SUPREME COURT OF QUEENSLAND

CITATION:	*Stowe v Johnson* [2018] QSC 278
PARTIES:	**JOHN ERIC STOWE** (plaintiff) **v** **MARGARET DORIS JOHNSON** (defendant)
FILE NO:	BS 7911 of 2014
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	3 December 2018
DELIVERED AT:	Brisbane
HEARING DATE:	16 July and 24 October 2018
JUDGE:	Ryan J
ORDER:	**The plaintiff has not established an entitlement to judgment. The claim is dismissed.**
CATCHWORDS:	TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – CONSUMER PROTECTION – UNCONSCIONABLE CONDUCT – where the plaintiff invested in a property management business and lent money to the business – where the plaintiff lost the money he invested, and failed to recover it as an unsecured creditor – where the plaintiff now claims damages under s1041I of the *Corporations Act* 2001 (Cth) for misleading or deceptive conduct; s 12GF of the *Australian Securities and Investment Commission Act* 2001 (Cth) for misleading or deceptive conduct; s 82 of the *Trade Practices Act* 1974 (Cth) for misleading or deceptive conduct/false or misleading representations or for negligent misstatement – whether the defendant made false or misleading representations to the plaintiff which induced him to invest in the business TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION

LEGISLATION – CONSUMER PROTECTION – UNCONSCIONABLE CONDUCT – where the plaintiff claimed damages for unconscionable conduct under section 12GF of the *ASIC Act* – whether the defendant's dealings with "the funding of the Cameo business" constituted unconscionable conduct

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE BREACH AND DEFENCES TO ACTIONS FOR BREACH – PERFORMANCE – where the plaintiff claimed damages for breach of contract – whether the defendant breached a term that she be "just and faithful" in her dealings with the plaintiff – whether the defendant breached a term that she would "ensure" that the trust would pay its debts and meet its obligations

COUNSEL: N J Shaw for the Plaintiff

No appearance for the Defendant

SOLICITORS: Porter Davies Lawyers for the Plaintiff

No appearance for the Defendant

Overview

[1] On the strength of an Offer Document, the plaintiff invested in the establishment of a property management business known as Cameo Property Services. Cameo Property Services operated by way of a unit trust. Polox Pty Ltd[1] was the trustee of the trust. The defendant was Polox's sole director. Polox owned the assets of the trust, the most valuable of which were its rent rolls.

[2] According to the plaintiff, in pursuance of his investment he paid a "bond" of $250,000 (which was returned to him); he subscribed for 500,000 units in the CPS Unit Trust[2] for $500,000 and he lent Polox $300,000 by way of a short-term loan.

[3] Cameo was not a successful business. It was struggling by the end of 2010. Liquidators were appointed on 3 February 2012. The plaintiff lost the money he invested in Cameo and lent to Polox. He claimed $300,000 against Polox as an unsecured creditor, which he did not recover. He now claims damages in the sum of $800,000 (which includes the $300,000) on six alternative bases, namely:

- Under section 1041I of the *Corporations Act* 2001 (Cth) (the *Corps Act*) for misleading or deceptive conduct (as per section 1041H of the *Corps Act*);

- Under section 12GF of the *Australian Securities and Investment Commission Act* 2001 (Cth) (the *ASIC Act*) for misleading or deceptive conduct (as per sections 12DA and 12 DB of the *ASIC Act*);

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1 Also called Cameo Property Services Pty Ltd.

2 The name of the trust through which the business operated.

- Under section 82 of the *Trade Practices Act* 1974 (Cth) (the *TPA*) for misleading or deceptive conduct/false or misleading representations (as per section 52);
- Negligent misstatement;
- Unconscionable conduct (also under section 12GF of the *ASIC Act*, relying on sections 12CB and 12CC); and
- Breach of contract.

[4] By email dated Friday, 13 July 2018, the defendant informed the Court that she would not attend the hearing of this matter. She did not appear on Monday, 16 July 2018. The matter proceeded in her absence and the plaintiff attempted to establish an entitlement to judgment.

[5] The plaintiff did not establish an entitlement to judgment on any basis.

[6] With respect to the misleading conduct claims based on written statements said to be false, I was not satisfied that the plaintiff had relied upon those written statements.

[7] With respect to the misleading conduct claim brought on the basis of oral statements, there was insufficient evidence that the defendant had made the oral statements alleged.

[8] With respect to the defendant's other conduct said to be unconscionable – namely, her "dealing with the funding of the Cameo business"[3] – I was not satisfied that that conduct fell within the relevant provisions of the *ASIC Act* or, if it did, that it was unconscionable within the meaning of section 12CB of that Act.

[9] With respect to the breach of contract claims, I was not satisfied that there had been a breach of either the term that the defendant be "just and faithful" in her dealings with the plaintiff; or the term that she would "ensure" that the trust would pay its debts and meet its obligations.

[10] My reasons follow.

Proceeding in accordance with rule 476 of the *Uniform Civil Procedure Rules* 1999

[11] In the defendant's absence, the matter proceeded under r 476 of the *Uniform Procedure Rules* 1999:

> **476 Default of attendance**
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> (1) If a defendant does not appear when the trial starts, the plaintiff may call evidence to establish an entitlement to judgment against the defendant, in the way the court directs.
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> (2) If the plaintiff does not appear when the trial starts, the defendant is entitled to dismissal of the plaintiff's claim and the defendant may call evidence necessary to establish an

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3 Written submissions of the plaintiff, paragraph 27.

> entitlement to judgment under a counterclaim against the plaintiff, in the way the court directs.
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> (3) Despite subrule (2), the defendant may submit to judgment if the plaintiff does not appear when the trial starts.
>
> (4) The court may set aside or vary any judgment or order obtained because of subrule (1) on terms the court considers appropriate.

[12] Guidance as to the procedure under r 476 may be found in the decision of Burns J in *Orchid Avenue Pty Ltd v Parniczky & Anor*.[4] In *Orchid Avenue*, his Honour said:

> [7] … [A]lthough r 476(1) permits the plaintiff to adduce evidence to establish an entitlement to judgment if the defendant does not appear when the trial starts, that may only occur "in the way the Court directs". It should therefore not be thought that a plaintiff has an automatic right to establish an entitlement to judgment under that rule. Thus, in a case where it appears to the Court that a defendant has not received notice of the trial, the appropriate course would be to adjourn the trial to enable such notice to be given to the defendant, and the same observation may be made in connection with r 476(2) in the case of a plaintiff who fails to appear. It follows that, before giving directions permitting a plaintiff to call evidence to establish an entitlement to judgment in the absence of the defendant, the Court must first be satisfied that such a course is, in all of the circumstances, appropriate. At the minimum the Court should direct the bailiff to leave the courtroom to call out the name of the absent defendant three times and, if there is still no appearance, it may then be necessary for evidence to be received as to the manner in which notice of trial was provided to the defendant or other relevant information including any enquiries which have been made as to the defendant's whereabouts.

[13] In this case, having regard to the email the defendant sent to the Court on Friday, 13 July 2018 informing the Court that she would not be attending the hearing, and having called the name of the defendant, I was of the view that it was appropriate to permit the plaintiff to attempt to establish an entitlement to judgment in her absence.

[14] In *Orchid Avenue*, his Honour went on to explain the appropriate way to proceed:

> [8] If, however, the court is satisfied that it is appropriate to proceed under r 476(1), the pleadings set the limits of what may be proved against an absent defendant to establish an entitlement to judgment. For that reason, a plaintiff proceeding under this rule can go no further in proof of the claim than to call evidence to support the allegations which are already contained in the statement of claim.[5] But, as to that, allegations which are admitted in the pleadings, either expressly or by operation of the UCPR, will of course not need to be proved; it is only that part of the pleaded case which is in issue on the

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4 (2015) QSC 207.

5 *Stone v Smith* (1887) 35 Ch D 188.

> pleadings which needs to be established by evidence. That may be achieved in the usual way through oral and documentary evidence[6] or, if the court considers it expedient, a direction may be made pursuant to r 390 that evidence be received by affidavit.[7]

[15] In the present matter, the plaintiff's counsel submitted that it was appropriate and more cost efficient for me to permit the plaintiff to give his evidence orally and I permitted him to do so.

[16] Burns J explained the significance of the filed defence in these circumstances:

> [9] It is important to keep in mind when proceeding in accordance with r 476(1) that the contents of any filed defence cannot be ignored despite the feature that the defendant has failed to appear at the trial. As Brennan J (as his Honour then was) explained in *Banque Commerciale SA, En Liquidation v Akhil Holdings Ltd,*[8] the whole object of pleadings is to bring the parties to an issue and, when that occurs, the court's function is to determine that issue.[9] As such, the defence must be considered alongside the statement of claim and any reply in order to determine the issues to be tried in the defendant's absence. Once identified in that way, the issues will then be determined by the court in accordance with such evidence as may be called by the plaintiff. That, of course, does not mean that the plaintiff will or must succeed on all such issues, but it will mean that an absent defendant will likely fail on any issue in relation to which he, she or it has a burden of proof. For example, a defendant who sets up a defence by which it is alleged that a contractual bargain was induced by a fraudulent misrepresentation would need to support such an allegation with evidence. If no such evidence is adduced, that issue – alive as it may have been on the pleadings – must necessarily be decided in the plaintiff's favour.

[17] In *Banque Commerciale*, Mason CJ and Gaudron J discussed the function of pleadings and the circumstances in which an issue may be determined on a basis other than that disclosed by the pleadings (citations omitted):[10]

> The function of pleadings is to state with sufficient clarity the case that must be met … In this way, pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision. The rule that, in general, relief is confined to that available on the pleadings secures a party's right to this basic requirement of procedural fairness. Accordingly, the circumstances in which a case may be decided on a basis different from that disclosed by the pleadings are limited to those in which the parties have deliberately chosen some different basis for the determination of their respective rights and liabilities …

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6 As in *Barclay v English* [2009] QSC 258.
7 As in *Gedala Pty Ltd & Anor v Gusdote Pty Ltd* [2010] QSC 482.
8 (1990) 169 CLR 279.
9 *Banque Commerciale,* at 287-288.
10 *Banque Commerciale,* at 286 – 287.

> Ordinarily, the question whether the parties have chosen some issue different from that disclosed in the pleadings as the basis for the determination of their respective rights and liabilities is to be answered by inference from the way in which the trial was conducted. It may be that, in a clear case, mere acquiescence by one party in a course adopted by the other will be sufficient to ground such an inference. In the present case, the Bank not having been present at the hearing, there could be no acquiescence by it in such course, if any, by which Akhil might have attempted to extend the issues at the hearing to encompass a case of fraud as against the Bank …

[18] Brennan J explained that pleadings may not be amended in the defendant's absence to avoid injustice to the defendant (some citations omitted):[11]

> When the pleadings bring the parties to the issue, the court's function is to determine that issue and to grant relief founded on the pleadings unless the parties are allowed to alter the issues at the trial without amendment of the pleadings …
>
> Non-appearance of a defendant at the trial does not allow the plaintiff a free rein to amend the pleadings to raise issues of which the absent defendant has had no notice or to obtain relief not founded on the pleadings … The reason why the court does not allow substantive amendments to pleadings so as to allow the plaintiff further or other relief against an absent defendant can be gleaned from analogous cases where the court has not allowed substantive amendments of the writ against a defendant who has failed to enter an appearance unless the writ is re-served … The reason is not that the court has no jurisdiction to amend the writ in the defendant's absence; the reason is that the risk of injustice to the absent defendant must be avoided, as Romer L.J. explained in *Jamacia Railway v Colonial Bank*[12]:
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> > "The Court has always borne in mind that an absent defendant served with the original writ may have acted upon the supposition that he thereby gathers substantially what the case made against him is, and relies upon it that that case and no other substantially different case will be made against him, and on that footing does not choose to appear. Accordingly the Court has refused to act upon a rule, which in terms covered a defendant who had not appeared, in cases in which the Court came to the conclusion that it would not be just to enforce the rule against such a defendant – not that the Court had no jurisdiction to proceed, but that it did not think it right to proceed in such a case."
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> And:[13]
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> > "Again, it has been held in favour of a defendant who has not appeared that, if a writ be amended by altering the claim indorsed on it so as substantially to increase the claim against the defendant, the Court, in

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11 Ibid at 288 – 289.
12 [1905] 1 Ch 677, at 690.
13 [1905] 1 Ch 677, at 691.

> the exercise of its discretion, will not allow the plaintiff to obtain as against such a defendant, the relief sought by the amended indorsement or extended claim unless the defendant be re-served personally with the amended writ."

The statutory provisions which form the basis of the plaintiff's alternative misleading or deceptive conduct claims[14]

[19] Section 1041I of the *Corps Act* permits a person who has suffered loss or damage by the conduct of another, in contravention of section 1041H of the Act, to recover the amount of the loss or damage by way of a civil action. Section 1041H of the *Corps Act* prohibits conduct in relation to a financial product or a financial service that is misleading or deceptive or is likely to mislead or deceive.

[20] Section 12GF of the *ASIC Act* permits a person who suffers loss or damage by the conduct of another who contravenes sections 12CA to 12CC or sections 12DA to 12DN of the Act to recover the loss or damage by way of a civil action. A limitation period of six years applies.

[21] Sections 12CA to 12CC concern the plaintiff's unconscionable conduct claim. Sections 12DA and 12DB of the *ASIC Act* are the sections concerning misleading or deceptive conduct and false or misleading misrepresentations. Section 12DA of the *ASIC Act* prohibits a person from engaging in conduct, in trade or commerce, in relation to financial services, that is misleading or deceptive or likely to mislead or deceive. Section 12DB of the *ASIC Act* prohibits a person from making specified false or misleading representations. The emphasis in the present matter was on section 12DA.

[22] Section 82 of the *TPA* permits a person who suffers loss or damage by the act of another in contravention of a provision of Part IV or V, to recover the loss or damage by way of a civil action. Section 52 of the *TPA* provides that a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive.

[23] The provisions of the three Acts have much in common.

