its power of sale in respect of the land to recover the full account balance then owing of $247,671.67. Mr Appleyard deposed that no default notice under the Code was served upon Mrs Appleyard. The appeal was argued upon that premise, although the bank did not concede that the notice was not served upon Mrs Appleyard.

[15] On 27 October 2015 the bank appointed a receiver to the land.

[16] On about 3 November 2015 the bank issued notices of exercise of power of sale under s 84 of the *Property Law Act* 1974 (Qld) to Mr Appleyard and to Mrs Appleyard (as guarantor). These notices related to Mr Appleyard's default under the Business Loan contract and Mrs Appleyard's guarantee of his obligations under that contract.

[17] On 10 November 2015 the bank gave a notice to quit to Mr and Mrs Appleyard demanding that they deliver possession of the land to the bank. Thereafter the bank issued and served an originating application seeking possession of the land as mortgagee pursuant to s 78(1)(c) of the *Land Title Act* 1994 (Qld) and an entitlement to possession upon default conferred upon the bank by the mortgage. In the bank's application for possession it did not allege or rely upon any default under the Home Loan contract.

Mr Appleyard's argument in the District Court

[18] Before the primary judge, Mr Appleyard sought a stay of the proceedings on the ground that the bank had not served Mrs Appleyard with a default notice under s 88 of the Code. Mr Appleyard relied upon four main arguments. Firstly, the issue by the bank of a notice of default under s 88 of the Code in relation to the Home Loan contract invoked the application of the Code also in relation to the bank's application to enforce the Business Loan contract. Secondly, the Code applied of its own force to the enforcement of the mortgage to the extent that it secures the Business Loan contract mortgage, because credit supplied by the bank under all contracts was "predominantly" credit supplied under the Home Loan contract, which was admittedly the supply of "credit" under a "credit contract". Thirdly, the enforcement action taken by the bank purportedly under the Business Loan contract alone inevitably amounted to enforcement of the Home Loan contract contrary to s 88 and other provisions of the Code. Fourthly, in response to a submission for the bank that s 7(2) of the Code entitled it to enforce the mortgage to the extent that it secured the obligations of Mr Appleyard and Mrs Appleyard (as guarantor) under the Business Loan contract which was not regulated by the Code, Mr Appleyard submitted that s 5(1) nevertheless applied as the dominant provision.

Decision of the primary judge

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5 See exhibit KA 4 to Mr Appleyard's affidavit. Mr Appleyard acknowledged in argument before the primary judge that this notice related only to the Home Loan contract: transcript 15 July 2016, p.1-3.

[19] The primary judge accepted the bank's argument that the effect of s 7(2) of the Code was that the Code did not regulate the bank's enforcement of the mortgage to the extent that it secured the obligations of Mr Appleyard under the Business Loan contract and the obligations of Mrs Appleyard under her guarantee relating to the Business Loan contract. The primary judge considered that the bank's notice under s 88 in relation to the Home Loan contract was irrelevant to the bank's entitlement to enforce the mortgage to the extent that it secured the obligations of Mr Appleyard and Mrs Appleyard (as guarantor) under Business Loan contract.

Mr Appleyard's argument on appeal

[20] Mr Appleyard repeated on appeal the arguments he had advanced before the primary judge. In addition, he argued that the word "extent" in s 7(2) of the Code is ambiguous.

Consideration

[21] Mr Appleyard's second argument should not be accepted. Whether or not the total amount of credit supplied under the Home Loan contract and the Business Loan contract was, or originally was intended to be, predominantly supplied under the Home Loan contract has no bearing upon the bank's entitlement to enforce the Business Loan contract. The extended definition of "contract" in s 204 does not have the effect of amalgamating with the only "credit contract" (the Home Loan contract), or the credit supplied under it, a separate contract to which s 5(1) does not attract the application of the Code (relevantly, the Business Loan contract), or the credit supplied under it. As the New South Wales Court of Appeal explained in a case dealing with indistinguishable provisions of the *Consumer Credit (New South Wales) Act* 1995 (NSW),[6] the extended definition "applies only to a series of contracts or arrangements with respect to a particular loan" and "[e]ach credit contract (whether it be constituted by one or a series of contracts and arrangements) relates only to the loan to which it refers". There is no other basis in the Code for applying its restrictions upon enforcement of a credit contract in a way that amalgamates those different contracts or the credit supplied under them. Section 7 of the Code is also inconsistent with the application of the predominance test in the way proposed in the applicant's second argument. If that argument were correct, then, as was submitted for the bank, there would be no scope for the application of s 7(2), because the Code would either apply to all of the combined obligations secured by the mortgage or it would apply to none of them.

