SUPREME COURT OF QUEENSLAND

CITATION:	*Scholz & Anor v Ace Finance Australia Pty Ltd* [2018] QSC 27
PARTIES:	**JOHN MICHAEL SCHOLZ** (first plaintiff/first respondent) **JANICE MERLE SCHOLZ** (second plaintiff/first respondent) **v** **ACE FINANCE AUSTRALIA PTY LTD** **ACN 101 588 747** (defendant/first applicant)
FILE NO:	No 9662 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	26 February 2018
DELIVERED AT:	Brisbane
HEARING DATE:	17 November 2017
JUDGE:	Davis J
ORDER:	**1. The order of the Court is as set out in the Schedule attached to these reasons.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – IMPLIED TERMS – where the defendant has applied to have a question as to the existence of an implied term determined prior to trial – where there are multiple agreements – where there may be an implied term appropriately read into a different agreement than the one specified in the application and pleadings – whether the question is appropriate to answer PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – SEPARATE DECISION OR DETERMINATION OF QUESTIONS AND CONSOLIDATION OF PROCEEDINGS – SEPARATE DECISION OR DETERMINATION – where the defendant has applied to have the question of a default under a relevant contract determined prior to trial – where the plaintiffs argue there was no default – whether it is appropriate to answer the question PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – SEPARATE DECISION OR DETERMINATION OF QUESTIONS AND

CONSOLIDATION OF PROCEEDINGS – SEPARATE DECISION OR DETERMINATION – where the defendant has applied to have the plaintiffs' allegation of an implied term determined prior to trial – where there are multiple agreements – where there may be an implied term appropriately read into a different agreement than the one specified in the application and pleadings – whether the question is appropriate to answer

Uniform Civil Procedure Rules 1999 (Qld) r 483, r 658

Bass v Permanent Trustee Co Ltd (1999) 198 CLR 334, cited
Finchbourne Ltd v Rodrigues [1976] 3 All ER 581, distinguished
Lambourn v McLellan [1903] 2 Ch 268, cited
Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited (2015) 256 CLR 104, applied
Reading Australia Pty Ltd v Australian Mutual Provident Society (1999) 240 FCR 276, followed
Re Multiplex Constructions Pty Ltd [1999] 1 Qd R 287, distinguished
Sanders v Snell (1998) 196 CLR 329, cited
Tamplin (FA) Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd [1916] 2 AC 397, cited
Victorian Producers Co-operative Co Ltd v Edwards (1993) 62 SASR 415, distinguished

COUNSEL: G Handran for the applicant/defendant
W Wild for the respondent/plaintiff

SOLICITORS: Hickey Lawyers for the applicant/defendant
TDK Lawyers for the respondent/plaintiff

[1] The defendant (the applicant in this application) seeks to have issues in the case summarily determined, or, if the issues cannot be determined summarily, seeks orders that the issues be determined prior to trial. It does this by seeking relief primarily under r 483 of the *Uniform Civil Procedure Rules* 1999 (Qld) (UCPR), in conjunction with r 658. Rule 483 authorises the determination of individual questions arising in a case. Further or alternatively, the defendant seeks declarations. The application for the primary relief[1] and the application for the alternative relief[2] are framed differently but the substance is the same; namely to determine the same two issues without trial, or before trial of the claim.

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1 Summary determination under rr 483 and 658.
2 The declarations.

[2] The application[3] is in these terms:

> "1. Pursuant to Rule 483 or alternatively Rule 658 of the *Uniform Civil Procedure Rules* ("UCPR") the following be determined summarily on the return of this application, separately from any other question in the proceedings and before any further trial of the proceedings:
>
> (a) Was Odna Pty Ltd ("Odna") in default under the written Finance and Development Agreement dated 17 July 2012, between it, the Defendant and others ("First Mortgagee Facility");
>
> (b) Is the Defendant only entitled to first priority for the money and liabilities secured by the "First Mortgagee Security" (as defined in the Deed of Priority dated 17 July 2012, between the parties and Odna ("Priority Deed") up to $3.5 million, plus reasonable interest, and reasonable fees, charges, costs and expenses payable to the Defendant.
>
> 2. Further or alternatively, pursuant to s. 10 of the Civil Proceedings Act 2011 or alternatively Rule 658 of the UCPR, declarations that:
>
> (a) Odna was in default under the First Mortgage Facility.
>
> (b) Upon the proper construction of cl.3.1(a) of the Priority Deed, the First Mortgagee Security has first priority for the money and liabilities secured by it up to $3.5 million, plus all interest, and all fees, charges, costs and expenses payable to the Defendant under the First Mortgagee Facility."

[3] In order to understand the application it is necessary to understand some background facts and the pleadings.

Background facts

[4] The defendant is in the business of money lending.

[5] On 8 May 2012, the defendant entered into a loan agreement with a company, Fraser Development Group Pty Ltd (Fraser). Fraser entered into the loan agreement (the Fraser Loan Agreement) in its capacity as trustee for the Anderson Family Trust No 3. By the Fraser Loan Agreement, the defendant advanced the sum of $704,617.12 to Fraser, on security of a mortgage over real property at Benowa on the Gold Coast. Guarantees were given by Fraser in its own right (not as trustee), Odna Pty Ltd (Odna), Odna as trustee of the Anderson Family Trust No 4, and each of Stephen, John and Sonja Anderson.[4]

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[3] Application, filed 30 October 2017, CFI 5.
[4] Affidavit of John Robert Facer, filed 17 November 2017, Ex JRF-1 at 1, 9.

[6] By the terms of the Fraser Loan Agreement, the principal advanced was to be repaid six months from the date of advance of the funds.[5] That was calculated to be 10 November 2012.