Meaning of misleading or deceptive conduct

[24] In *ASIC v Camelot Derivatives Pty Ltd*,[15] Foster J considered the meaning of misleading or deceptive conduct in the context of section 12DA of the *ASIC Act* and section 1041H of the *Corps Act*. At [46] and [47], his Honour said:

> The question whether conduct is misleading or deceptive or is likely to mislead or deceive is a question of fact. It is an objective question that the Court must determine for itself. Conduct is misleading or deceptive if it leads a person into error or if it induces or is capable of inducing error or leads to an erroneous assumption or misconception. Conduct is misleading or deceptive if it causes, or is likely to cause, a person to misinterpret, or be

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14 Because these claims did not succeed evidentially, I was not required to consider whether they were brought with in time.

15 [2012] FCA 414. See also Gordon J in *Australian Competition and Consumer Commission v Telstra Corporation Ltd* (2007) 244 ALR 470 at [14] – [15].

> deluded as to, the relevant facts. Conduct is likely to mislead or deceive if there is a real but not remote possibility of it doing so …
>
> In determining whether a contravention of s 1041H or 12DA has occurred, the task of the Court is to examine the relevant course of conduct as a whole. The context in which the alleged conduct occurred is to be determined in light of the relevant surrounding facts and circumstances. It includes the content of the representations that were in fact made and, in the context of a document, the whole of the contents of the document and includes any other statements made that might impact on the relevant representations.

Causation

[25] The relevant sections of the *Corps Act*, the *ASIC Act* and the *TPA* permit a civil claim for loss or damage where that loss or damage is caused "by" certain conduct.

[26] To recover, the plaintiff is required to prove that the alleged misleading conduct caused his loss by proving his reliance upon it, as explained in *Woodcroft-Brown v TimberCorp Securities (in liq)*:[16]

> It is well established that in proceedings under s 52 of the *Trades Practices Act* (now the *Australian Competition and Consumer Law*), an applicant for relief has a remedy if the loss or damage is suffered '*by*' the contravening conduct. The word "by" in the former ss 82 and 87 expressed clearly the notion of causation as a common law practical or commonsense concept.
>
> The authorities make clear that the actionable conduct need not be the only cause of the loss or damage. It is sufficient if it played a part in the loss or damage, even if it was only a minor part. Recovery under s 52 is based on an applicant's actual reliance upon the conduct, although that conduct may not be the only factor activating a relevant decision. There are occasions where, by reason of the nature of a transaction and the conduct relied upon, an inference may readily be drawn linking the conduct, be it a representation or silence, and the decision to enter into the transaction.

[27] To establish causation, more is required than a statement of what, in hindsight, might have been done or not done, as Jackson J explained in *Juniper Property Holdings No 15 P/L v Caltabiano (No 2)*:[17]

> [73] Proof of reliance is "a sufficient connection to satisfy the concept of causation".[18]
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> [74] The onus is on the defendant to prove on the balance of probabilities that he relied on the alleged representations.[19]

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16 (2011) 253 FLR 240.

17 [2016] QSC 5.

18 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 525; *I & L Securities v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 127.

19 For a summary of the principles applicable derived from *Gould v Vaggelas* (1985) 157 CLR 215, see *Lord Buddha v Harpur* [2013] VSCA 101, [159].

[75] The defendant gave evidence that but for the alleged representations he would not have entered into the contract to purchase the Soul Penthouse. The issue of evidence of that kind was summarised in *Razdan v Westpac Banking Corporation*,[20] where McColl JA said:

> "Indeed, courts are cautious in accepting assertions of reliance in this context because they are regarded as essentially self-serving: *Hanave Pty Ltd v LFOT Pty Ltd (formerly Jagar Projects Pty Ltd)* [1999] FCA 357; (1999) 43 IPR 545 (at [50]) per Kiefel J (Wilcox J agreeing (at [11]). They are similar to statements as to what a person would have done if some impugned conduct had not occurred which have little probative value unless the "reliability of their evidence" is confirmed by "reference to objective factors": *Chappel v Hart* [1998] HCA 55; (1998) 195 CLR 232 (at [32] (fn (64)) per McHugh J; (at [93] Item 7) per Kirby J; *Rosenberg v Percival* [2001] HCA 18; (2001) 205 CLR 434 (at [24] per McHugh J. Thus, in *Ricochet v Equity Trustees* [1993] FCA 99; (1993) 41 FCR 229 (at 235) the Full Federal Court (Lockhart, Gummow and French JJ) upheld the trial judge's finding of no reliance by the key people concerned, notwithstanding direct evidence as to reliance. However, a declaration of non-reliance by a person said to have been affected by the conduct is relevant to the question of causation: *Campbell v Backoffice Investments Pty Ltd* (at [29]) per French CJ."[21]

[76] I agree with Her Honour's analysis. It is all too easy for a representee to give evidence in hindsight of what they would have done. With this in mind, I must look to see what other evidence supports the defendant's evidence that he would not have entered into the contract but for the alleged representations.

[28] In that case, his Honour found that, despite asserting his reliance upon certain representations, the representee had not attached any importance to them. One of the facts which his Honour took into account was that there had been no complaint by the defendant about the falsity of the representations after he learnt of them.

The plaintiff's claims and the defendant's response <u>as per the pleadings</u>

Misleading conduct - overview

[29] In his pleadings, the plaintiff asserted that the defendant made false statements in the Offer Document which invited his investment in Cameo. He also asserted that she made false representations in e-mail correspondence and when seeking from him a loan for $300,000.

[30] He designated the various statements which he claimed were misleading as –

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20 [2014] NSWCA 126.

21 *Razdan v Westpac Banking Corporation* [2014] NSWCA 126. Similarly, see *Fabcot Pty Ltd & Anor v Port Macquarie-Hastings Council* [2011] NSWCA 167, [183]-[187].

- the Ownership and Security Representations;
- the Return and Profitability Representations;
- the Short-Term Loan Representations; and
- the E-mail Representations.

[31] The plaintiff's counsel indicated, at the beginning of the hearing, that he would not be pursuing the claim based on the E-mail Representations.

[32] On the plaintiff's case, the Ownership and Security Representations and the Return and Profitability Representations were made in the Offer Document and the Short-Term Loan Representations were made orally by the defendant before the plaintiff agreed to lend Polox $300,000.

The Ownership and Security Representations

[33] The plaintiff asserted that –

> "The statements in the Offer Document … were apt to convey the impression that an investment [of $500,000] in the CPS Unit Trust would:
>
> (a) provide the investor with 50% ownership of the CPS Unit Trust as well as ownership of assets associated with the investment; and
>
> (b) be secured against assets of the CPS Unit Trust, namely its rent roll, fitout equipment and databases".

[34] He asserted that the representations were misleading because at the time they were made –

> "(a) it was not intended by the defendant that investors in the CPS Unit Trust would own any assets of the investment other than units in the CPS Unit Trust;
>
> (b) investments in the CPS Unit Trust were not intended by the defendant to be secured against the assets of the investment because:
>
> i. the defendant intended to cause Polox to take out loans secured against the assets of the CPS Unit Trust and, as such ,the assets could not have been intended as security for investments; and
>
> ii. the defendant had not caused Polox to make the arrangements necessary to give security over the assets to an investor."

[35] The defendant asserted that the representations in the Offer Document were expressly provisional upon further negotiation and agreement between the parties, including a Unit Holders Agreement, which would "outline the terms and conditions of the investment".[22]

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22 Amended defence: 24(a).

[36] She asserted further, or in the alternative, in paragraph 24(b) of the defence, that –

> "(i) in the context of the Offer Document the reference to "ownership" of assets of the Trust means indirect ownership in the capacity of a unit holder; and
>
> (ii) in the context of the Offer Document the reference to an investment being "secured" meant that the CPS Unit Trust would be purchasing valuable assets that could be sold to protect a person's investment, and not that the investor would also be a secured creditor; and
>
> (iii) the plaintiff obtained legal and financial/accounting advice regarding the investment."

[37] In his reply the plaintiff asserted that the representations in the Offer Document were not provisional upon further negotiation and agreement and that the Unit Holders' Agreement did not expressly refer to or qualify the representations in the Offer Document. He also asserted that the defendant had not pleaded what the "context" of the Offer Document was said to be and continued –[23]

> "(i) …
>
> (ii) The meaning to be attributed to the representations in the Offer Document is an objective interpretation;
>
> (iii) The interpretations of the representations attributed in paragraphs 24(b)(i) and (ii) are not open or reasonable."

[38] The plaintiff's assertion, that the interpretations in paragraphs 24(b)(i) and (ii) of the defendant's amended defence were not open or reasonable, is relevant to the plaintiff's attempts to expand upon, or "recast", his claim at the hearing, as discussed below.

The Return and Profitability Representations

[39] I have not included in this part of this judgment the pleadings that relate to the Return and Profitability Representations because the plaintiff gave evidence at the hearing that he did not rely on them: he used his own "figures" to evaluate the investment, not those contained in the Offer Document. Any claim based upon the Return and Profitability Representations could not, therefore, succeed.

The Short Term Loan Representations

[40] The plaintiff asserted that the defendant made statements which were apt to convey that –

> (a) In order to complete the purchase of rent rolls as contemplated by the Offer Document, Polox required short-term funding which was to be replaced by bank finance when it became available;

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[23] At paragraph 8.

(b) The property management business of the CPS Unit Trust was generating and would continue to generate sufficient income to service the interest payments of the Short Term Loan; and

(c) It was likely that Polox would obtain finance to replace the Short-Term Loan.

[41] He asserted that these statements were misleading or deceptive, or likely to mislead or deceive, because at the time the Short Term Loan was agreed –

(a) the defendant knew, or should have known, that the CPS Unit Trust was not generating sufficient income to service the interest payments under the Short Term Loan;

(b) the defendant knew, or should have known, that it was unlikely that Polox would be able to obtain finance to replace the Short Term Loan at or before the end of the term of the Short Term Loan;

(c) alternatively, the defendant did not care whether the Short-term Loan Representations were accurate.

Negligent Misstatement

[42] The plaintiff asserted that, in making the representations referred to above, the defendant knew, or ought to have known, that the plaintiff –

> "18(a) Had no independent knowledge or sources of knowledge regarding:
>
> i. the real estate industry or the business or property management; and further or alternatively
>
> ii. [matters stated in the Offer Document about the plans for Cameo; the opportunity presented by a property management business; the way in which the invested funds would be used; its predicted returns]
>
> (b) was entirely reliant upon:
>
> i. the Defendant's exclusive knowledge regarding the subject-matter of the …[representations]; and
>
> ii. the experience and expertise of the Defendant.
>
> (c) expected the Defendant to …
>
> i. be honest and truthful …
>
> ii. take reasonable care in making … [the representations]; and
>
> iii. ensure that … [the representations] were accurate and reliable.

(d) Would act in reliance upon the Offer Document Representations and further and alternatively the Short-term Loan Representations by investing in the CPS Unit Trust and entering into a contract entirely in writing and signed by each of Polox, the plaintiff, and the defendant on 24 May 2008 ("**the Unit Owners' Agreement**") and further or alternatively advancing the Short-Term Loan sum; and

(e) Would be exposed to potential loss or damage by investing in the CPS Unit Trust and entering into the Unit Owners' Agreement and further and alternatively the Short Term Loan in reliance on the Offer Document Representations."

[43] The plaintiff asserted that the defendant owed a duty to him to exercise reasonable skill and care in the making of the representations to him, and in breach of that duty, the representations were false in a material particular or materially misleading.

Unconscionable conduct

[44] The plaintiff asserted that the defendant's conduct was unconscionable; it related to the supply, or potential supply, of financial services and was in contravention of sections 12CB and 12CC of the *ASIC Act*. The conduct said to be unconscionable "included the alleged misrepresentations and the defendant's dealing with the funding of the Cameo business".

[45] The defendant admitted that her conduct (as pleaded by the plaintiff) related to the supply or possible supply of financial services, being the units in the CPS Unit Trust and the Short-Term Loan. For the reasons given below, I do not agree that her dealing with the funding of the Cameo business was conduct in relation to the supply of financial services. The defendant denied that her conduct was unconscionable.

Breach of contract

[46] The plaintiff asserted that the defendant breached the terms of the Unit Owners Agreement in pursuance of which the parties were to be "just and faithful" in their activities and dealings with each other, and "ensure" that the CPS Unit Trust would "pay its debts and meet its obligations, including bank loans and trade creditors, as they fall due, from the revenue of the Trust".

Factual context for claim as asserted in the pleadings

[47] Because this matter proceeded in the defendant's absence, an outline of the plaintiff's factual assertions as pleaded, and the defendant's assertions in response, follow. I have also included under this heading the relevant contents of any document referred to in the pleadings which was tendered at the trial.

[48] It was not in dispute that Polox Pty Ltd was a company duly incorporated on 10 April 2006. It was deregistered on 18 August 2013. Between 7 May 2008 and 2 February 2012, Polox was called Cameo Property Services Pty Ltd. Between 16 April 2007 and 18 August 2013, the defendant was the sole director of Polox/Cameo Property Services.

[49] The defendant was also the executive manager of a company called Locksley Barrington Partners Pty Ltd, which carried on business as an investment broker. The plaintiff was one of Locksley's clients.

[50] According to the plaintiff,[24] in early 2008 the defendant approached him at Locksley's office at Robina and asked him to consider an investment opportunity in the establishment and development of a property management business to be called "Cameo Property Services". In early 2008, the defendant sent to the plaintiff an Offer Document, to induce him to invest in Cameo.

[51] The defendant asserted[25] that the initial communication between the parties involved a first approach from the plaintiff, in which he expressed interest in investing in Cameo, to which Locksley responded, including by sending the plaintiff an "Investment Statement" which provided certain warnings to investors.

[52] In his reply, the plaintiff denied that he approached Locksley. There had not been disclosure of the Investment Statement at the time the plaintiff filed his amended reply, and accordingly, he "did not admit" to the assertions about his receiving it, or its contents. The Investment Statement referred to by the defendant was not, in her absence, proven at trial.

[53] The plaintiff maintained, in his amended reply, that the defendant gave him the Offer Document personally.

The Offer Document

[54] The Offer Document was tendered at trial.[26]

[55] It contained a letter from the defendant, which outlined her plans for Cameo. The letter sought investors who saw "the real value in the Property Management Industry and who [were] prepared to support this venture and potential future initiatives in the growth trajectory". The letter outlined the opportunity presented by the property management business proposed, and touted the defendant's experience and expertise.