[22] Mr Appleyard's fourth argument suggested that that s 7(2) should be construed in a way that would make it accord with the predominance test in s 5(1)(b), s 5(1) being submitted to be the dominant provision in the Code. This argument invoked the principle articulated in the second of the following paragraphs in the joint reasons of McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky Inc v Australian Broadcasting Authority*:[7]

> "The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and

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6 *Bahadori v Permanent Mortgages Pty Ltd* (2008) 72 NSWLR 44; [2008] NSWCA 150 at [170] and [172] (Tobias JA, Campbell JA agreeing; Giles JA's reasons are not inconsistent with the reasons of Tobias JA). See also *Devon v Thirteenth Kaysan Pty Ltd* [2016] FCA 357 at [22] – [23] and *Australia and New Zealand Banking Group Ltd v Smith* [2009] VSC 556 at [30] – [32].

7 (1998) 194 CLR 355 at 381-382 [69]-[70]. I have omitted citations.

> purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole"https://jade.io/j/ - _ftn46. In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed.
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> A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court "to determine which is the leading provision and which the subordinate provision, and which must give way to the other". Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme."

[23] The second paragraph is inapplicable here because there is no conflict between s 5 and s 7. These provisions deal with different subjects, as their headings indicate: s 5 concerns "Provision of credit to which this Code applies" and s 7 concerns "Mortgages to which this Code applies". The relevant effect of s 5(1) in this case is that the Code applies to the Home Loan contract and the Code does not apply to the Business Loan contract or Mrs Appleyard's guarantee. The relevant effect in this case of s 7(2) is that the Code does not regulate the bank's enforcement under the mortgage of Mr Appleyard's obligations under the Business Loan contract and Mrs Appleyard's guarantee of those obligations.

[24] The principle expressed in the first quoted paragraph from *Project Blue Sky Inc v Australian Broadcasting Authority* requires as the primary object of statutory construction that the provision in issue be construed "so that it is consistent with the language and purpose of all the provisions of the statute". In this case it was not suggested that material assistance in ascertaining the statutory purpose might be derived from any source other than the statutory provisions. The relevant statutory purpose may be described in general terms as the imposition of restrictions upon the enforcement of the credit contracts defined in s 5(1) and mortgages only to the extent that mortgages secure obligations of borrowers under such credit contracts. It is not a purpose of the Code to impose any restrictions upon the enforcement of an obligation under a contact that is not caught by 5(1).

[25] Accordingly, Mr Appleyard's third argument should not be accepted. Obtaining possession of a mortgaged lot of land is a common mode of enforcing a mortgage. That mode of enforcement is not divisible according to the extent to which the mortgage secures obligations under different contracts. Section 7(2) would not have the substantive effect it is evidently intended to have if the Code's restrictions apply to such a mode of enforcement of an obligation in a contract to which the Code does not apply

merely because a different contractual obligation, also secured by the mortgage, is caught by s 5(1). Rather, s 7(2) allows enforcement of a mortgage without application of the Code's restrictions if the mortgagee is enforcing the mortgage as security for an obligation under a contract that is not caught by s 5(1), even though those restrictions would apply if the mortgagee sought to enforce the mortgage as security for a different obligation under a credit contract that is caught by s 5(1).

[26] Nor should Mr Appleyard's first argument be accepted. The circumstance that the bank gave Mr Appleyard a notice pursuant to s 88 of the Code relating to the Home Loan contract but did not give Mrs Appleyard a similar notice could not affect the conclusion that the Code does not apply to the Business Loan contract, Mrs Appleyard's guarantee, or the mortgage to the extent that it secures obligations under the Business Loan contract and the guarantee.

Breach of the Code of Banking Practice by the bank's appointment of a receiver before the expiration of the period specified in the s 88 default notice

[27] Mr Appleyard's challenge to the bank's appointment of a receiver has no relevance to the question whether the bank is entitled to delivery up of the possession of the land, as it sought in its originating application.

Error in finding that the appellants' defence only related to the Overdraft Loan and not the Business Loan contract

[28] Mr Appleyard argued before the primary judge that the bank misled him about the default interest rates that would apply to advances under the Business Overdraft contract. The primary judge held that it was not necessary to consider those arguments because they were not raised in relation to the Business Loan contract secured by the mortgage. Mr Appleyard argued that the primary judge was in error in deciding that the argument applied only to the Overdraft Loan, and not to the mortgage, because if Mr Appleyard's "claim for deceit"[8] succeeded, then the Business Loan contract would not have proceeded.

[29] It appears from Mr Appleyard's affidavit filed in the District Court that this claim is based upon his contention that a letter of variation dated 23 March 2017, by which the limit of the overdraft facility was increased, included a misleading and incorrect representation that all of the terms and conditions of the Business Overdraft contract remained unchanged. This was said to be incorrect and misleading because, whereas the original Business Overdraft contract (a "Business Finance Agreement" for "Facility Business Options Overdraft – Business Assets" dated 30 September 2005) specified additional interest on default described as "a variable default margin, (currently four per cent per annum)", under the Business Finance Agreement as varied by the letter dated 23 March 2007, interest charged on overdue amounts was to be at the "unarranged lending rate with the actual rate of interest not being specified".[9] Mr Appleyard deposed that the effect of the new provisions was that the default margin rate was increased from four per cent to seven point five per cent per annum in 2007.