[7] Property at 43 Lamberth Road, Regents Park (Lamberth Road) was owned by the plaintiffs. By a contract dated 16 July 2012, the plaintiffs agreed to sell Lamberth Road to Odna as trustee for the Anderson Family Trust No 4 for the sum of $3,799,999.[6] The purchase price was payable by instalments. By the time of the conveyance of the title in Lamberth Road to Odna, the plaintiffs had been paid the sum of $1,700,000. The plaintiffs allege they also provided services to Odna at a consideration of $200,000, payment for which was to be made by Odna on dates in 2013 and 2014.[7]

[8] Lamberth Road had development potential and Odna intended to subdivide the land into residential lots.[8]

[9] By a document styled "Finance and Development Agreement" dated 17 July 2012 (the Lamberth Road Loan Facility), the defendant agreed to lend to Odna as trustee for the Anderson Family Trust No 4 the sum of $3,500,000. The advance was to be secured by a first mortgage over Lamberth Road in favour of the defendant, together with guarantees by Odna in its own right (not as trustee) and Sonja and John Anderson.[9]

[10] By the terms of the Lamberth Road Loan Facility:

(i) The sum advanced was for the purposes of the acquisition and development of Lamberth Road;[10]

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5 Affidavit of John Robert Facer, filed 17 November 2017 at [5], Ex JRF-1 at 2.

6 Affidavit of Hendrik de Korte, filed 17 November 2017, Ex HDK-1 at 8; Statement of claim, filed 20 September 2016, CFI 1 at [2].

7 Affidavit of Hendrik de Korte, filed 17 November 2017, Ex HDK-1 at 8; Statement of claim, filed 20 September 2016, CFI 1 at [3], [5].

8 Affidavit of John Robert Facer, filed 17 November 2017, Ex JRF-5 at 32; Defence, filed 19 October 2016, CFI 2 at [4(b)].

9 Lamberth Road Loan Facility: Affidavit of John Robert Facer, filed 17 November 2017, Ex JRF-5 at 25, 54, 58.

10 Lamberth Road Loan Facility, recital B, cls 1.1(c), 2, 6.1.

(ii) The advance was to be made in instalments, the first of which financed the acquisition of Lamberth Road.[11] Subsequent instalments were intended to finance the land's development;[12]

(iii) Interest was payable at a rate of 36 per cent per annum unless the borrower (Odna) was not in default of its obligations under the Lamberth Road Loan Facility and in those circumstances the interest rate would fall to 18 per cent;[13]

(iv) Odna and the defendant were to share in any profits generated by the development of Lamberth Road. After repayment of the debt to the defendant and all development expenses, the defendant would receive the first $1,152,000 profit.[14] There were provisions dealing with the division of further profits, but they are not relevant to the present application.

(v) Odna was liable to pay various fees including:

(a) an establishment fee of $96,250;[15]

(b) an ongoing administration fee of 0.25 per cent of the debt;[16]

(c) a "Finance Control Fee" of not less than $375,000, with an additional $125,00 per annum in certain circumstances;[17] and

(d) a "Risk Management Fee" of $627,000.[18]

(vi) The defendant had the right to recover various costs and expenses, including costs incurred in enforcing its rights under the securities.[19]

(vii) "Default" under the Lamberth Road Loan Facility was defined as default "in the performance of any term agreement or condition contained in or implied

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11 Clause 2.
12 Clause 2.
13 Clause 13.1, set out in full later; sch 1 item 6.
14 Clause 17.2.
15 Schedule 2.
16 Schedule 2.
17 Schedule 2.
18 Schedule 2.
19 Clause 19.

> by this Agreement, a Transaction Document or any other agreement between the Lender [the defendant] and … The Borrower [Odna as trustee for the Anderson Family Trust No 4]".[20] The term "Transaction Document" was defined as I later explain.

[11] The guarantee given by Odna as trustee for the Anderson Family Trust No 4 of the obligations of Fraser under the Fraser Loan Agreement was, on one view of it, an agreement between the defendant and Odna as trustee for the Anderson Family Trust No 4 for the purposes of the definition of "default". The guarantee, though, is not specifically mentioned in the Lamberth Road Loan Facility, unlike the Transaction Documents, which are.

[12] By the terms of the Lamberth Road Loan Facility, the defendant took a first mortgage over Lamberth Road.[21] The plaintiffs were therefore exposed, as, under their arrangements with Odna, the full sale price for Lamberth Road had not been paid. The plaintiffs took a second mortgage to secure payment of the balance of the purchase price and the money to become owing to the plaintiffs for services to be rendered to Odna. On 17 July 2012 (the same day the Lamberth Road Loan Facility was signed), the plaintiffs entered into a Deed of Priority with the defendant (the Priority Deed).[22]

[13] By virtue of the registration of its mortgage ahead of the plaintiffs' mortgage, the defendant had priority over the plaintiffs for all money owing under the mortgage including any further advances.[23] The Priority Deed altered that position, so the defendant only had priority to the extent of the $3,500,000 advanced "plus interest and [other charges] payable to [the defendant] under the first mortgage facility".[24]

[14] On 28 November 2012, the defendant and Odna varied the Fraser Loan Agreement with the consent of the guarantors so the payment date was extended to 10 January 2013 and the loan amount was increased.[25] In 2013, Odna paid the plaintiffs a further $500,000 on