[56] The Offer Document included a section headed "Details of the Offer" in which it explained that the purpose of the Offer Document was to attract funds from "sophisticated investors" for the establishment of a specialised property management business. It also set out how the funds invested would be spent, including on the acquisition of rent rolls in "strategically selected areas".

[57] In a section headed "Investment Structure" the offer document stated (my emphasis):

> It is proposed that an appropriate structure be established for an investment amount of $500,000 **which would secure 50% ownership of Unit Trust and associated assets**, plus provide a regular income (if required) to support any borrowings secured by the Investor for the purpose of this investment.

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24 All of the plaintiff's assertions are taken from his amended statement of claim, or his amended reply.
25 All of the defendant's assertions are taken from her amended defence.
26 Exhibit 60.

Features of this investment are as follows:

- Share Class: $1.00 Ordinary Units
- Return on Investment 50% of the net operating profit (NPBT)
- Distribution Cycle: 6 monthly in arrears, (to be reviewed annually)
- **The investment is secured by the Rent Roll, fit out & equipment of the acquired office and Prospective Landlord and Tenant Databases**
- Key Man and or "Buy/Sell Insurance will also be taken out to protect the investor's investment
- A Unit Holder's Agreement will be provided that will outline the terms and conditions of the investment.

[58] The plaintiff relied upon the statements in bold as the Ownership and Security Representations.

[59] The Offer Document also contained a section headed "Projecting the future value of a Rent Roll" underneath which appeared a table said to set out the growth in value of the rent roll on certain assumptions. The plaintiff relied upon the information contained in this section as the Return and Profitability Representations.

[60] In her defence, the defendant referred to the "Investment Warning" at the front of the Offer Document and the statement on page 2 of the offer document. The warning and the statement included the following (my emphasis):

> [Investment Warning]
>
> (i) The information prepared in the document … has been prepared by or on behalf of the person who is proposing to issue the securities and Locksley Barrington Partners has not undertaken an independent review of the information contained in the publication.
>
> (ii) The information contained in this publication about the proposed business opportunity and the securities is not intended to be the only information on which the investment decision is made and is not a substitute for a prospectus or any other notice that may be required under the Corporations Law, as this law may apply to an investment decision. Detailed information may be needed to make an investment decision for example: accounts, a business plan, information about ownership of intellectual or industrial property, or expert opinions including valuations or auditor's reports.
>
> (iii) **Investment in new business carries high risks. It is highly speculative and before investing in any project about which information is given, prospective Investors are strongly advised to take appropriate professional advice.**
>
> (iv) Prospective Investors should be aware that no established market exists for the trading of any securities that may be offered.

(v) This offer is made to sophisticated investors under Section 708(8) of the Corporations Act.

(vi) ASIC neither endorses nor authorises the information that is presented. (my emphasis)

[Statement on page 2]

Before deciding to invest in the Company, potential investors should read the entire Offer Document and in particular, in considering the prospects for the Company, investors should consider the risk factors that could affect the financial performance of the company.

The Company is at the early stages of its development and therefore there are risks. The investment opportunity offered in this offer document should be considered speculative. Investors should carefully consider these facts in light of personal circumstances (including financial and taxation issues) and seek professional advice from an accountant, stockbroker, lawyer or other professional advisor before deciding whether to invest.

Potential investors should understand that these investments are subject to investment and other risks, including possible delays in repayment and the loss of income and principal invested.

Cameo Property Services Pty Ltd recommends that all potential investors undertake their own Due Diligence prior to making a decision.

[61] In his reply, the plaintiff asserted that the "passages extracted in the pleadings" were inaccurate reproductions of the contents of the Offer Document. They are, in fact, essentially accurate reproductions.

[62] The defendant also referred to the statement which appeared at the bottom of every page of the Offer Document: "All investments carry risk, seek independent advice".

By whom were the representations made?

[63] The plaintiff asserted that the statements made in the Offer Document were made by Polox Pty Ltd and the defendant, or alternatively, the statements were made by Polox, and the defendant was "involved and knowingly concerned with each statement" because she prepared, or assisted in the preparation of the Offer Document; or was the controlling mind of Polox; or she arranged for the production and dissemination of the Offer Document; or she was principally responsible for raising money for the investment proposed by the Offer Document.

[64] The defendant admitted that the statements made in the Offer Document were made by Polox. She denied that the statements were made by her. She responded as follows to the other assertions about her responsibility for the statements made by Polox:

"7.(c)…

(i) [The defendant] cannot further plead to the allegation that she was "involved and knowingly concerned in" the statements by reason

there are inadequate particulars of such allegations to permit the plaintiff to define the issues and permit the defendant to plead in response;

(ii) denies that she solely prepared the Offer Document because Polox retained expert advisors to assist with the preparation of the document; [particulars of those advisors followed]

(iii) says that she assisted in the preparation of the Offer Document;

(iv) says that, at the time that the Offer document was created, she was the controlling mind of Polox Pty Ltd;

(v) admits that she arranged through [Locksley] the production and dissemination of the Offer Document; and

(vi) admits that she and [Locksley] were principally responsible for the investment proposed by the Offer Document."

[65] Ultimately, it was not necessary for me to resolve this issue.

The structure of Cameo and the acquisition of rent rolls

[66] The defendant referred to the proposal in the Offer Document that Polox, as trustee for the CPS Unit Trust, would create and operate a property management business that would commence trading by using raised capital to purchase a rent roll from an identified potential vendor for approximately $377,000 – presumably to reinforce her position that the representations were by the company.

[67] Polox was not mentioned in the Offer Document, but the trust structure was. The $377,000 rent roll was referred to as one which had made an "immediate impression" upon the defendant and was included in the Offer Document "to provide the investor with an example and understanding of the quality and size that Cameo seeks in its first acquisition".[27] The Offer Document set out the benefits of that particular rent roll and other details relevant to its potential purchase.

[68] Under the heading "Business Model", the Offer Document explained that the plan was to acquire an already established business as the company's foundation rent roll, with a view to rebranding the business under the Cameo Property Services "banner" and to immediately seek an increase in its properties under management.

Plaintiff's interest in investing in Cameo Property Services

[69] The plaintiff asserted that, after the receipt of the Offer Document, "in or about" April 2008, he and the defendant had a conversation during which he indicated his interest in investing in Cameo which he would fund with the money in his superannuation fund. He expected to retire in July 2008, at which time he intended to establish a self-managed superannuation fund (SMSF); and upon establishment of his SMSF, the SMSF would invest in Cameo. The plaintiff's SMSF was established on 17 July 2008 with funds drawn from the plaintiff's previous superannuation fund.

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27 Exhibit 60, page 267 (as per trial bundle page numbers).

The bond of $250,000

[70] The plaintiff asserted that the defendant told him that he could purchase 500,000 units in the CPS Unit Trust at $1 per unit. To secure his investment, he could pay a "bond" of $250,000 in April and May 2008 and, upon establishment of the SMSF, he could buy the units with money from his SMSF and the bond would be refunded.

[71] The defendant asserted that the discussions between the parties, prior to their written agreement on 30 April 2008, did not mention a $250,000 bond and no such bond was paid.

[72] The question of the status of the first payment assumed significance in the pleadings and in evidence, although it was not critical to the substance of any of the claims made. It might have been relevant if limitation questions arose, but ultimately they did not.

The Unit Trust Deed

[73] The plaintiff asserted that, on a date between April and August 2008, a unit trust, known as the CPS Unit Trust, was established upon the execution of a unit trust deed by Polox as trustee and the plaintiff and the defendant as unit holders.

[74] The Unit Trust Deed of the CPS Unit Trust was tendered at the trial.[28] It bore a handwritten date of execution of 30 April 2008.[29] That same date appeared, typed, on the schedule to the deed.[30] The plaintiff corrected the spelling of his name on the first page of the deed and on the signing/execution page of the deed, but not on the schedule.

[75] The deed recited that the plaintiff and the defendant paid $10 to the trustee, Cameo Property Services Pty Ltd, to establish the CPS Unit Trust. Clause 1 stated that the initial unit holders (the plaintiff and the defendant) held the number of units in the trust specified in the schedule. The schedule stated that the defendant held 250,001 shares in the trust and the plaintiff held 250,000.

Discussions involving ownership of/security over assets

[76] The defendant denied any discussion between the parties in which either the plaintiff suggested, or the defendant offered, that:

> "9A(g) …
>
> (i) the plaintiff should or would own the assets of the CPS Unit Trust, either in their entirety or in a 50% share (other than indirectly as a unit holder): or
>
> (ii) that the plaintiff should or would be a secured creditor of the CPS Unit Trust, or otherwise hold a registered or unregistered charge over the assets of the Trust equal to the value of his investment."

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28 Exhibit 34.
29 Exhibit 34, page 145 (as per trial bundle page numbers)
30 Exhibit 34, page 144 (as per trial bundle page numbers)

[77] In his reply, the plaintiff relied on the statements in the Offer Document to the effect that the plaintiff would acquire ownership and security.

Payments made by the plaintiff

[78] The plaintiff asserted that –

> "11. In reliance upon the statements contained in the Offer Document … and the words spoken by the defendant … the plaintiff:
>
> (a) paid the Bond to Polox Pty Ltd by way of three instalments between 15 April and 15 May 2008; and
>
> (b) as trustee of the SMSF, subscribed for 500,000 units in the CPS Unit Trust at a cost of $500,000 which he paid to Polox Pty Ltd as trustee of the CPS Unit Trust by way of two instalments:
>
> i. one instalment of $160,000 paid on 22 August 2008; and
>
> ii. one instalment of $340,000 paid on 28 August 2008."

[79] The defendant denied those assertions. In particular, she denied that there was an agreement regarding the payment of a bond.[31]

The Unit Holders Agreement

[80] The Unit Holders Agreement was tendered at trial.[32] It was an agreement between Cameo Property Services Pty Ltd (as trustee) and the defendant and the plaintiff. The agreement was dated 27 May 2008, and was apparently signed on that date by the parties to it.

[81] It recited (among other things) that the plaintiff and the defendant had become owners of units in the CPS Unit Trust "with the intent that the Trust acquire and develop a property management business" and that –

> The parties wish this deed to record the general scheme in which they will hold their units in the Trust.

[82] Under the agreement, by clause 1, the parties agreed to commence the business using the trust "as soon as reasonably practicable".

[83] By clause 2, the parties were to hold their shares in the following amounts: defendant: 250,001/plaintiff: 250,000.

[84] Clause 4 set out the commitment of the parties to the Trust and its business and included that each party must –

> d Be just and faithful in its activities and dealings with the other parties;

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31 Amended defence paragraph 10.

32 Exhibit 35.

e Ensure that the Trust pays its debts and meets it obligations, including bank loans and trade creditors, as they fall due, from the revenue of the Trust.

[85] By clause 9, on three months' written notice, one party could require the sale of the business and other assets of the trust.

Repayment of the bond

[86] The plaintiff asserted that Polox repaid the bond to the plaintiff on 28 August 2008. The defendant denied the repayment of the bond.

Seeking the short-term loan

[87] The plaintiff asserted that on or about 1 September 2008, the defendant telephoned him and said that Polox had purchased two rent rolls on behalf of the CPS Unit Trust. The due date for payment had arrived. The trust did not have the funds to pay for them. Polox had applied to the Commonwealth Bank (CBA) for a loan, but the CBA required three months to complete a due diligence process. The trust required "short-term funding" to pay for the rent rolls until the loan application was processed. The defendant asked the plaintiff to lend $300,000 to Polox. The plaintiff asserted that the defendant –[33]

> "said words to the effect that the commission received through the operation of the CPS Unit Trust property management business would be sufficient to service the interest payments on the loan; and … that Polox would receive bank funding sufficient to repay the principal of any loan from the plaintiff."

[88] The defendant denied the phone call and its contents.

[89] The plaintiff asserted that he entered into the short term loan agreement on or about 1 September 2008. He agreed to lend $300,000 to Polox, as trustee for the CPS Unit Trust, for two years, at an interest rate of 18 per cent, monthly, in arrears, for the duration of the term. Polox was to repay the principal sum advanced upon expiry of the two year term.

[90] The plaintiff paid $300,000 on or about 3 September 2008. Polox repaid interest in the sum of $9,000 by way of four payments of $2,250 each between October 2008 and February 2009. It did not repay the principal sum or make any other payments.[34]

[91] The plaintiff asserted that he agreed to provide the loan because –

> "11B(c) …
>
> (i) [he] believed that he would be repaid out of funds advanced by CBA at the end of the loan term;

---

33 Amended statement of claim paragraph 11B.

34 The "List of Matters Not in Dispute" recites at 13 that the $9,000 was paid by four instalments between October 2008 and February 2009. However, there is evidence in the bank statements of payments made in March and December 2009 also. Nevertheless, the matter did not assume any significance.

(ii) [he] believed that he would be adequately compensated for the loan by the receipt of interest; and

(iii) [he] believed the loan was necessary to protect the value of his investment in the CPS unit trust."

[92] The defendant denied that she asked the plaintiff to provide the additional $300,000 or that she represented that the additional $300,000 was necessary to protect the value of the plaintiff's investment. She denied that the plaintiff believed that the additional funds were necessary to protect the value of his investment.[35]

Business Sale Contract (X-far)

[93] Among the tendered documents was a contract for the sale of a business, dated 14 July 2008, between X-far Homes Pty Ltd (as seller) and Cameo Property Services (as buyer).[36]

[94] The business to be sold was described as "Real estate property management and letting". The purchase price was $300,000 (with $30,000[37] to be paid by way of deposit); and the balance of $270,000 to be paid on Monday 1 September 2008.[38] The contract was subject to finance within 14 dates from 'the date hereof" – that is, from 14 July 2008.

Letter of offer from the Commonwealth Bank

[95] Also tendered was a letter of offer from the Commonwealth Bank,[39] dated 31 July 2008, approving facilities totalling $321,500, for the "Purchase of Rent Rolls, Lambert and Smollen and X-far". The facility offered was to be provided by way of two "Better Business" loans: one for five years and the other for three years. The interest rate for the loans were 12.46% p.a. and 12.75% p.a. respectively.