[30] The original default margin was described as "variable" and the reference to four per cent per annum made it clear that that was the "current" rate. The change made by 23 March 2007 letter, was stated on page 3:

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8 Appellants' amended Outline of Argument, para 17.

9 Affidavit of Mr Appleyard, para 11.

> "You agree to pay … interest on overdue amounts including excesses above Facility Limits at the *Unarranged Lending Rate*, which will be determined by the Bank from time to time … The *Unarranged Lending Rate* will be published in a tombstone with our other Business Finance lending rates. Advertisements of … the *Unarranged Lending Rate* will appear in [the same newspapers referred to in the original facility] …"

It therefore appears that the change was merely terminological: the original "variable default margin" became an "*Unarranged Lending Rate* [as] determined by the bank from time to time."

[31] In relation to the consequences of the change, Mr Appleyard deposed only that "had I been aware at [March 2007] of the misrepresentation by the Applicant, I would have refinanced all loans held with the Applicant with another bank or lending institution and I consider I would have been capable of refinancing the loans in 2007 or not proceeded with the increased overdraft facility." That evidence does not expressly address the question whether or not Mr Appleyard would have entered into the Business Loan contract, which was made in September 2009 and varied twice in 2011. Nor does the evidence arguably support a case that Mr Appleyard sustained a loss as a result of the alleged misrepresentation. The evidence falls short of supporting an argument that the alleged misrepresentation in relation to the Business Overdraft contract justified any claim in connection with the Business Loan contract upon which the bank relied in its originating application.

[32] There is no evidence of any deceit by the bank. The suggested claim was of a statutory remedy for allegedly deceptive and misleading conduct. Neither Mr Appleyard nor Mrs Appleyard commenced any such claim. As was submitted for the bank, a mere potential for a misleading and deceptive conduct claim against the bank in relation to the Business Overdraft contract did not provide a defence to the bank's claim to possession of the land pursuant to the mortgage securing the Business Loan contract, which was admittedly in default.

[33] Mr Appleyard also argued that the bank failed to comply with a provision of the *Code of Banking Practice* 2004, which was incorporated into the Business Loan contract and the Business Overdraft contract, first, by failing to make full disclosure of the change in the terms of the variable default margin made by the letter of variation of 23 March 2007, and, secondly by not acting in good faith by appointing a receiver and manager of the land on 27 October 2016 before expiry of the period limited by the default notice under s 88 of the *National Credit Code*. The first alleged contravention is not a defence to the bank's claim for possession under the mortgage based on default in the Business Loan contract. As the s 88 notice related only to the Home Loan contract, the second alleged contravention also could have no bearing upon the bank's entitlement to possession of the land upon default under the Business Loan contract.

Appropriateness of an originating application rather than a statement of claim

[34] Mr Appleyard argued that disputed questions of fact rendered it inappropriate for the bank to bring its proceedings by way of an originating application rather than a claim and statement of claim. There was no relevant factual dispute and the issue

turned upon the proper construction of provisions of the Code. In those circumstances it was appropriate to proceed by originating application.[10]

Conclusion

[35] It was not in issue that the bank held a registered mortgage, Mr Appleyard's default under the Business Loan contract and Mrs Appleyard's default under the guarantee of the Business Loan contract amounted to a default by the respondents under the mortgage, and the terms of the mortgage and s 78(2)(c)(i) of the *Land Title Act* 1994 (Qld) entitled the bank to possession of the land upon the occurrence of that default. No error has been identified in the primary judge's decision to order delivery of possession of the land to the bank.

[36] The notice of appeal sought an order that the receiver appointed for the property by the bank be discharged. No application for such an order was made in the District Court. It would be inappropriate to consider any such application for the first time on appeal.

Costs

[37] The primary judge ordered Mr and Mrs Appleyard to pay the bank's costs of the application, including reserved costs, on the indemnity basis. Mr Appleyard's outline of submissions did not advert to that order, but in oral submissions he argued that the primary judge had not afforded him the opportunity to make submissions on it. Whether or not that is so does not appear from the record book, the transcript of the relevant part of the hearing in the District Court being incomplete on its face. Unsurprisingly, at the hearing of the appeal, counsel for the bank was not prepared to make a submission upon the point. Counsel obtained instructions that the bank was content for the order made in the District Court to be replaced by an order giving the bank its costs on the standard basis, rather than the indemnity basis, thereby sensibly avoiding the expenditure of further costs merely about a costs order.

Proposed orders

[38] I would order that the appeal be allowed to the extent only of varying paragraph 4 of the order made in the District Court on 19 August 2016 by omitting the text ", on the indemnity basis". Otherwise, the appeal should be dismissed with costs.

[39] **PHILIPPIDES JA:** I agree with the reasons of Fraser JA and with the orders proposed by his Honour.

[40] **McMURDO JA:** I agree with Fraser JA.

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[10] See UCPR, Rule 11(a), which authorises the commencement of a proceeding by application if "the only or main issue in the proceeding is an issue of law and a substantial dispute of fact is unlikely".