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[20] Clause 14.1, set out in full later.
[21] Lamberth Road Loan Facility, sch 1 item 7; Affidavit of John Robert Facer, filed 17 November 2017, Ex JRF-6 at 61.
[22] Priority Deed: Affidavit of John Robert Facer, filed 17 November 2017, Ex JRF-8 at 88.
[23] *Property Law Act* 1974 (Qld) s 82.
[24] Priority Deed cl 3.1, Schedule item 1.
[25] Affidavit of John Robert Facer, filed 17 November 2017 at [6], Ex JRF-2 at 16, 18. The date mentioned in clause 1 of the Deed of Variation should be 10 January 2013, not 2012.

account of the purchase price of Lamberth Road and $100,000 on account of the services rendered to it by the plaintiffs.[26]

[15] The defendant alleges that Fraser did not pay the principal under the Fraser Loan Agreement by the extended date and therefore was in default. Demand was purportedly made of the guarantors, including Odna as trustee for the Anderson Family Trust No 4.[27]

[16] The defendant alleges that Odna is in default under its guarantee of Fraser's obligation under the Fraser Loan Agreement, and therefore Odna is in default under the Lamberth Road Loan Facility because Odna is in default under "any other agreement between [the defendant] and [Odna]".[28] Therefore, the defendant says, Odna cannot insist on calculation of its indebtedness based on the discounted interest rate.[29] That, of course, impacts the plaintiffs, because their mortgage over Lamberth Road ranks behind the defendant's mortgage.

[17] Based on the default alleged under the guarantee of the Fraser Loan Agreement, the defendant took possession of Lamberth Road, completed the subdivision and sold the lots. It calculated the sum due to it under the Lamberth Road Loan Facility based on the higher interest rate and the result was, in effect, that all the proceeds of sale were retained by the defendant.[30]

[18] The plaintiffs then sued the defendant, alleging a failure to account properly to them as second mortgagees. For present purposes the details of the particular calculations in the pleadings as to what is allegedly owed do not matter.

The pleadings

[19] The statement of claim pleads some of the history. It then pleads the existence of the two mortgages over Lamberth Road, the Priority Deed[31] and the failure by the defendant to apply any part of the proceeds of sale of the subdivided lots to the plaintiffs.[32] It is then

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26 Statement of claim, filed 20 September 2016, CFI 1 at [13]–[14].
27 Affidavit of John Robert Facer, filed 17 November 2017 at [12], Ex JRF-4 at 21–24.
28 Clause 14.
29 Defence, filed 19 October 2016, CFI 2 at [4], [6].
30 At [17], [22]..
31 Statement of claim, filed 20 September 2016, CFI 1 at [1]–[18].
32 At [22].

alleged that the defendant has retained money in breach of the Priority Deed.[33] Most of the facts (as opposed to legal assertions) alleged in the statement of claim which are relevant to the present application are non-contentious. The real matters in issue in the application are identified in the defence and the amended reply.

[20] By the defence, the defendant pleads various details concerning the advance of money to Odna under the Lamberth Road Loan Facility and the expenditure of money to develop Lamberth Road.[34] It also pleads details of money received from sales of the subdivided lots.[35] None of that really matters for present purposes. Importantly, the defendant pleads that it was a term of the Lamberth Road Loan Facility that "events of default included a default in the performance of any term of any agreement between the defendant and Odna",[36] and that Odna was in breach of such an agreement.[37]

[21] Those were assertions made by the defendant in reliance upon clause 14.1 of the Lamberth Road Loan Facility, which, relevantly here, provides as follows:

> "The Borrower shall at the option of the Lender be immediately in default upon the occurrence of any of the following events of default:-
>
> (a) if there is a default (other than by the Lender) in the performance of any term agreement or condition contained in or implied by this Agreement, a Transaction Document or <u>any other agreement between the Lender and</u>:-
>
> (i) <u>the Borrower</u>…"[38] (emphasis added)

[22] Under the Lamberth Road Loan Facility, the defendant is the "Lender" and Odna as trustee for the Anderson Family Trust No 4 is the "Borrower".

[23] By clause 13.1 of the Lamberth Road Loan Facility:

> "The Borrower must pay interest on the Debt at the Higher Rate, but if the Borrower pays interest and all other amounts payable on the due date for payment, and if there is no subsisting Event of Default or Potential Event of Default, the Lender agrees to accept interest on those amounts at the Lower Rate."

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33 At [24].
34 Defence, filed 19 October 2016, CFI 2 at [5], [11].
35 At [13] and [14].
36 At [4(b)(viii)].
37 At [6].
38 Lamberth Road Loan Facility cl 14.1.

The "Higher Rate" is defined in Schedule 1 as 36 per cent per annum and the "Lower Rate" is defined as 18 per cent per annum.[39]

[24] The defendant then pleads:

> "On or about 12 December 2013 Odna fell into default under the finance and development agreement[40] by breaching a term of an agreement between the defendant and Odna."[41]

The defence then calculates the interest payable on the higher rate.[42]

[25] On 9 November 2016, the plaintiffs' solicitors wrote to the defendant's solicitors seeking particulars identifying the agreement between the defendant and Odna under which Odna was allegedly in default.[43] The particulars delivered by the defendant are:

> "1. The agreement between the Defendant and Odna is a guarantee of a loan to [Fraser] dated 8 May 2012. A copy is attached.
>
> 2. The term breached is clause 8 requiring the loan to be repaid within 6 months of the advance date.
>
> 3. Fraser failed to repay the loan on the due date for repayment, being 10 January 2013. Odna guaranteed performance of Fraser's obligations. Notice of Default was provided to Fraser and Odna on 6 December 2013. A copy of this Notice is attached."[44] (emphasis removed)

The attachment referred to in paragraph 1 of those particulars was a copy of the Fraser Loan Agreement.