[96] The facility was to be secured by the defendant as guarantor, limited to $321,500, and a first registered company charge by Cameo over the whole of its assets and undertakings (including the rent roll).[40]

[97] Before Cameo was able to access the facilities, the bank would arrange a valuation of the two rent rolls, at Cameo's expense. The valuation had to be undertaken by a qualified valuer; be acceptable to the Commonwealth Bank in all respects; and be equal to, or more than, "$300,000 and $318,586.80".

[98] The offer of finance was open for 30 days.

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35 Amended defence paragraph 12.

36 Exhibit 64.

37 Cameo's bank statements commence on 27 July 2008, so it is not possible to know whether the deposit was paid on that date out of either of its accounts. I note – but having regard to the state of the evidence, draw no inference from it – that the plaintiff paid $30,000 into CPS Unit Trust's Business Websavings Account on 20 August 2008.

38 Cameo's bank statements do not include the statements for the date 1 September 2008 so it is not possible to know whether the $270,000 was paid from either of those accounts by way of bank cheque or direct deposit to the seller or otherwise.

39 Exhibit 65.

40 Exhibit 65 page 321 (as per trust bundle page numbers).

The Agreement, dated 1 September 2008

[99] An agreement about the plaintiff's payment of $300,000 was in evidence.[41] The plaintiff referred to it as the Short Term Loan Agreement.

[100] The agreement was between Cameo Property Service Pty Ltd "atf CPS Unit Trust" and the plaintiff. It was dated 1 September 2008.

[101] Its recitals stated –

> 1) An Investment Offer Document has been presented to John Eric Stowe outlining Cameo Property Services Pty Ltd atf CPS Unit Trust's Investment plan and business strategy.
>
> 2) This agreement as (sic) a result of the acceptance by both parties of the Offer and sets out the terms and conditions of the offer.
>
> **3) This agreement has been provided along with the following Investment Warning:** [I have extracted only part of the warning immediately below]
>
> i. The information prepared on the document (Security Offer Document) has been prepared by or on behalf of the person who is proposing to issue the securities and RDG Accountants and Advisors has not undertaken an independent review of the information contained in this publication.
>
> ii. The information contained in this document about the proposed business opportunity and the securities is not intended to be the only information on which the investment decision is made and is not a substitute for a prospectus … Detailed information may be needed to make an investment decision …
>
> iii. Investment in a new business carries high risk. It is highly speculative and before investing in any project about which information is given, prospective investors are strongly advised to take appropriate professional advice.
>
> …

[102] The body of the agreement contained the following terms:

> 1) John Eric Stowe will provide an investment to the sum of $300,000 to Cameo Property Services Pty Ptd atf CPS Unit Trust within 7 days of the date of this agreement.
>
> 2) The investment class will be in the form of convertible notes.

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41 Exhibit 36.

3) The term of the investment will be for a period of 2 years or 24 months from the date that the investment is received as cleared funds by CPS Unit Trust.

4) An interest only payment of 18% per annum paid monthly in arrears will be paid by Cameo Property Services Pty Ltd atf CPS Unit Trust to John Eric Stowe, into the nominated bank account as detailed in the attached schedule. [The schedule set out the detail of the plaintiff's Bank of Queensland account.]

5) At the end of the term, a review will be conducted and John Eric Stowe will have the option to either:

   (a) Convert the notes as outlined in clause 2, to ordinary units at the agreed value of one share per dollar invested;

   (b) Convert all or part there of (sic) the amount invested to ordinary units, or

   (c) Redeem the full amount invested.

6) John Eric Stowe agrees to provide Cameo Property Services Pty Ltd atf CPS Unit Trust at least 120 days notice of his intention on maturity of the agree term.

…

10) Cameo Property Services Pty Ltd atf CPS Unit Trust agrees to provide John Eric Stowe with any information to meet the legal requirements of the Self Managed Super Fund Act that require information of this investment. Such information to be provided in a reasonable time frame.

[103] The defendant denied that the agreement was a loan agreement – although "informally this language was sometimes used".

[104] She admitted that the term of the investment was two years but denied that the sum was – without further action by the plaintiff – due to be repaid at the expiration of the period of two years, relying on the terms of the Agreement (clause 5) and asserting that the plaintiff did not exercise his option.

[105] She admitted that Polox did not repay the $300,000, but asserted that the Agreement did not require Polox to repay (without the plaintiff exercising his option to redeem the full amount invested under the Agreement). She asserted that the plaintiff did not seek to redeem his investment.

[106] In his reply, the plaintiff admitted that the loan was an investment which took the form of an agreement for convertible notes. He asserted that the natural and ordinary meaning of "convertible notes" was that it was a form of debt funding, which was convertible to equity at the option of the lender. In other words, it was a loan not an investment.

[107] The plaintiff admitted that he and the defendant used the term "lend" in relation to the short term loan but did not admit that the use of that term was "informal" because the defendant did not plead what she meant by that term. He denied that the repayment date was conditional upon the exercise of any option because "the term of the loan was 2 years and the money advanced was repayable on expiry of the term". He admitted that he did not communicate any exercise of option under the "Short Term Loan" (presumably a reference to the 1 September 2008 Agreement).

Loans after 1 September 2008 but before December 2010

[108] The plaintiff asserted that, after the short term loan was made, but before December 2010, the defendant caused Polox, on behalf of the CPS Unit Trust, to borrow another $450,000, which included:

> "11G …
>
> (a) A loan from a bank of $200,000;
>
> (b) Two loans from private lenders totalling $70,000;
>
> (c) A loan from a private lender of $80,000;
>
> (d) A loan from a private lender of $40,000;
>
> (e) Numerous loans from non-bank lenders totalling $60,000, and
>
> some or all of which were secured against the assets of the CPS Unit Trust".

[109] The defendant denied these assertions on the basis that they were untrue. She stated facts which she asserted caused the CPS Unit Trust to fall into financial difficulties – none of which (apart from perhaps the fact of the Global Financial Crisis) were proven in her absence. She also asserted that the plaintiff was aware of the financial difficulties which "struck" the CPS Unit Trust.

[110] She asserted, but of course did not prove, that she informed the plaintiff in December 2008 or January 2009, that for the CPS Unit Trust to keep functioning, it would need $200,000 from a bank or another lender and that the plaintiff agreed to the trust borrowing that amount.

[111] With respect to the other loans referred to, the defendant asserted, but of course did not prove, that from September 2008 until December 2010, the CPS Unit Trust moved into property sales in addition to managing rental properties. She asserted, but of course did not prove, that during this period, the trust was required to pay commission to a real estate agent before it had cleared funds to do so, and thus it obtained short term finance to meet its obligations, which it repaid.

[112] In his reply, the plaintiff did not admit the financial difficulties which the defendant asserted had struck the CPS Unit Trust because they were not matters within his knowledge. He denied that the plaintiff contacted him and discussed with him the need for Polox to borrow $200,000. He could not know therefore that a lender would require security for a $200,000 loan (as the defendant asserted he knew or ought to

have known). He denied any knowledge of a $200,000 loan to BankWest, secured by a fixed and floating charge over the assets of the CPS Unit Trust. He said that no relevant documents had been disclosed.

E-mail correspondence

[113] In his statement of claim, the plaintiff referred to two e-mails sent to him by the defendant, dated 26 February 2010 and 23 March 2010. Each e-mail stated that his investment was "safe".

[114] These e-mails were tendered,[42] along with others in related "e-mail chains".

E-mails dated 26 February 2010

[115] The e-mail from the defendant, dated 26 February 2010, was in response to an e-mail from the plaintiff to her on that same date in which he expressed concerns about the interest payments on the loan of $300,000 not being paid.[43]

[116] The defendant's reply to the plaintiff's e-mail included the following –[44]

> No doubt you will have been visiting our website on a regular basis so you will see the number of Sales listings that we have; those that we have Sold have further underpinned Cameo's financial security and operational requirements month to month and it will slowly but surely increase to a level where a surplus will emerge. That surplus will then go towards paying down Cameo's debt like our computer and equipment leases (which are expensive and a drain on our monthly resources) as well as your $300,000 Loan.
>
> Your investment is safe John … it is just not paying you the monthly dividend that you had initially expected or I anticipated the Company could meet … and I am acutely aware of that – however I do not apologise for taking the decision to protect the entire investment you made and looking at the long term picture by being prudent rather than try to meet its service rate when the company could not afford it.
>
> We have a couple of settlements due early this month so I will send you across $2,400 representing $1,200 for each of January & February's contribution to your monthly commitment; this is something I want to be able to maintain going forward … something is better than nothing. There is no doubt however, that we will have to re negotiate the loan; it (sic) interest rate is untenable and has not reflected the interest rate of recent times … we will look at what options are open to us at the time that we sit down to do that …

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42 Exhibit 16 – e-mail chain including e-mail of 26 February 2010; exhibit 20 – e-mail of 23 March 2010.

43 The e-mail chain was tendered without objection in the defendant's absence. I have treated it as evidence for all purposes – with its evidential weight to be determined by me: *Walker v Walker* (1937) 57 CLR 630 at 636; *Hunt v Australian Associated Motor Insurers Ltd* [2012] QCA 183 at [47]. I also note the defendant's assertion of her intention to rely upon the contents of her e-mail at trial.

44 Exhibit 16, page 88 (as per trial bundle page numbers).

E-mails dated 23 March 2010

[117] The defendant's e-mail dated 23 March 2010 responded to an issue the plaintiff raised with her about his SMSF and continued –[45]

> As for your loan component, I have explained on many occasions what has prevented the payment of such its large interest component and how it cannot be sustained … so I am just repeating myself …
>
> John why do you keep giving me grief over your investment? It is here – it is safe – it is secured by a known and quantifiable asset … and (sic) asset that is about to be quadrupled over the next two years … why would you not stay in Cameo and enjoy the benefits of this level of growth?
>
> The reason I touched on the conversion of the $300,000 loan into units was because the loan agreement allows for that very option … yes you still have the 49% holding but one that is going to be **substantially more valuable** … it is not as though you are not going to benefit … it was not remotely unreasonable for me to ask you to consider the option considering it was addressed I (sic) the loan agreement … and ask for this added contribution considering the rewards it is going to reap for you …
>
> …
>
> I am at a loss as to what more I can do or say … however I can confirm that I have already started making enquiries for someone to start taking you out as I cannot so my only option is to replace you as my silent partner if this is the track you insist on going down on …
>
> I will let you know if and when I receive any interest from any party to do so …

[118] The defendant asserted certain facts relevant to the trust's financial position, which were not proven.[46]

[119] In his reply, the plaintiff asserted that he had no knowledge of the facts stated by the defendant relevant to the trust's financial position.

[120] He admitted that between 16 and 23 March 2010, he and the defendant exchanged e-mails that dealt with (among other things) the possibility of his converting his convertible notes into units.

Balmanno Loan

[121] The plaintiff asserted that, in or about December 2010, the defendant caused Polox to enter into a loan agreement with Balmanno Pty Ltd. Balmanno lent $293,887 to Polox

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45 Exhibit 20. I have treated this e-mail, and all others, as evidence for all purposes.

46 They included that if the CPS Unit Trust were liquidated in February 2010, it could have paid the plaintiff at least $300,000 for his convertible notes but it could not cover all of its expenses and also pay the interest on the convertible notes.

as trustee for the CPS Unit Trust and, as security for the loan, Polox granted to Balmanno a charge over all of the assets of the CPS Unit Trust.

[122] The plaintiff asserted that at the time Polox entered into the loan agreement with Balmanno, the defendant knew, or should have known, that –

> "(a) Polox was in default of the Short-Term Loan for failure to pay interest to the plaintiff and failure to repay the principal of the Short-Term Loan upon the expiry of the term of the loan;
>
> (b) Polox would not be able to repay the Balmanno Loan from the assets of the CPS Unit Trust; and
>
> (c) By Polox agreeing to the Balmanno Loan and granting the Charge, Polox prejudiced the plaintiff's prospects of being repaid the amounts owing under the Short-Term Loan or receiving a return on his investment in the CPS Unit Trust."

[123] The plaintiff asserted that Polox was in default of the Balmanno loan in or about December 2011 and owed Balmanno $382,989. On 20 January 2012, the defendant caused Polox to sell the business of the CPS Unit Trust to Balmanno for a purchase price of $382,989, which was applied to satisfy the debt owed by Polox to Balmanno.

[124] In her amended defence, the defendant admitted that Polox entered into a loan agreement with Balmanno but did not admit that it was for $293,887 because she was uncertain about the truth or falsity of the allegation. She admitted that Balmanno took a charge over all of the assets of the CPS Unit trust.

[125] She asserted that the loan was obtained in certain circumstances which were not proven at trial.[47]

[126] The defendant denied that Polox was in default of its short term loan from the plaintiff because there was no loan (it was an investment in exchange for convertible notes). She admitted that Polox failed to pay its monthly interest payments in accordance with the Agreement. She said that the plaintiff forgave or otherwise waived his rights with respect to Polox's failure to make the interest repayments.

[127] In his reply, the plaintiff asserted that he did not forgive or waive his rights "in the e-mails referred to".

[128] In response to the plaintiff's allegation that she knew, or ought to have known, that Polox would not be able to repay the Balmanno loan, the defendant asserted certain things about her state of mind which, of course, she did not prove at trial. She denied that by agreeing to the Balmanno loan and granting the charge she prejudiced the plaintiff's prospects of being repaid any amounts owing to him or receiving a return on his investment for certain financial reasons which she asserted but did not prove. She

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47 Those circumstances included BankWest claiming that Polox was in default of its loan; that it would appoint investigative accountants; and reserving its right to take enforcement action. Balmanno agreed to take over the BankWest loan on a short term basis, to give Polox time to find a purchaser for the rent rolls. Balmanno took over the loan and BankWest's security over the CPS Unit Trust's assets in December 2010.

neither admitted nor denied that Polox was in default of the Balmanno Loan and indebted to Balmanno in the sum of $382,989 and asserted that she was unable to admit it until there had been third party disclosure. She denied that she caused Polox to sell the business of the CPS Unit Trust to Balmanno for $382,989, which was applied to satisfy the debt, for reasons which she asserted but did not prove.[48]

The plaintiff's case at the hearing

[129] In opening the case for the plaintiff, the plaintiff's counsel stated that his case was not going to focus on what were described in the pleadings as the Email Representations, and for that reason, I did not outline them above.