[26] The plaintiffs read the particulars as identifying the "agreement" allegedly breached by Odna as the Fraser Loan Agreement, not the guarantee given by Odna. Odna is in fact a party to the Fraser Loan Agreement, but there is no covenant in that agreement by Odna guaranteeing the liability of Fraser to the plaintiff. Those obligations are contained in a separate document, being the guarantee.[45] What was intended was to identify the guarantee by Odna of the obligations of Fraser under the Fraser Loan Agreement as the agreement pleaded in the defence as breached by Odna. What the particulars do not do

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39 Schedule 1 item 6.
40 Which I have called "the Lamberth Road Loan Facility".
41 Defence, filed 19 October 2016, CFI 2 at [6].
42 At [9].
43 Affidavit of Hendrik de Korte, filed 22 November 2017, CFI 7, Ex HDK-3.
44 At ex HDK-4.
45 Affidavit of John Robert Facer, filed 17 November 2017, Ex JRF-1 at 9.

is identify the clause in Odna's guarantee that Odna has allegedly breached. Instead, they identify the clause in the Fraser Loan Agreement which Fraser has allegedly breached.

[27] In their amended reply, the plaintiffs say that Odna was not in breach of any obligation under the Fraser Loan Agreement.[46] That plea is probably right. However, as I have previously explained, the defendant's case is that Odna was in breach of its obligation under the guarantee of Fraser's obligations under the Fraser Loan Agreement.

[28] The plaintiffs then allege that if Odna was a guarantor of Fraser, Odna was not in breach of those obligations because the guarantee was never called upon.[47] There are then allegations as to the amount of money received by the defendant on the sale of the subdivided lots.[48] The details of that are not relevant for present purposes.

[29] Critically for present purposes, paragraphs 7A – 7D of the plaintiffs' reply allege as follows:

> "7A On the proper construction of the Priority Deed, or by way of a term implied as a matter of law, the defendant was only entitled to priority for interest, fees, charges, costs and expenses to the extent that such charges were reasonable, and were reasonably incurred by the defendant.
>
> 7B The defendant purported to accrue interest at a rate of 36% per annum, compounded monthly, which interest charge:
>
> 7B.1 was unreasonable at this rate, relative to the rate of borrowing available to the defendant, and akin to a penalty;
>
> 7B.2 was unreasonably incurred, since Odna was not in default, such that the "Higher Rate" in the Finance & Development Agreement[49] did not apply; and
>
> 7B.3 was unreasonably incurred, because the defendant made an election to enter in possession as mortgagee and thereafter continue the development itself, rather than to sell the Property.
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> 7C A reasonable rate of interest would be 12% or alternatively 18% per annum.
>
> 7D The defendant purported to charge the following fees, which were unreasonable in amount, and/or were unreasonably incurred, because

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46 Amended reply of the plaintiffs, filed 4 July 2017, CFI 4 at [3].
47 At [3.3].
48 At [4A], [6A].
49 The Lamberth Road Loan Facility.

> the defendant made an election to enter in possession as mortgagee and thereafter continue the development itself, rather than to sell the Property:
>
> 7D.1 a purported "Establishment Fee" of $96,250.00;
>
> 7D.2 a purported "Administration Fee" of 0.25% per month plus GST;
>
> 7D.3 a purported "Risk Management Fee" of $627,000.00 plus GST; and
>
> 7C.4[50] a purported "Finance Control Fee" of $125,000 per annum."

[30] It can be seen that by paragraph 7A of the amended reply, the plaintiffs allege an implied term in the Priority Deed limiting the defendant to priority in relation to "interest, fees and charges, costs and expenses" which are "reasonable" or "reasonably incurred".

[31] Paragraph 7B.1 is pleaded in reliance upon the implied term alleged in 7A, but the allegation that the interest charged is "akin to a penalty" might have its foundation otherwise than in the term allegedly implied in the Priority Deed. At least hypothetically, the plaintiffs could attack clause 13.1 of the Lamberth Road Loan Facility as constituting a "penalty" without implying a term in the Priority Deed.

[32] Paragraph 7B.2 alleges that Odna is not in default. However, that is an assertion of law and there are no facts pleaded in paragraphs 7B, 7C or 7D in answer to the defendant's plea alleging that Odna was in default. However, paragraph 3.3 of the amended reply alleges that a condition precedent to Odna's default under the guarantee (the making of demand) has not been fulfilled and I will return to that.

[33] Paragraph 7B.3 may be pleaded in reliance upon the allegedly implied term. However, the allegation might be better based upon an analysis of the rights and obligations of the defendant and Odna under the Lamberth Road Loan Facility than under any term implied into the Priority Deed. That does not seem to have been considered. I express no view on that.

[34] The allegations made in paragraphs 7C and 7D seem to be made only in reliance upon the term implied as alleged in paragraph 7A of the amended reply.

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[50] Presumably, this should be 7D.4.

[35] It is against these facts and these pleadings that the defendant's application is brought.

The application

[36] The defendant's position before me was that if a term of reasonableness cannot be implied, and if Odna was in default under the guarantee, then the case is reduced to an accounting exercise.[51] However, I have doubts as to whether the guarantee by Odna of the obligations of Fraser falls within the category of agreements caught by clause 14.1(a) of the Lamberth Road Loan Facility.

[37] In *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited*,[52] French CJ, Nettle and Gordon JJ said, in what are becoming regularly quoted passages:

> [46] The rights and liabilities of parties under a provision of a contract are determined objectively, by reference to its text, context (the entire text of the contract as well as any contract, document or statutory provision referred to in the text of the contract) and purpose.
>
> [47] In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean. That enquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract.
>
> [48] Ordinarily, this process of construction is possible by reference to the contract alone. Indeed, if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) cannot be adduced to contradict its plain meaning.
>
> [49] However, sometimes, recourse to events, circumstances and things external to the contract is necessary. It may be necessary in identifying the commercial purpose or objects of the contract where that task is facilitated by an understanding "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating". It may be necessary in determining the proper construction where there is a constructional choice. The question whether events, circumstances and things external to the contract may be resorted to, in order to identify the existence of a constructional choice, does not arise in these appeals.
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> [50] Each of the events, circumstances and things external to the contract to which recourse may be had is objective. What may be referred to are events, circumstances and things external to the contract which are

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51 Defendant's outline, 16 November 2017 at [15].
52 (2015) 256 CLR 104 ('*Mount Bruce*') at [2]–[7].

> known to the parties or which assist in identifying the purpose or object of the transaction, which may include its history, background and context and the market in which the parties were operating. What is inadmissible is evidence of the parties' statements and actions reflecting their actual intentions and expectations.
>
> [51] Other principles are relevant in the construction of commercial contracts. Unless a contrary intention is indicated in the contract, a court is entitled to approach the task of giving a commercial contract an interpretation on the assumption "that the parties ... intended to produce a commercial result". Put another way, a commercial contract should be construed so as to avoid it "making commercial nonsense or working commercial inconvenience". (references omitted)

[38] The defendant's submission is, in effect, that the term "any other agreement between [the defendant] and [Odna]" must mean "any agreement whatsoever between the defendant and Odna". That, with respect, is unlikely. Regard must be had to the fact that the Lamberth Road Loan Facility is one of three contracts, the others being the contract of sale by the plaintiffs to the defendant and the Priority Deed. Surely, a reasonable businessperson[53] would not have understood that a breach by Odna of any agreement whatsoever (on any terms and relating to any topic) would trigger the higher interest rate, especially given the structure of the transaction constituted by the three contracts and the priority of the plaintiffs' debt owed by Odna. There must surely be some limits to the term "any other agreement between [the defendant] and [Odna]".

[39] There are obvious arguments open as to where the limits might lie. Clause 14.1 refers to agreements between "the Lender" and "the Borrower". It may make commercial sense to read clause 14.1 as referring to "agreements" entered into between the defendant *qua* lender and Odna *qua* borrower. In that light, it is arguable that Odna's contingent liability as guarantor (not borrower) under the guarantee of the Fraser Loan Agreement is not an agreement caught by clause 14.1 of the Lamberth Road Loan Facility.

[40] Further, the Lamberth Road Loan Facility refers to the "Project", being "the residential development to be undertaken on [Lamberth Road]." Against that background, clause 14.1 identifies three categories of agreements, the breach of which constitutes default: the Lamberth Road Loan Facility itself, "Transaction Documents" and "any other agreement between [the defendant] and [Odna]." "Transaction Documents" are defined as:

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[53] *Mount Bruce* at [47].

> "(i) this Agreement;
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> (ii) any charge, mortgage, pledge, lien, agreement, document or any security or preferential interest or arrangement of any kind identified in Item 7;
>
> (iii) any Guarantee or other security or document or agreement at any time created or entered into as security for the Loan Amount or any amount owing by the Borrower to the Lender;
>
> (iv) any agreement or arrangement varying, amending or novating any of the documents described in (a) to (c); and
>
> (v) any other document that the Borrower and the Lender agree in writing is a "Transaction Document"."[54]

[41] Odna's guarantee of Fraser's obligations under the Fraser Loan Agreement is not caught by paragraph (iii) of the definition of "Transaction Documents". Odna's guarantee was (at best for the defendant) entered into a security for the amount owing by Fraser to the defendant, not by Odna (the Borrower) to the defendant.

[42] Each of the Lamberth Road Loan Facility and the Transaction Documents concern "the Project". Clause 16 of the Lamberth Road Loan Facility contemplates agreements being made during the execution of the Project. Of course, the parties can always make further agreements concerning the Project. Reading "any other agreement" *ejusdem generis* with the terms "this agreement" and "Transaction Documents" may exclude the guarantee.[55]

[43] The application does not seek to have this construction point determined. There is nothing in the plaintiffs' pleadings which raises the construction point. A construction in favour of the defendant seems to have been assumed. As the construction point is not strictly raised by the application and the parties have not fully addressed me on it, it is not appropriate for me to determine the question. However, my doubts about the proper construction of clause 14.1 are relevant to the exercise of discretion in deciding the application. The question as to whether Odna was in default under the guarantee may be irrelevant to the dispute and not necessary to be determined at all, let alone before trial.

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[54] Lamberth Road Loan Facility cl 1.1(hhh).

[55] *Lambourn v McLellan* [1903] 2 Ch 268 at 275–6; *Lend Lease Real Estate Investments Ltd v GPT RE Ltd* [2006] NSWCA 207 at [31]; see generally *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2012) 247 CLR 240.

[44] Although the plaintiffs did not argue before me that Odna's guarantee was not caught by clause 14.1 of the Lamberth Road Loan facility, they did plead, and attempted to maintain before me that Odna was not in breach of the guarantee. The case as pleaded by the plaintiffs[56] and put to me in argument can be summarised as:

(i) Odna was not in breach of its obligation as guarantor unless demand was made of it;

(ii) The documents which the defendant says constitute the demand upon Odna do not as a matter of law amount to a demand;

(iii) Therefore, Odna was not in default of its obligations under the guarantee and it therefore follows was not in default of its obligations under the Lamberth Road Loan Facility.