[130] He foreshadowed that he intended to ask the Court to draw "some fairly heavy inferences" from the defendant's failure to appear and give evidence. However, in his closing submissions, counsel said that while he would like the Court to "draw some extravagant inferences", he could find no authority which permitted an inference to be drawn "beyond the ordinary inference". Counsel was obviously referring to the rule in *Jones v Dunkel*[49] that the unexplained failure by a party to call a witness, or tender documents or other evidence, may, in appropriate circumstances, lead to an inference that the uncalled evidence would not assist that party's case. The rule applies where a party is required to explain or contradict something.

[131] The plaintiff's counsel explained that the claims under the *Corps Act* and the *ASIC Act* overlapped but if I were to find that the conduct was not in relation to a financial product then I was required to turn to the *TPA*.

[132] He said that his case in negligent misstatement was an afterthought in case there was "some submission or some finding that [took him] outside of the statutes".

[133] He explained that the unconscionable conduct and breach of contract cases were slightly different but ran in the alternative because they followed "the same factual matrix except to the extent that the unconscionable conduct [case relied] additionally upon the Balmanno conduct and the short term funding conduct".

[134] In later oral submissions,[50] the plaintiff's counsel suggested that I would approach my findings as to unconscionable conduct in the following way, after I asked how I was to infer that the defendant had behaved unconscionably rather than incompetently:[51]

> In circumstances where the case that is put against [the defendant] in the pleading by raising issues of unconscionability necessarily puts an allegation for her to meet that she has acted immorally and in breach of good conscience and she doesn't appear and say, "I didn't", the inference is open. Otherwise, it wouldn't be, because I would have to cross-examine

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48 The defendant asserted that from December 2010 until January 2012, Polox was in negotiations with the Australian Tax Office about a payment plan for tax owed by the CPS Unit trust. Ultimately the ATO rejected any payment plan and wound up Polox and the CPS Unit Trust. She asserted that Balmanno purchased the CPS Unit Trust rent rolls after the ATO put Polox into liquidation.

49 (1959) 101 CLR 298.

50 On 24 October 2018.

51 Transcript 24 October 2018, 1 – 17, 10 – 30.

> her and demonstrate the manner in which I attack her conduct based on her answers, but she chose not to do that …
>
> …
>
> That is why in a sense it's somewhat difficult for me to establish the unconscionable conduct case in the tradition sense, and that is ----
>
> …
>
> ---- I attack her in the box and I demonstrate that she has no reasonable moral explanation for what she did, that is, went out and took a bunch of loans without telling Mr Stowe, got more money from him without properly revealing to him the financial circumstances of the business, all of those things, she chose not to stand and present a reasonable explanation for that that would say, "Well no. What's put against me isn't right. I might have made a mistake, but I wasn't behaving unconscionably".

[135] I acknowledge that under the general law of unconscionable dealing, the burden of proof initially lies upon the party seeking to set aside a transaction to establish the elements of unconscionable dealing. Once those elements[52] have been established, a presumption of unconscionable dealing arises and the burden of proof then falls upon the party against whom relief is sought to show that the transaction was not unconscionable. It may be that that was what counsel for the plaintiff was referring to in this submission.

[136] In this matter, in the defendant's absence, it seemed to me that the correct approach was for the court to determine whether, on the plaintiff's case, unconscionable conduct as contemplated by the relevant provisions of the *ASIC Act* was established. If it was, then in the absence of evidence from the defendant, the claim could not be defeated. However, the plaintiff must do more than raise an issue of unconscionability. He must establish by evidence, on the balance of probabilities, that the defendant "engaged in conduct", as relevantly defined, which was unconscionable in all of the circumstances.

The plaintiff's evidence

[137] The plaintiff, Mr Stowe, is a retired man. He had a very good employment history in the electricity industry which commenced in 1969 and concluded in July 2017, after a "retirement" break for almost three years starting in 2008.

[138] In terms of his investment experience, the plaintiff "started" in rentals in 1974 and "maintained that all the way through". He had "done a little on shares". He was not impressed with the work he had to put into shares for the return he got. Property had been good to him. His property investments involved his purchasing residential properties and letting them out. He also invested in industrial property through share trusts. He branched out into property trusts including one that had been "really good" to him about 30 years ago and invested in another one which did very well. He was

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[52] The transaction; the existence of a special disability; the taking advantage of it by the other party; and that the other party knew or ought reasonably have known of the special disability.

inclined to property trusts rather than direct investment in residential properties. He did not use a financial adviser, but discussed his investments with his accountant.

[139] He came to know the defendant after responding to an advertisement in the newspaper by Locksley Barrington. He understood the defendant to be the executive secretary of Locksley who handled the communications to do with investment. He understood she was "part of the business" of Locksley and that her husband was one of the owners and shareholders. He understood Locksley to be acting as a broker for a number of companies. He made inquiries and invested in about four of those companies. All of his dealings with Locksley were through the defendant.

[140] He met the defendant in person in the later part of 2007. He went to an office at Robina. He received an email from Locksley about investment in Cameo. He explained that he was on the Locksley email distribution list, but his first information about Cameo came from a "PDS" (a public disclosure statement) – that is the Offer Document – which he said he received in the mail in early 2008.

[141] That Offer Document[53] has been referred to above. An investment warning is on its front page. The plaintiff said he read the Offer Document after he received it, including the investment warning. When he read it he thought –[54]

> … well, every investment does carry some risk, but in my due diligence, it wouldn't have mattered how much due diligence I did I could not have foretold the money that was drained out of the Cameo accounts and put into a private account …"

[142] I note that that complaint does not underpin any of the claims made.

[143] The plaintiff's attention was drawn to the statement "Investment in new business carries high risk", and he was asked whether he considered that statement when he read the Offer Document. He said:[55]

> Well, I did, but the way I viewed it, to me rent rolls are a very lucrative cash – cash flow business. They're readily saleable and when you look at – well, with my experience there was one real estate that used to build up a rent roll, then sell it off. They were – they're quite good businesses and I – I didn't consider that was all that high of a risk.

[144] The plaintiff's attention was drawn to the part of the Offer Document headed "Projecting the future value of a rent roll", under which was a table which purported to demonstrate potential growth. The plaintiff was asked whether he considered that part of the document in his decision to invest. In answers that were not responsive, he said:[56]

> I saw from this I could actually be a 50% owner in this business … yeah, a share in the business … a 50% share … I saw that the actual rent roll and

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53 Exhibit 60.
54 Transcript 1-28, 34-40.
55 Transcript 1-29, 30-34.
56 Transcript 1-30, 43 – 1-31, 14.

> the fitout was – was security … for my line. … By way of selling it to get my investment back.

[145] He said that was very important to him. He explained, "Well, I always looked at I needed something to fall back on if it didn't go right and I could sell it off".[57]

[146] He was asked whether he considered what was said about the money that could be made. He replied, in effect, that he did not necessarily agree with the predictions made in the Offer Document. He explained, in effect, that notwithstanding what was predicted in the Offer Document, he did his own calculations:[58]

> … I saw the rent roll should naturally grow and become worth more in value. What extent I'm not sure. These figures represent the Gold Coast area and I'm used to property in Rockhampton that was very subdued compared to this. This is more – it gave higher returns, but then again if there was a downturn it would have been a higher – you know, a greater loss, but to me I was only looking at a steady increase anyway. I didn't necessarily agree with – that those figures would eventuate. … I wasn't at the time [familiar] with rentals down in the Gold Coast area which has a higher return and all that sort of thing to what I was used to, and my figures were more or less being based on what I was used to in the area I was, which were not up to this level. So I wasn't really expecting it to outperform.

[147] This evidence obviously did not assist the plaintiff's case based on the Return and Profitability Representations.

[148] The plaintiff was asked what he would describe as the main things that motivated him to invest in Cameo. He replied:[59]

> To me it was in real estate that I had years of, although I was more on the side of being a landlord, and owner, not so much in this, but I had had a lot of experience with rent rolls and in my time I must have gone through nearly every rent roll in Rockhampton. I wasn't happy for one reason or another and I could see this one had intentions of addressing a lot of my concerns, so it should have been a good business. … Because it filled some of the shortfalls of the rent rolls I'd actually gone through as a – as an owner and a renter.

[149] At the peak of his investment in residential properties, the plaintiff owned six flats, two houses and a unit. That was before his wife passed away in 1995. In the last 10 years he had bought no property but he owned two flats and two houses.

[150] He was asked whether he thought the investment in Cameo was a safe investment and he said that he thought it was because it was a cash flow business: "You know every month … what your income is and you can keep track on everything from that".[60] That

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57 Transcript 1-31, 18-20.
58 Transcript 1-32, 41 – 1-33, 6.
59 Transcript 1-34 ll 18-30.
60 Transcript 1-38 ll 17-18.

answer did not assist the plaintiff's case that he was induced to invest on the basis of a representation that his investment was "secured" and therefore safe.

[151] He was asked what he considered he would do, as he was reading the Offer Document, if the investment went bad. He said he did not really consider that too much because "these two rent rolls were already established and they were up and running".[61] He added, "[T]he rent roll was the saleable item. If things got into trouble you can always sell that to get your investment back".[62] His response that he "did not really consider" what he might do if things went bad did not assist his case based on the Ownership and Security Representations.

[152] He was then asked whether he would have invested in Cameo if the investment did not involve a saleable asset like the rent roll and he said he would not have. He explained that he saw the rent roll as the "backup", if things went wrong it could be sold off "to recoup".[63]

[153] About that suggestion, that the rent roll was available as "backup", I note the following. The Offer Document proposed that 50% of the cost of the rent roll would be financed. Thus, on the basis of the projections in the Offer Document, it would not be until at least year 7 that 50% of its value would come close to meeting the plaintiff's total outlay. And of course, the plaintiff considered those projections ambitious. Also, on the plaintiff's evidence, he had already invested $500,000 in Cameo when he was asked to lend it $300,000 to buy a rent roll or rent rolls. Cameo had no other assets. He must have appreciated that the rent rolls were – at least in the short term – unable to "back up" the whole of his $800,000 investment.

[154] He was asked whether he sought any legal advice about the Offer Document. He said he did not take legal advice but he ran it past his general accountant and his superannuation fund accountant. He was asked whether he sought any advice from either of the accountants about whether the investment was safe or risky and he said, "Not really, no".[64]

[155] The plaintiff was taken to a document also entitled "Cameo Property Services Offer Document"[65] (the second Offer Document). The plaintiff said he had received that document by post after he had gone "down" to have a "look" at Cameo in September 2008. He referred to a meeting he had with Cameo's accountant, Zaak Wheaton, on 24 September 2008. He said that after that meeting, when he got back to Biloela, he received the second Offer Document in the post. He understood that the second Offer Document was related to an opportunity to expand Cameo because a rent roll had "made itself available".[66]

[156] Having regard to the plaintiff's counsel's indication that he placed no reliance upon the second Offer Document it is unnecessary to recite its contents.

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61 Ibid, 20-25.
62 Transcript 1-38, 15-27.
63 Transcript 1-39, 39-40.
64 Transcript 1-40, 40-41.
65 Exhibit 59.
66 Transcript 1-41, 47.

[157] The plaintiff said he invested in Cameo when his superannuation fund "bought into it". He made two payments with his superannuation fund money. The first was on 22 August 2008 of $160,000 and the second was on 28 August 2008 of $340,000, resulting in a total investment of $500,000. Before that investment he had paid other money, by way of a holding deposit or a bond of $250,000:[67]

> When I agreed to buy in and I was looking at a 50% share, which was $500,000, I was still working. And the director said to me "because you're still working" they wanted a holding deposit for a bond of 250,000. And I made that in three payments. The agreement on that was that that money would come back to my accounts when I bought in with the super fund money. … The first [payment] was on the 27th of April 2008 for $5000 from my … line-of-credit account. I then had to put more collateral into my line- of-credit account … and on the 17th of April I made two payments: 240,000 from my line-of-credit account and 5000 from my Rock Building Society account. Now, the agreement was that they pay me 10,000 back to my Rock Building Society account and 240 to the line-of-credit, which made 250,000 all up.

[158] He explained that the agreement to which he referred was an agreement between the defendant and himself about what he called the "bond money", which arose out of discussions he had had with the defendant.[68] He explained that his bond was to be repaid when his superannuation fund "bought in". It was in fact repaid on 28 August 2008.[69] His explanation as to how he came to pay that bond was not clear:[70]

> It was put to me that I had agreed but it [the actual buying in to Cameo] wasn't going to happen until my super fund money came available to buy in.

[159] Bank statements for the CPS Unit Trust's Websavings Account showed the $160,000 payment by the plaintiff to Cameo on 22 August 2008.[71]

[160] There was no statement available for the second payment of $340,000 which was said to have been made on 28 August 2008. The relevant page was apparently missing from the statements the plaintiff's solicitor received from the bank by way of non-party disclosure.

[161] Interestingly, other pages from bank statements from other accounts, which were tendered, were missing also.

[162] The Trustee of the CPS Unit Trust's Everyday Business Account was exhibit 67. Its statements for the period from 27 August 2008 to 26 October 2008 (including therefore the critical times of late August and September 2008) were missing.[72]

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67 Transcript 1-42, 33 – 1-43, 29.
68 Transcript 1 – 43.
69 Transcript 1 – 43, 41 – 43.
70 Transcript 1-44, 1-10.
71 Exhibit 68.
72 My analysis of Cameo's bank statements revealed that its practice was to receive payments into its Websavings Account and to transfer from that account into its Everyday Business Account through which it conducted its day to day operations.

[163] The plaintiff's Line of Credit facility with the Bank of Queensland was exhibit 66. Its statements for the period from 31 August 2008 until 1 January 2009[73] (including therefore September 2008) were missing.[74]

[164] The plaintiff's Line of Credit Facility statement showed a payment of $240,000 into it on 28 August 2008, which, according to the plaintiff's testimony, showed *Cameo's* repayment to him of $240,000 of his $250,000 bond. However, on its face, the statement shows that the $240,000 was paid by *the plaintiff himself* into the account. The plaintiff was asked no questions about, nor did he explain, why he, and not Cameo, made that payment of $240,000 into the account.

[165] The plaintiff said that the other $10,000 (to repay the bond) was paid into his Rock Building Society account on that same day – but his statements from that account were not tendered.