[45] As already observed, the particulars delivered by the defendant are defective. They do not identify the clause in the guarantee by Odna of Fraser's obligations said to be breached. The plaintiffs guess that it is clause 10. Clause 10 of the guarantee provides:

> "The Guarantor for the consideration aforesaid <u>will pay on demand</u> to the Mortgagee immediately the same becomes or may become due and payable all and every payment instalment or sum of money and other indebtedness and monetary obligations and liabilities of the Mortgagor to the Mortgagee on any account whatsoever and whether present, future or contingent with [sic] does may be or become owing or payable to the Mortgagee at any time or times under or pursuant to or connected with the Mortgage or any instrument, security or document as aforesaid or any of them."[57] (emphasis added)

[46] If clause 10 is the clause that is said to have been breached by a failure to pay, then it is incumbent upon the defendant to prove demand for payment of the money.[58] The default is said to have occurred on 10 January 2013 when Fraser did not pay the principal due under the Fraser Loan Agreement. Evidence of the alleged demand is contained in the documents exhibited to the affidavit of John Robert Facer. A letter was sent by the defendant's solicitors on 21 January 2013 in the following terms:

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[56] Amended reply of the plaintiffs, filed 4 July 2017, CFI 4 at [3.3].
[57] Affidavit of John Robert Facer, filed 17 November 2017, Ex JRF-1 at 9.
[58] *Re Taylor* (1995) 130 ALR 723, 725.

> "We refer to previous communications and note that the loan term expired on 10 January, 2013.
>
> We are instructed that the principal sum remains outstanding and the facilities have not been repaid.
>
> You are in default of your loan facility and therefore in default of all securities granted by you and the guarantors in favour of our client.
>
> Due to your default our client is entitled to charge interest at the normal rate under the facility/securities from the date of default, namely 10 January, 2013.
>
> Our client reserves it's [sic] rights."[59]

[47] That letter was directed to "The Directors, Fraser Development Group Pty Ltd as Trustee for Anderson Family Trust No 3 Pty Ltd". It is perhaps by clerical error that "Pty Ltd" appears at the end of the name of the trust. Fraser as trustee was the borrower under the Fraser Loan Agreement. Although the letter purports to record that a copy was sent to Odna, I cannot see that the letter constitutes a demand of Odna for payment.

[48] A further letter was sent by the defendant's solicitors on 6 December 2013. It is in the following terms:

> "In accordance with your guarantee and indemnity in favour of our client dated 8 May, 2012 we write to advise that default has occurred and the loan is now immediately due and payable.
>
> We demand immediate payment of the monies set out in the enclosed notices.
>
> Please telephone Daniel Nash of our office to arrange rectification of the default and/or the handing over of possession of the property, as a matter of urgency."[60]

[49] The letter of 6 December 2013 is directed to "The Directors, Fraser Development Group Pty Ltd". It is not directed to "Fraser Development Group Pty Ltd as Trustee for the Anderson Family Trust No 3 Pty Ltd". Fraser Development Group in its own right is a guarantor. It seems that a copy of that letter and the enclosures were also sent to various parties including Odna. The enclosures are a notice of exercise of power of sale under s 84 of the *Property Law Act* and a notice of demand directed to "The Directors, Fraser Development Group Pty Ltd as Trustee for the Anderson Family Trust No 3", and "The Directors, Fraser Development Group Pty Ltd". It is difficult to see how any of those

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[59] Affidavit of John Robert Facer, filed 17 November 2017, Ex JRF-3 at 20.
[60] Ex JRF-4 at 21.

documents constitutes a demand upon Odna. There is no evidence of any letter of demand addressed to Odna.

[50] The defendant submits that making demand upon Odna was not a condition precedent to it being in default under the guarantee. The defendant relies upon other provisions in the guarantee which it says contain obligations independent to those under clause 10. In particular, clause 1 provides as follows:

> "1. The Guarantor hereby and herewith guarantees and this by way of continuing guarantee the due, proper and prompt payment by the Mortgagor to and to the complete satisfaction of the Mortgagee of all payments, instalments, moneys and all other indebtedness and monetary obligations and liabilities of the Mortgagor under, pursuant to or connected with the Mortgage AND the due, proper and prompt observance, performance and/or fulfilment at all times by the Mortgagor of each and all agreements, covenants, terms, conditions and stipulations expressed or implied in the Mortgage and on the part of the Mortgagor to be observed, performed and/or fulfilled."

[51] The defendant submits that clause has been breached as Fraser had not in fact fulfilled its obligations under the Fraser Loan Agreement and no demand upon Odna is necessary to render Odna in breach. There may be force in that argument[61] and it will depend ultimately upon the proper construction of the guarantee.

[52] Rules 483 and 658 of the UCPR provide as follows:

> **"483 Order for decision and statement of case for opinion**
>
> (1) The court may make an order for the decision by the court of a question separately from another question, whether before, at, or after the trial or continuation of the trial of the proceeding.
>
> (2) The Supreme Court, other than the Court of Appeal, may also state a case for the opinion of the Court of Appeal.
>
> **658 General**
>
> (1) The court may, at any stage of a proceeding, on the application of a party, make any order, including a judgment, that the nature of the case requires.

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[61] See *Filmana Pty Ltd & Ors v Tynan & Anor* [2013] QCA 256 at [35] and following, and the cases referred to therein.

> (2) The court may make the order even if there is no claim for relief extending to the order in the originating process, statement of claim, counterclaim or similar document."