[166] The plaintiff was taken to a document entitled "Unit Holders Agreement" between him and Cameo Property Services Pty Ltd. He agreed that he signed that document on the date it bore – 27 May 2008.[75]

[167] He was also taken to the CPS Unit Trust deed which he confirmed he had signed on the date it bore – 30 April 2008.[76]

[168] The plaintiff was asked why the trust deed was signed on 30 April 2008 when, on his evidence, his investment was not made until August 2008. He said he was told that "this" was set up by the accountant on that date; the document was sent to him by post; and the director asked him to sign it.[77]

[169] It is difficult to understand why the trust deed, which reflected the acquisition by the plaintiff of 250,000 units, would be backdated.

[170] The Unit Owners Agreement (of 27 May 2008) recited that the plaintiff and the defendant had become the owners in units of the CPS Unit Trust. If indeed the plaintiff acquired no interest in the CPS Unit Trust until August 2008, it is difficult to understand why the Unit Owners Agreement would be backdated. The plaintiff was not asked about it.

[171] As noted above, the plaintiff corrected the spelling of his name on the trust deed in two of the three places it appeared. He made the same correction to minutes of meeting dated the same day, 30 April 2008.[78] He said that the meeting to which the minutes related was "regarding the bond money [he'd] put in".[79] (See below at [173] for the text of the resolution.)

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73 And there were other gaps.

74 This exhibit included statements for 1 July 2008 until 31 August 2008, from 1 January 2009 until 31 August 2009, from 1 October 2009 until 31 October 2009, from 1 December 2009 until 31 May 2010 and from 1 July 2010 until 29 February 2012.

75 Exhibit 35.

76 Exhibit 34.

77 Transcript 1 – 50, 1 – 5.

78 Exhibit 52.

79 Transcript 1 – 50, 24.

[172] His evidence about how he came to correct the spelling of his name on the minutes was confusing. After being shown the minutes, his testimony continued:

> Do you recognise that document? ---- Yeah, I do, yes.
>
> What is it? ---- That was regarding the bond money I'd put in.
>
> When did you first see this document? ---- That would have been one of the documents handed to me – apart from signing it, handed to me at the meeting on the 24th of September.
>
> And what do you mean "apart from signing it"? ---- Well, I signed – signed earlier than that by – it was sent to me.
>
> This document was sent to you? ---- Sorry?
>
> Firstly? ----? ---- Hang on a minute. I'm getting this mixed up with the meeting of minutes. No, this was handing to me on that – at that meeting.
>
> Which meeting? ---- When I was taken to meet [Zaak] Wheaton.
>
> And what date was that? ---- That was the 24th of September.
>
> Had you seen this document before that? ---- No.
>
> Can you see that the document refers to a meeting on the 30th of April 2008? ---- Yeah.
>
> And it says that you were present at that meeting? …
>
> … I wasn't actually present.
>
> How do you know that? ---- Well, that meeting was for the 30th of April. And on that date I was actually working at Callide Power Station.

[173] His attention was drawn to the resolution contained in the minutes:

> John Eric Stowe is to hold 250,000 units issued paid at $1 per unit paid in full in cash to the value of $250,000. Margaret Doris Johnson as trustee for Avalon Investment Trust will hold 250,001 units at $0.0001 per unit. This unit holder will have the balance value represented by her intellectual property contribution making her total contribution $250,001.00.

[174] Having said that he was not present at the meeting, he was asked whether he agreed to that resolution outside the meeting and he said no. He continued –[80]

> No. This is the one that they actually used my bond money but buying her units at .01 of a percent. I didn't agree to any of that. I don't know of that meeting on that date and I was not there.

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80 Transcript 1-51, 38-40.

[175] His attention was drawn to the corrections to the spelling of his name in the minutes. As I understood the plaintiff's evidence, he said he made the corrections when the document was handed to him on 24 September 2008.[81]

[176] The plaintiff's evidence about the timing of his signing of the Unit Trust Deed and the minutes concerned me. Those documents are to be read together. The resolution contained in the minutes sets out the proportions in which the plaintiff and the defendant were to hold units in the trust. The schedule to the Unit Trust Deed reflects the resolution. Both documents spell the plaintiff's name incorrectly, and he has corrected the spelling of it in both. His name is correctly spelt in the Unit Holders Agreement which was executed later in May 2008.

[177] The plaintiff was taken back to the Unit Holders Agreement. He "confirmed" he signed it on 30 April 2008, notwithstanding his earlier evidence that he was in Callide at that time and that it was sent to him by post after his meeting with Mr Wheaton in September 2008.[82]

[178] He was asked whether he read the schedule on the second last page of it. That schedule nominates, as the two unit holders in the CPS Unit Trust, the defendant and the plaintiff. It indicates that the defendant held 250,001 units and that the plaintiff held 250,000 units.

[179] The plaintiff explained that he understood that those unit holdings did not refer to the full amount of the buy in. It was only for the first stage –[83]

> That was only, like, the first stage for the unit owners' agreement. It was only half of the total holding.

[180] Then the following questions and answers occurred:[84]

> You gave evidence earlier that you paid a bond of $250,000? ---That's right.
>
> In light of that evidence and your evidence that you later paid the $500,000 in August, can you explain in any way why you would have units to your name of $250,000? --- That was – I used that to buy in, and that was private money … Originally Cameo was not set up, like, with the rent rolls, and then my super fund bought on the 22nd and 28th of August, and this bond money came back.
>
> Did you – before paying the 250,000, did you have any discussions with the defendant or Mr Wheaton about when you would receive units in the trust? --- I didn't have any discussions at all with [Zaak] Wheaton. That meeting I went to on the 24th of September was the first and only time I've ever seen him.

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81 Transcript 1 – 52, 15.
82 Transcript 1 – 54, 35 – 38.
83 Transcript 1-54, 45-46.
84 Transcript 1-55.

> Right. Did you have any discussions with Ms Johnson about when you would own your units in the trust?--- I would own that when I paid into it … [G]oing by the offer document all up there would be 500,000 units at a dollar a unit, which was $500,000.
>
> After receiving the Offer Document did you have any discussions with Ms Johnson about how and when you would pay for units in the trust?--- Only to the extent when the money came available from my super fund, which would be shortly after I retired.

[181] He said that discussions with her about the $250,000 that he paid first were around its return when his super fund bought in. He was asked whether he had any discussions with the defendant about receiving any units in return for the $250,000 that he paid and he said:[85]

> Only – yeah, well, that's right. I – I got the units, but they should have been bought back because over private money.

[182] He was asked whether he discussed with the defendant getting any units in return for $250,000 and he said, "Not really, no".[86]

[183] In response to a question from me, the plaintiff said he thought that the Unit Trust Deed told him he would be the "other one in the business with Margaret Johnson". He went on to explain that, when he saw the page that showed him receiving 250,000 units, he thought –[87]

> … they've used my bond money for that, but as this was only an interim unit owners' agreement, because that was private money it had to be bought back by the trust and then the super fund buys in with super money – super fund money, and then that 250 was only 50% of the amount of the all up holding, of what it will be, 500,000 …

[184] He was asked whether he asked the defendant why he was listed as owning units and he said –[88]

> The only question I asked [of Ms Johnson] was how came (sic) she had one unit more than I, and I was told that gave them the authority to sign cheques and everything to run the business rather than chase me.

[185] He said he asked that question at the meeting on 24 September 2008.

[186] He said he did not ask the defendant any questions about why he had been listed as owning 250,000 units in the Unit Trust Deed. He said:[89]

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85 Transcript 1-55, 39-40.
86 Transcript 1-55, 45-46.
87 Transcript 1-56, 33-45.
88 Transcript 1 – 56, 39 – 41.
89 Transcript 1-57, 18-20.

> No, I didn't, because I saw that as – that's only the first stage. That has to be rewritten when the super fund bought in for the full 500,000, and that was never done.

[187] According to the plaintiff, he was shown the Unit Trust Deed *after* his superfund had bought in (in the amount of $500,000 entitling him to 500,000 units), which was, on his evidence, on 28 August 2008.

[188] In addition to my comments above about it being difficult to understand why the minutes, the Unit Trust Deed and the Unit Holders Agreement were backdated, I note that –

- the plaintiff's evidence was inconsistent – he claimed at one stage not to have agreed to his "bond" being applied to the purchase of 250,000 units in the unit trust, but also said, in effect, *that he held units in the interim* which he expected the trust to buy back;

- if indeed the plaintiff did not wish his "bond" money to be applied to the purchase of 250,000 units in the CPS Unit Trust, then he has signed three documents reflecting that purchase, contrary to his intention, on three separate occasions (on his evidence), without objection; and

- he claimed to have seen the Unit Trust Deed – reciting an investment of $250,000 and the acquisition of 250,000 units – at a time at which, on his evidence, he had in fact invested $500,000 and acquired 500,000 units – but made no complaint about that inaccuracy.

[189] I found the plaintiff's testimony concerning the bond and the backdated documents unsatisfactory. Although the bond issue was not relevant to the substance of any of the claims, the plaintiff's evidence about it caused me to approach his testimony generally with some caution.

[190] The plaintiff said that after he got his bond money back the defendant approached him about a short term loan for $300,000. She telephoned him and explained that settlement for two rent rolls was coming due and Cameo needed funds to complete settlement. She told him the Commonwealth Bank needed six months to do "due diligence" on the business. In effect, she asked for the loan until the Commonwealth Bank had performed its due diligence. The plaintiff understood the loan, which he agreed to make, to be a short term loan for two years with interest to be paid in arrears at 18 per cent. The terms were arranged during one or more phone calls.

[191] I have referred above to the contract for the purchase of X-far (which was to settle on 1 September 2008) and the facility offered by the Commonwealth Bank for that purchase, dated 31 July 2008. Those documents seem to be related to this aspect of the plaintiff's evidence.

[192] The plaintiff was shown the "loan" agreement for $300,000 dated 1 September 2008.[90] I note that it refers to the $300,000 as an "investment".

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[90] Exhibit 36.

[193] The plaintiff's understanding from his discussions with the defendant was that the loan was to be short term because the bank had asked for six months to do its due diligence. While the defendant did not say to him "outright" that she would replace his loan with the bank loan – that was his understanding and that was what he "expected".[91] He said he would not have made the loan if he was not going to be paid interest, nor would he have made the loan if it was not going to be short term. The reason why the term mattered was that he provided the loan from his line of credit, and he could only tolerate a reduction in that line of credit for a short term. He explained, in effect, that he could tolerate a two year loan.[92]

[194] The plaintiff said that he received four interest repayments equivalent to half month payments on the loan. As I understood the plaintiff's evidence, the interest repayments were to be paid into his general account to "[go] into [his] tax return".[93] He was never repaid the principal of $300,000. He chased Ms Johnson for other interest repayments. He said he got $1,200, 12 months later but "kept on to her about it".[94]

[195] He said that in reply to his chasing her, she told him that his investment was safe; and that she was working out ways to get the repayments "back". She blamed X-far, one of the rent rolls Cameo bought, and referred to other difficulties. She told the plaintiff that X-far had caused a problem and Cameo did not have the money to pay him the interest on his loan.

[196] The plaintiff denied that in the period around December 2008 and January 2009 the defendant told him that Cameo required further funding. He said Ms Johnson never asked him whether he agreed to Cameo taking out a loan with BankWest. Nor did she consult him about any other loans.

[197] The plaintiff received, on about 24 November 2009, Cameo's financial statements, which were tendered.[95] He said he did not read them when he received them.

[198] He made a visit to Cameo's offices on 15 May 2010. The first thing he saw when he arrived was a big pink Mercedes Benz convertible in the carpark bearing the number plate "MDJ".

[199] The purpose of the meeting was for the plaintiff to look at the books of the company. A person called Carl Melchek was present at the meeting. The defendant told the plaintiff that Mr Melchek was looking to buy the plaintiff's share in the business. The plaintiff became suspicious of Mr Melcheck and went home to Biloela. He learnt soon after that there was an anomaly in relation to his superannuation fund account and the tax office declared it non-compliant.[96]

[200] The plaintiff read through Cameo's financial statements sometime between 15 May 2010 and 2 June 2010.[97] He found what he referred to as "anomalies" in it. He

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91 Transcript 1 – 60, 9 – 15.
92 Transcript 1-60, 45 – 1-61, 36.
93 Transcript 1 – 62, 13.
94 Transcript 1-63, 4-5.
95 Exhibit 15.
96 Transcript 1 – 65 – 1 – 66.
97 Transcript 1 – 67, 45.

discovered when he "crunched the figures"[98] that the defendant had taken out a personal loan from BankWest for $200,000.

[201] He could not find his loan of $300,000 to the company recorded anywhere in the financial statements as a loan. It had been "put down" as 300,000 units in the business.[99] Those units appear under the heading "Unit holder equity".[100] The plaintiff had not authorised the conversion of his loan into equity. As he understood things, the tax office would not allow it. Indeed, in accordance with the agreement dated 1 September 2008, the time at which he was required to nominate whether he intended to "convert" his $300,000 debt into units had not arrived.

[202] The plaintiff knew nothing about the other bank loan for $190,000 which appeared under the heading "Financial liabilities" in the statements.[101]

[203] There was email correspondence from the plaintiff to the defendant, dated 2 June 2010,[102] in which the plaintiff accused the defendant of having her "hand in the honey pot", drawing a wage, and borrowing from Cameo, as well as "deceit deception fraud and theft".

[204] In her e-mail reply, the defendant denied those accusations; said she forwarded the plaintiff's e-mail to her accountant and solicitor; and informed the plaintiff that she would not communicate with him directly anymore.

[205] The plaintiff was referred to an earlier e-mail he sent to the defendant on 9 November 2009[103] in which he said that he was deeply concerned about his investment funds in the business. In that e-mail, he said he could understand why no-one would be attracted to take over the $300,000 loan. He continued:

> I intend to have my investment "secured" (and become a "secured investor"). I require a valuation of the tangible asset value of Cameo at the present time (November) and this has to come up to the value of 850K and a "charge" will be registered over it (Cameo) to this value. This is merely to have my investment funds protected so that I have first port of call on this value of funds and nothing more. I have no doubt this will not be a problem as you have assured me on several occasions that Cameo is moving forward and upward and that my investment is secured by the worth/value of Cameo. As you stated in a previous email "you have no control over happenings in someone else's life". This also applies to me! Whenever, down the track, when you take over my holding in Cameo (as you have previously mentioned of your intentions as against taking on another investor) my "charge" over Cameo will be released. This will have no other effect on Cameo. I have an appointment with my solicitor tomorrow morning and he will be in touch as to his requirements to execute this issue.