[53] Many cases have considered the exercise of discretion to determine issues before trial. Branson J in *Reading Australia Pty Ltd v Australian Mutual Provident Society*[62] analysed the principles relevant to the separate determination of issues. I adopt her Honour's analysis. While in *Re Multiplex Constructions Pty Ltd*[63] the Court of Appeal urged the summary determination of separate questions, when possible and convenient,[64] it will often not be appropriate to do.[65]

[54] In exercise of discretion, I do not intend to make orders in terms of either paragraph 1(a) or 2(a) of the application, for reasons which follow. Firstly, the issue as to whether Odna was in default of its guarantee may be irrelevant depending upon the proper construction of clause 14 of the Lamberth Road Loan Facility. Secondly, there is clearly a factual dispute between the parties as to the receipt and effect of the so-called letters of demand. Thirdly, there are questions arising as to the construction of the guarantee and full argument was not heard on that issue. Fourthly, the determination of the question will not determine the proceedings. There will still need to be a trial on the other issues between the parties. It seems to me appropriate that the issue be dealt with at a full trial of the action. I therefore refuse to determine the issue raised by paragraphs 1(a) and 2(a) summarily and I refuse to order that issue to be tried before trial of the claim.

[55] The question raised by paragraphs 1(b) and 2(b) of the application is whether a term is implied in the Priority Deed limiting the interest, fees, costs and expenses the defendant can claim, in priority to the plaintiffs debt, to "reasonable" interest, charges, etcetera, which are "reasonably incurred".[66] The defendant's position is that provided the interest, fees, costs, etcetera, are owing under the terms of the Lamberth Road Loan Facility, they take priority regardless of their "reasonableness".

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62 (1999) 240 FCR 276, applied consistently, see *Oceltip Pty Ltd v Noble Resources Pte Ltd* [2016] QSC 246; *Prescott Securities Limited v Gobbett (No 2)* [2017] FCA 81.

63 [1999] 1 Qd R 287.

64 At 288.

65 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334; *QBE Insurance (Australia) Limited v Tropical Reef Shipyard Pty Limited* [2009] FCAFC 161.

66 Application filed 30 October 2017, CFI 5; Amended reply of the plaintiffs, filed 4 July 2017, CFI 4 at [7A].

[56] The full text of clause 3.1(a) of the Priority Deed is as follows:

> …the First Mortgagee Security has first priority for the money and liabiltiies secured by the First Mortgagee Security up to the amount set out in Item 7 of the Schedule plus all interest, and all fees, charges, costs and expenses, whether capitalised or not, payable to the First Mortgagee under the First Mortgagee Facility…[67]

[57] Item 7 of the schedule is “”$3,500,000”.

[58] By clause 3.1(a) read with Item 7 of the schedule, the defendant has priority for $3,500,000 plus “interest, and all fees and charges, costs and expenses”. The “interest” and the “fees and charges, costs and expenses” are those which are “payable to the [defendant] under the First Mortgagee Facility”.

[59] The “First Mortgagee Facility” is defined as:

> “…the loan facility between the First Mortgagee and the Borrower which is secured by the First Mortgagee Security…”[68]

[60] The “First Mortgagee Security” is defined as:

> “…collectively, the Security Interests granted by the Mortgagor to First Mortgagee, particulars of which are set out in Item 5 of the Schedule, together with any additional Security Interest, which is to be treated as part of the First Mortgagee Security…”[69]

[61] “Security Interest” is defined as:

> “…a mortgage, pledge, lien, charge, assignment by way of security, hypothecation, secured interest, title retention arrangement, preferential right, trust arrangement or other arrangement (including any set-off) having the same or equivalent commercial effect as a grant of security.”[70]

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67 Priority Deed cl 3.1(a)
68 Priority Deed cl 1.1(e).
69 Cl 1.1(f).
70 Clause 1.1(k).

[62] The first mortgage granted by Odna to the defendant is clearly a "Security Interest" and therefore falls within the meaning of "First Mortgagee Security". Further, it is referred to in the particulars set out at Item 5 of the Schedule:

> "**Item 5: First Mortgage Security**
>
> - Registered Mortgage over property situated at 43 Lamberth Road, Regents Park QLD more particularly described as Lot 36 on RP123488, Title Reference 14576073…"[71]

[63] The first mortgage[72] defines "Secured Money" as:

> "**Secured Money** includes:
>
> (a) the Principal Sum;
>
> (b) all money owing, contingently or otherwise, to the Mortgagee by the Mortgagor, the Debtor, a Related Entity of either the Debtor or the Mortgagor, or another person under or in respect of this Mortgage, any Agreement or Collateral Security, including interest, and money payable under any indemnity given in this Mortgage, any Agreement or Collateral Security;
>
> (c) all money owing, contingently or otherwise, by the Mortgagor or the Debtor to the Mortgagee under any guarantee or indemnity given by the Mortgagor or the Debtor alone or with another person that secures the obligations of a person to the Mortgagee regardless of whether the guarantee or indemnity, if given by more than 1 person, has been given jointly, severally or jointly and severally;
>
> (d) all money payable by the Mortgagee under any indemnity given by the Mortgagee to a Receiver, manager or agent appointed by the Mortgagee under this Mortgage or any Collateral Security;
>
> (e) all money that the Mortgagee lends or pays or is liable to lend or pay to, for, to the credit of, for the accommodation or otherwise on the account of another person at the request or under the authority of the Mortgagor;
>
> (f) all money that the Mortgagee or a Receiver or attorney appointed under this Mortgage or any Collateral Security pays in exercising or in defence of its rights or powers under this Mortgage, any Agreement or Collateral Security;
>
> (g) all costs incurred by the Mortgagee or for which the Mortgagee becomes liable in connection with this Mortgage, an Agreement or a Collateral Security;
>
> (h) the remuneration of a Receiver or manager appointed under this Mortgage or any Collateral Security;

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[71] Priority Deed sch item 5.