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98 Transcript 1 – 68, 13.
99 Transcript 1 – 69.
100 The unit holder equity of 1,050,001 units was made up of 250,001 belonging to the defendant, 500,000 and then another 300,000 belonging to the plaintiff.
101 Transcript 1 – 70, 1 – 12.
102 Exhibit 27.
103 Exhibit 13.

[206] It is apparent from this e-mail that the plaintiff did not understand that his investment in, or loan to, Cameo to have provided him with ownership of assets, nor did he understand it to be secured in such a way as to give him priority over other creditors. That presented an obvious difficulty for the plaintiff in his misleading conduct case to the extent to which its success depended upon proof of his being induced to invest in Cameo by representations that conveyed that his investment was "secured" in that sense.

[207] The plaintiff was asked a series of questions about his understanding of the status of his investment. The effect of his answers to those questions was that he understood his investment to be "backed" by the assets of Cameo:[104]

> In your email you refer to, "I intend to have my investment secured and become a secured investor". Prior to sending this email did you understand your investment to have been backed by the asset – the assets of Cameo? --- I did.
>
> Rather than secured? --- [Indistinct] backed. I saw it that if need be the rent roll and the rest of it could be sold off to recover the money.
>
> To recover what money? --- The money I'd paid in.
>
> …
>
> Do you understand there to be any difference between the concept of asset backing in the sense that we just discussed it and security over assets? --- Security would be like an insurance over it.
>
> And did you understand that you had that at the time of sending this email? --- What date's this in …
>
> November of 2009? --- I recall talking to my accountant, and he said by rights, I should have shares in the business. They should have put shares in the business for me, and he said it doesn't have to be $500,000 worth of shares, long as I had shares in it to show I was part of it. So from that, yeah, there was something missing in what – what was actually going on. I was actually in the trust.
>
> …
>
> Was it your understanding at the time of this email that your investment was backed by the assets of Cameo? --- Yes I did.
>
> But you had to take a step further to secure that backing? --- Yeah, well, that's what that was about.
>
> I see. And what was? --- I wanted them to give me some sort of security on it.

---

104 Transcript 1-80.

[208] Mr Stowe knew nothing about a loan from Balmanno to Cameo. It was the liquidator of Cameo who told him about the loan. The defendant/Cameo had stopped conversing with the plaintiff on 2 July 2010.[105]

Liquidators appointed 3 February 2012

[209] The report of the liquidator of Polox was tendered.[106]

[210] The liquidator, Michael Griffin, was appointed on 3 February 2012. His role was to secure and realise the assets of the company. Polox had ceased trading before his appointment. The director (the defendant) advised Mr Griffin that the reason for the insolvency of the company was adverse legal action.

[211] The report as to the affairs of the company stated that the company had creditors in the order of $172,703. Mr Griffin also received a claim from the plaintiff, as an unsecured creditor, for $300,000.

[212] The report stated that Polox sold its business to Balmanno Pty Ltd for $382,989. Balmanno had previously lent Polox $293,887 in December 2010 and took a fixed and floating charge over the assets of the company as security for the loan. A year later, Balmanno issued Polox with a default notice and demanded repayment of the debt which then totalled $382,989 (including interest).

[213] Balmanno provided the liquidator with documents which substantiated the loan. Balmanno advised the liquidator that the only asset purchased was a rent roll which was substantially overvalued.

[214] The liquidator's report attached Polox's financial statements as at June 2009.

[215] It also showed the "Proofs of Debt" received which included approximately $172,000 owed to the ATO; $300,000 owed to the plaintiff and approximately $11,000 owed to McDonald and Balanda Associates.

The plaintiff's misleading conduct cases based on the Offer Document - discussion

[216] In his written submissions, the plaintiff's counsel stated that the plaintiff's complaints about the Offer Document (and the statements made in it) "revolve[d] around the Ownership and Security Representations and the Return and Profitability Representations".[107]

The Ownership and Security Representations

[217] The relevant pleadings are outlined above at paragraphs [33] to [37]. As noted, the plaintiff asserted in his reply that the defendant's contentions as to the way in which the statements in the Offer Document were to be understood were "not open or reasonable".

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105 Transcript 1 – 75, 6-28.
106 Exhibit 54.

107 Written submissions [9].

[218] Thus, on the pleadings, the plaintiff's case was that the Ownership and Security Representations conveyed that, upon his investment, he would acquire ownership in the assets of the trust and that his investment would be secured against the assets of the trust in such a way as to give him some priority over unsecured creditors of the trust. His counsel's written submissions, which were prepared before the plaintiff gave evidence, reflected that position:[108]

> (whether by way of security interest, direct ownership or otherwise) the investment was made safe and secure because there was a group of underlying saleable assets …
>
> There was no security given to the plaintiff … Viewed as representations as to the structure of the investment opportunity, the Ownership and Security Representations were false and misleading because the security and ownership referred to simply did not exist.
>
> Neither was the existence of assets such as the rent roll a matter which made the investment more safe or secure. The plaintiff had no right to access to require sale of any of the trust assets and, in any event, the defendant's conduct immediately after the plaintiff invested demonstrated that she had always intended to seek bank finance secured against all of the Cameo assets.
>
> **The overall impression from an objective reading of the Ownership and Security Representations was that the investment was made safe by the presence of the business assets and, further, that the investor would have direct ownership and a security interest over those assets.** This was untrue and misleading and is the type of inducement to which the consumer protection purpose of the statutory provisions are directed. (my emphasis)

[219] In his oral submissions, the plaintiff's counsel submitted that I ought to consider the objective meaning of the Ownership and Security Representations in the Offer Documents through a "consumer protection lens".[109] He submitted that the word "secured" in the context in which it was used conveyed two meanings. The first was that an investment in Cameo would be secured in a "legal sense" by way of a charge over the assets of Cameo. The second was a "more general and colloquial meaning" that an investor would have "some sort of direct ownership or security that would make the investment safe, that it would be backed by an asset … [i]n a sense that if things go bad then there is an asset to be sold to at least reduce the loss".[110]

[220] I referred counsel to the plaintiff's pleaded case. The plaintiff's counsel submitted that because the pleading (and in particular the defence) created an issue about the meaning conveyed by the word "secured" he was not confined to his pleaded case. In other words, he submitted that he was able to make an argument that the misrepresentation was to the effect that the investment would be "backed" by an asset.

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108 Written submissions [12] – [15].
109 Transcript 1 – 85, 16.
110 Transcript 1 – 85, 15 – 25.

[221] The following exchange is relevant:[111]

> MR SHAW: … He has read and placed emphasis on those parts of the document that are before your Honour now. He hasn't said, "I read that, and I thought I'd have [a] charge over a rent roll". That's unsurprising. He's not a lawyer. He's not an accountant. So I can't tell your Honour that he relied upon the statements to say that he would have a direct security interest in the rent roll and other assets.
>
> HER HONOUR: Although, isn't that what you've pleaded?
>
> MR SHAW: That is the pleaded – and if I could go back to the pleading to see the precise definitions. Yes, so there's two elements to the definition, one being provide 50 per cent ownership of the trust and other assets.
>
> HER HONOUR: Yes.
>
> MR SHAW: That's taken word for word, effectively, and be secured against the assets of the CPS unit trust. Now, what's pleaded in response is, aside from I think there's a general denial that that meaning can arise, but what was intended to be meant by those words was, well, "secured" didn't mean secured in the legal sense, it meant that there's an asset [distinct] so in my submission, I'm not confined to the security carrying a legal meaning only, because what is in issue on the pleadings is, well, did it carry the meaning of being secured against the assets of the CPS unit trust. Well, it must have that meaning because that's what's written on the document, but does that mean a strict legal security in the term of a direct collateral interest, or does it mean something in a more colloquial sense, being that there was – and I'll actually use the words of the defence to be more precise …
>
> MR SHAW: Paragraph 24 addresses that, and in paragraph (b)(ii), it is pleaded what I would refer to as the more colloquial asset backing type representation.
>
> HER HONOUR: Which is what you client ---
>
> MR SHAW: Which is what his evidence was more directed towards.
>
> HER HONOUR: --- understood it to be, yes.
>
> MR SHAW: Yes.
>
> HER HONOUR: Now, whether that matters or not is another thing.
>
> MR SHAW: Yes. Yes. It's a different – I still need to establish that that's misleading, but I don't think in the circumstances where it's been pleaded against me that that meaning arises from the statement, that it falls outside the matters in issue on the pleading.

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111 Transcript 1 – 85, 31 – Transcript 1 – 86, 31.

[222] Those submissions fail to take into account the plaintiff's pleaded reply[112] which made it plain that his case alleged a representation that his investment would be secured by collateral.

[223] On a later date, seeking further submissions,[113] I asked the plaintiff's counsel about the effect of the plaintiff's pleaded reply upon the case he was able to assert in the defendant's absence. He said, in effect, that the meaning conveyed by the representation was a matter for me – it did not matter how it was pleaded – and that it was significant that the plaintiff was attempting to adopt the defendant's pleaded case in the recasting of his own. He suggested that there was no injustice to the defendant caused by his attempt to recast his case in terms of a representation to the effect that the plaintiff's investment was "backed" rather than secured.

[224] I consider the plaintiff bound by his pleaded case. As was explained in *Banque Commerciale*, in the defendant's absence, the plaintiff's case was made easier by the absence of cross-examination and contrary testimony, but the plaintiff was still required to make good his case against her as defined in the pleadings. The defendant's non-attendance did not permit the plaintiff a "free rein" to raise issues of which the absent defendant had no notice or to obtain relief not founded on the pleadings.[114]

[225] The plaintiff cannot succeed on his pleaded case in this regard. He knew that his investment was not secured in the sense that the assets of the trust were offered as collateral for it. His e-mail to the defendant of 9 November 2009,[115] in which he stated his intention to *then* have his investment secured, reflected, unambiguously, his understanding that he was not a secured investor in Cameo nor was he an owner of the assets of the Unit Trust.

[226] Also, the plaintiff did not allege that he did not understand the documents he signed to give effect to, or reflect, his dealings with the defendant and Cameo. It may be inferred therefore that he understood – on the strength of the Unit Trust Deed and the Unit Owners Agreement – that he and the defendant were unit holders in the CPS Unit Trust, the trustee of which was Polox or Cameo Property Services Pty Ltd, and the entity which would "acquire" a property management business (or rent roll). He understood that, in pursuance of clause 9 of the Unit Owners Agreement, he could, on three months written notice, cause the business and the assets of the trust to be sold – implicitly acknowledging that he had no direct ownership of the assets.

[227] If I am wrong and the plaintiff was entitled to base his case on the strength of a representation that the rent roll was available as "back up" – notwithstanding his pleaded case – I am not persuaded that the representation conveyed that the assets were available as "back up" without qualification, nor am I persuaded by the plaintiff's evidence that, even as so understood, it induced him to invest.

[228] The Offer Document which contained the Ownership and Security Representations also contained a warning (which the plaintiff read) that the investment was subject to risks, including possible delays in repayment and the loss of income and principal invested.

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112 Transcript 1 – 99, 33 – 1 – 101, 45.

113 24 October 2018.

114 The plaintiff's counsel did not refer me to any authority to support his contention that he was permitted to recast his case as he proposed; nor was I able to find any.

115 Exhibit 13.

Thus, even if the statements about ownership and security in the Offer Document conveyed that the investment was "backed" by a saleable asset, in my view that representation had to be understood in this way: your investment is backed by saleable assets – but you must also understand that it is subject to other risks and you might lose it.[116]

[229] If I am wrong, and the representation ought to be considered without reference to the investment warning, then the question arises as to what "backed by" means to an unsecured investor or lender.

[230] Without more to the representation, such as an assurance that the assets of the business would not be used as security for another investment or loan, or otherwise guaranteeing the plaintiff some priority were the assets of the business to be sold to repay investors and lenders, it is difficult to understand how "backing" rendered the plaintiff's investment (or loan) "safe".

[231] In any event, I am not persuaded that the plaintiff was induced by the representation.

[232] His spontaneous evidence about the "main things" which motivated him to invest in Cameo did not include a reference to his investment being secured or "backed up" in any sense. He said that Cameo "filled some of the shortfalls of the rent rolls [he'd] gone through as … an owner and renter". He said he thought the investment in Cameo was "safe" because it was "a cashflow business".

[233] He said he did not really consider what he would do if the investment "went bad" (at the time he was reading the Offer Document). He said that he did not really consider that too much because the rent rolls were already established and up and running.[117]

[234] I note that even on the best projections, it would have taken several years before the rent rolls would be worth enough to cover the plaintiff's investment and loan. And it is plain from the plaintiff's e-mail dated 9 November 2009 that he knew he did not have "first port of call" on any funds which might be raised upon the sale of Cameo's assets.

The Return and Profitability Representations

[235] In oral submissions, counsel for the plaintiff said he would not be "pressing the case" on the Return and Profitability Representations. The plaintiff's evidence was to the effect that he used his own "figures" to predict the return on his investment. That is, he placed no reliance upon the Return and Profitability Representations. As counsel acknowledged, the plaintiff's evidence was "quite the opposite" of what was required to allow him to press that case.[118]

The plaintiff's misleading conduct cases based the Offer Document - conclusions

[236] The plaintiff relied only upon the Ownership and Security Representations. He was bound by his case as pleaded. On the evidence, the plaintiff did not understand his

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116 See *Tomasetti v Brailey* [2011] NSWSC 1446 at [412].

117 I assume by that answer the plaintiff meant that Cameo was intending to purchase "up and running" rent rolls – not that Cameo owned rent rolls of that kind when he invested (which was not the case). He added that the rent roll was a saleable item that could be sold "if things got into trouble".