[72] First Mortgage: Affidavit of John Robert Facer, filed 17 November 2017, Ex JRF-6 at 61

(i) all money paid or payable by the Mortgagee on account of the Mortgagor whether directly or indirectly in respect of the Property under a term of this Mortgage; and

(j) all money that the Mortgagor, the Debtor or another person is liable to pay the Mortgagee by way of damages arising out of this Mortgage, any Agreement or Collateral Security…"[73]

[64] The term "Principal Sum" is defined as:

"…the amount of $3,500,000.00…"[74]

[65] There is no doubt that the Lamberth Road Loan Facility is "an agreement between [the defendant] and [Odna]". It was signed on the same day as the first mortgage and the Priority Deed and is clearly contemplated as the primary obligation secured by the first mortgage.

[66] The Lamberth Road Loan Facility contains clause 13, the relevant part of which is set out at paragraph [23] of these reasons.

[67] On a proper construction of clause 3 of the Priority Deed, the "interest" referred to includes the interest charged under clause 13 of the Lamberth Road Loan Facility. The "fees, charges, costs and expenses" are clearly those identified in clause 19 and schedule 2 of the Lamberth Road Loan Facility.

[68] The plaintiffs seek to imply an objective restriction to the interest and charges, etcetera, referred to in clause 13. They submit that only that interest and those charges which are "reasonable" and are "reasonably incurred" take priority. The implication of a term arises from the construction of the agreement,[75] so a term will not be implied inconsistently with express terms.[76] Here, the agreement is that the interest and charges to take priority are those calculated under the Lamberth Road Loan Facility. There is no room for an implied term as submitted by the plaintiffs. There is no other reason to read clause 3.1(a) as incorporating a restriction of reasonableness. Whether such a restriction can be implied

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[73] First Mortgage at 64–5.
[74] At 64.
[75] *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 345.
[76] *Tamplin (FA) Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd* [1916] 2 AC 397 at 442–3; *Sanders v Snell* (1998) 196 CLR 329.

in the Lamberth Road Loan Facility is another issue. Whether any obligation created in the Lamberth Road Loan Facility can be attacked as a penalty is yet another issue.

[69] Various authorities were cited by the plaintiffs in support of the implication of the term. None are of assistance to the plaintiffs. In *Victorian Producers Co-operative Co Ltd v Edwards*,[77] a term was implied limiting a lender to "reasonable" interest. However, in that case, unlike here, no interest rate had been agreed and specified in the agreement. Here an interest rate is specified in the Lamberth Road Loan Facility, and that is the interest referred to in the Priority Deed. In *Finchbourne Ltd v Rodrigues*,[78] the landlord had a contractual right to recover costs of maintaining the building tenanted. It was held that a term was implied limiting the landlord to recovery of reasonable costs. However, the term was implied in the absence of specification in the contract of the amount that could be recovered for the cost of maintenance. Again, the position is different here. The costs, etcetera, are those identified in the Lamberth Road Loan Facility.

[70] That of course raises the issue as to the proper construction of the Lamberth Road Loan Facility and, perhaps, whether terms can be implied into that agreement limiting the interest, costs, charges, etcetera, to those that are "reasonable" or "reasonably incurred". While it is obvious that such an argument would face difficulties,[79] that issue was not argued before me and I ought not comment further.

[71] It is the case, though, that on a proper construction of the Priority Deed, no implied term as alleged by the plaintiffs arises.

Appropriate orders

[72] For the reasons given, I do not intend to make a determination as to whether Odna is in breach of its guarantee of Fraser's obligations under the Fraser Loan Agreement, so I will dismiss paragraphs 1(a) and 2(a) of the application.

[73] I am also disinclined to make orders in terms of either paragraph 1(b) or 2(b) of the application.

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77 (1993) 62 SASR 415.
78 [1976] 3 All ER 581.
79 Many of the fees and charges are specified in Schedule 2 to the Lamberth Road Loan Facility.

[74] The finding sought by paragraph 1(b) cannot be made in those terms. The only logical answers to the question posed are "yes" or "no", but whether there is any objective restriction on the priority afforded to the defendant depends upon the construction of the Lamberth Road Loan Facility, and perhaps further documents and potentially upon the determination of factual issues. None of that has been argued before me.

[75] The declaration sought by paragraph 2(b) of the application only concerns the construction of the Priority Deed. However, it is obvious that the Amended Reply will need to be further amended, so a more appropriate course may be to strike out paragraphs 7A-7D of the reply, give leave to the plaintiff to amend the amended reply consistenly with these reasons, and make directions to advance the case. However, I have not heard argument on that alternative course.

[76] I will dismiss the application made in paragraphs 1(a) and 2(a) hear the parties on the form of other orders and costs.

[77] The order of the Court is as set out in the Schedule attached to these reasons.

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 9662 of 2016

First Plaintiff: **JOHN MICHAEL SCHOLZ**

AND

Second Plaintiff: **JANICE MERLE SCHOLZ**

AND

Defendant: **ACE FINANCE AUSTRALIA PTY LTD**
ACN 101 588 747

ORDER

Before: Davis J

Date: 26 February 2018

Initiating document: Application filed 30 October 2017

THE ORDER OF THE COURT IS THAT:

(1) Paragraphs 7A, 7B, 7C and 7D of the amended reply be struck out.

(2) By 5 March 2018, the defendant deliver amended particulars of paragraph 6 of the defence, including particulars of those provisions of the guarantee by Odna Pty Ltd of Fraser Development Group Pty Ltd alleged to have been breached.

(3) The plaintiff file and serve any further amended reply by 19 March 2018.

(4) The defendant file and serve any rejoinder by 23 March 2018.

(5) The application is otherwise dismissed.

(6) The defendant's costs of the application be its costs in the proceedings.