118 Transcript 1 – 83, 13 – 33.

investment to be secured against the assets of the trust in the sense that those assets provided collateral for it; nor did he understand his investment to provide him with ownership (in whole or part) of the assets of the trust. The plaintiff did not therefore establish the fundamental factual propositions upon which his misconduct cases based on the Ownership and Security Representations were pleaded.[119]

[237] If I am wrong, and the plaintiff is not bound by his case as pleaded, I am not persuaded that the representation conveyed the alternative meaning suggested – that the investment was "backed" by the assets of the business – and nothing more. In the context of the Offer Document, which included the investment warning, I find that it conveyed that his investment was backed by the assets of the business (whatever that meant) but was subject to risks and might be lost.

[238] Even if it is not correct to consider the construction of the representation in the context of the investment warning, I am not persuaded that the plaintiff was misled by such a representation because he understood that he did not have "first port of call" on Cameo's assets.

The Short Term Loan Representations - discussion

[239] The plaintiff asserted in his amended statement of claim that there were two Short Term Loan Representations – the first was that the funding provided by the plaintiff would be replaced by bank finance when it became available; the second was that the property management business of the trust was generating and would continue to generate, sufficient income to service the interest payments of the Short Term Loan.

[240] The alleged misrepresentations were said to have been made orally by the defendant in conversations with the plaintiff. Relevantly, in *Watson v Foxman* (1995) 49 NSWLR 315 at 318 – 318, McLelland CJ in Eq said about the proof of spoken words:

> Where, in civil proceedings, a party alleges that the conduct of another was misleading or deceptive, or likely to mislead or deceive (which I will compendiously describe as "misleading") within the meaning of s 52 of the Trade Practices Act 1974 … it is ordinarily necessary for that party to prove to the reasonable satisfaction of the court: (1) what the alleged conduct was; (2) circumstances which rendered the conduct misleading. Where the conduct is the speaking of words in the course of a conversation, it is necessary that the words spoken be proved with a degree of precision sufficient to enable the court to be reasonably satisfied that they were in fact misleading in the proved circumstances. In many cases (but not all) the question whether spoken words were misleading may depend upon what, if examined at the time, may have been seen to be relevantly subtle nuances flowing from the use of one word, phrase or grammatical construction rather than another, or the presence of absence of some qualifying word or

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[119] In oral submissions the plaintiff's counsel acknowledged the shortcomings of the plaintiff's case based on the Ownership and Security Representations. He said, referring to the case based on the Short Term Loan Representations, that it was "made out much closer to the pleaded case", meaning, in context, much closer to the pleaded case than the case based on the Ownership and Security Representations: T 1 – 92 ll 29 – 30.

> phrase or condition. Furthermore, human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience.
>
> Each element of the cause of action must be proved to the reasonable satisfaction of the court, which means that the court "must feel an actual persuasion of its occurrence or existence". Such satisfaction is "not … attained or established independently of the nature and consequence of the fact or facts to be proved" including the "seriousness of the allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding": *Helton v Allen* (1940) 63 CLR 691 at 712.
>
> Considerations of the above kind can pose serious difficulties of proof for a party relying upon spoken words as the foundation of a cause of action based on s 52 of the *Trade Practices Act* … in the absence of some reliable contemporaneous record or other satisfactory corroboration.

[241] The plaintiff's counsel properly acknowledged that the plaintiff did not give evidence of the Short Term Loan Representations but nevertheless invited me to conclude that the defendant had made them inferentially. He said:[120]

> Neither of those were made out on the precise terms in the evidence … Mr Stowe's evidence in respect of the short-term nature and replacement wasn't that he was directly told that the CBA would replace the funding, but he was directly told that it would be short term …
>
> … So while there's no evidence that Ms Johnson said to him, "CBA will replace this after the six month due diligence period is finished", Mr Stowe has taken that meaning in some sense from what she has said and that is CBA are going to fund this purchase. There's a six month due diligence period. I need your funding to settle this purchase" … That's my paraphrasing.
>
> ... But that's the meaning that should be drawn from the first of the representations. Now it is reasonable for Mr Stowe to rely on that and say "well, the money will come in to pay out my loan at some stage". So while it wasn't expressed that CBA will pay out the money, she didn't say, "I'll make sure that happens", he can draw that from what she was saying. In reality there was no binding obligation on CBA to pay that money, else it would have, and I have tendered the CBA loan offer … it speaks for itself.

[242] I will consider the representations alleged separately.

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120 Transcript 1 – 92 – 1 – 94.

The alleged representation that the loan would be replaced by bank funding

[243] The plaintiff's evidence about the Short Term Loan Representations included evidence that, after the bank's due diligence, he "expected" the defendant to "get another loan, and I would get his one – my money back".[121] However, he did not give evidence of any representation made by the defendant that caused him to have that expectation. Indeed, when asked whether the defendant told him that he would get him money back in that way he said "Not outright, no".

[244] Also, nothing in the documents tendered by the plaintiff assisted him in proof of the representation.

[245] To the extent that the plaintiff testified that the defendant told him about a contract for the acquisition of rent rolls which was due to settle, and the CBA requiring time for its "due diligence", two of the documents were relevant, namely –

- the "Contract Business Sale"[122] between Cameo and X-far for the sale of its rent roll to Cameo; and

- the Letter of Offer from the CBA to "the Director" of Cameo,[123] which approved "facilities totalling $321,500" subject to conditions which included an independent valuation of the rent rolls to be purchased with the funding.

[246] The contract was dated 14 July 2008 and had a settlement date of 1 September 2008. Other evidence suggested that the settlement took place and that Cameo purchased the rent rolls. I have assumed that the CBA's due diligence involved valuing the rent rolls, but there was nothing in the evidence about the time it might take for that valuation.

[247] The content of the "loan" agreement between the plaintiff and the defendant, dated 1 September 2008 is outlined above.[124] Its clauses about the term of the loan (clause 3) and what was to happen at the end of that term (clause 5), considered in the context of the agreement as a whole, are inconsistent with any expectation on the plaintiff's part that the principal would be repaid out of loan funds provided by the CBA or any other lender. Clauses 6, 7 and 8 of the agreement anticipate the possibility of a conversion to ordinary units at the end of the loan term, or at the least, an election to do so. If the plaintiff had the expectation he claimed to have then it is difficult to understand why he signed an agreement in these terms.

[248] Nothing in the tendered e-mail communication between the plaintiff and the defendant confirmed the plaintiff's stated expectation about the repayment of principal. In his e-mail to the defendant dated 9 November 2009,[125] the plaintiff stated "I now fully understand why no one could be attracted to 'take over' the $300K loan". That statement does not imply an expectation, on the plaintiff's part, that the loan would be repaid by CBA (or other) loan funds.

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121 Transcript 1 – 60, 14 – 15.
122 Exhibit 64.
123 Exhibit 65.
124 Exhibit 36.
125 Exhibit 13.

The alleged representation that the trust was generating, and would continue to generate, sufficient income to service the interest payments of the Short Term Loan

[249] The plaintiff's counsel suggested that the plaintiff's case based on this alleged representation was stronger than his case based upon the alleged representations about the repayment of the principal.[126] But again, the plaintiff did not give evidence of this representation.

[250] Counsel acknowledged as much but submitted, in effect, that the plaintiff's evidence that he had discussed the payment of interest at a certain percentage with the defendant was evidence of the defendant "representing that he will be paid that sum".

[251] The highest the plaintiff's evidence went on this point was that the plaintiff would not have made the loan were he not to be paid interest – but his evidence did not prove that the defendant made a representation about the income generating potential of the property management business of the CPS Unit Trust:[127]

> … did you talk about whether you would be paid interest? ---- Yes.
>
> And what were those discussions? ---- The – it would be paid in arrears at 18 per cent interest. That was before the GFC.
>
> And just to be clear, when was that discussion about – both about the interest and the discussion about the short-term two-year term that you just gave evidence of? ---- That's shown in the agreement, but it was mainly by phone call.
>
> …
>
> … Did [the defendant] tell you that you would be paid interest? ---- Yes.
>
> Would you have given the loan if you weren't going to be paid interest? ---- No.

[252] In my view, and bearing in mind the statements in *Watson v Foxman*, the plaintiff's evidence falls very short of that which is required to enable me to conclude, on the balance of probabilities, that a representation was made to the plaintiff by the defendant about Cameo's capacity to pay the interest charges on the loan when they fell due.

Short Term Loan Representations - conclusion

[253] The evidence tendered in the plaintiff's case does not satisfy me that the defendant made a representation to the plaintiff that his $300,000 loan would be repaid by CBA (or other) loan funds as soon as they were available.

[254] The plaintiff's evidence about interest repayments fell well short of satisfying me that the defendant made representations to him about Cameo's business income being sufficient to meet its interest obligations under the loan.

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126 Transcript 1 – 94, 7 – 9.

127 Transcript 1 – 58, 37 – 45 – 1 – 60, 25.

Negligence misstatement

[255] Because of the conclusions I have reached about the plaintiff's case on the alleged misrepresentations, I do not need to consider the case based on negligent misstatement.

Unconscionable conduct

[256] The conduct said to be unconscionable occurred between 8 January 2009 and December 2010.

[257] The plaintiff originally brought his unconscionable conduct case under sections 12CB and 12CC of the *ASIC Act*, before its amendments in 2011. In later oral submissions, the plaintiff confined his case to section 12CB on the basis that an investment for the purposes of the plaintiff's superannuation fulfilled the requirements of section 12CB(5) as at the relevant time:

> **12CB Unconscionable conduct**
>
> (1) A person must not, in trade or commerce, in connection with the supply or possible supply of financial services to a person, engage in conduct that is, in all the circumstances, unconscionable.
>
> (2) Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the ***supplier***) has contravened subsection (1) in connection with the supply or possible supply of services to a person (the ***consumer***), the court may have regard to:
>
> (a) the relative strengths of the bargaining positions of the supplier and the consumer; and
>
> (b) whether, as a result of conduct engaged in by the supplier, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and
>
> (c) whether the consumer was able to understand any documents relating to the supply or possible supply of the services; and
>
> (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the services; and
>
> (e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent services from a person other than the supplier.
>
> (3) A person is not taken for the purposes of this section to engage in unconscionable conduct in connection with the supply or possible

supply of financial services to another person merely because the person:

(a) institutes legal proceedings in relation to that supply or possible supply; or

(b) refers a dispute or claim in relation to that supply or possible supply to arbitration.

(4) For the purpose of determining whether a person has contravened subsection (1) in connection with the supply or possible supply of financial services to another person:

(a) the court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and

(b) the court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.

(5) A reference in this section to financial services is a reference to financial services of a kind ordinarily acquired for personal, domestic or household use.

[258] In his written submissions, the plaintiff's counsel explained that the unconscionable conduct claim was pressed only if the plaintiff failed in his misleading conduct claims. It was limited to the payment of $300,000.

[259] He relied upon the alleged Ownership and Security Representations and the Short Term Loan Representations (which as I have noted, were not made out) and went further, including the –

27. … unconscionability of the defendant's dealings with the funding of the Cameo business [namely] –

(a) The defendant caused the plaintiff to lend $300,000 to Polox in September 2008 on the promise of interest payments and replacement funding;

(b) Polox immediately defaulted on the interest payments;

(c) Without telling the plaintiff and at a time when Polox was not servicing the interest payments to the plaintiff or providing any return on his initial investment, the defendant took out at least the following loans, secured against the assets of the CPS Unit Trust:

i. On 8 January 2009, a loan from BankWest with a maximum liability of $1,000,000;

ii. On 15 June 2010, a factoring agreement with Real Factor Pty Ltd;

iii. On 1 September 2010, a factoring agreement with Commfact Pty Ltd;

iv. In December 2010, a loan agreement with Balmanno Pty Ltd;

(d) Shortly before the company was wound up in insolvency, the defendant (without telling the plaintiff), sold the business from the unit trust to Balmanno in satisfaction of its loan.

28. Considering what was known about the financial position of the unit trust (i.e. that it was running a heavy trading loss from the 2009 financial year), it was unconscionable for the defendant to firstly (sic) induce the plaintiff to loan $300,000 and then, behind his back, take out secured funding that eventually crippled the business. The plaintiff suffered a direct loss of $300,000 as a result of that conduct alone.

[260] In oral submissions, the plaintiff's counsel explained that he had pleaded his unconscionable conduct case "broadly". He continued –

> … Ms Johnson has taken the $500,000 investment into Cameo. A couple of days later by the looks of the date on the documents, asks for another 300,000. Her conduct immediately following that is to put that agreement immediately into default before the end of the calendar year.
>
> …
>
> Then at the start of the next calendar year, take out a secured facility with Bankwest. Now, not only is that unconscionable in light of what has been said to Mr Stowe about the asset backing of his $500,000 … it is utterly unconscionable for her to not even have told him that she's going to get secured funding from a bank that would have priority over his $300,000 …

[261] The elements of an allegation of unconscionable conduct under the *ASIC Act* are these:

- a person must not;
- in trade or commerce;
- in connection with the supply of financial services to a person;
- engage in conduct;
- that is, in all the circumstances, unconscionable.

[262] "In trade or commerce" means conduct "which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character": *Concrete Constructions (NSW) Pty Ltd v Nelson*.[128]

[263] The expression "in connection with" was considered by Lindgren J in *Monroe Topple*[129]. His Honour said (at [252] – [260]), in a decision which was affirmed by the Full Federal Court:

> Such expressions "in connection with", "in relation to", "relating to" and "in respect of", while potentially broad, bear a meaning dictated by legislative context, purpose or objects …
>
> Both the context internal to s 51AC and the legislative history to which I have referred, teach that the expression "in connection with" in s 51AC requires that the conduct impugned "accompany", "go with", or "be involved in" the supply of goods or services, and that it is not sufficient that, as alleged in the present case, such a supply be the occasion of unconscionable conduct of the supplier directed to an unrelated third party with which the supplier has no dealings at all …

[264] Section 12BA of the *ASIC Act* provides that "financial service" has the meaning given to it by section 12BAB of the Act, which includes a financial product.

[265] A "financial product" is a facility through which, or through the acquisition of which, a person makes a "financial investment". A "financial investment" is made if a person gives money to another person and that person intends to use the contribution to generate a financial return for the investor, and the investor has no day-to-day control over the use of the contribution to generate the return or benefit: section 12BAA of the *ASIC Act*.

[266] While the plaintiff's purchase of units in the unit trust is likely to be a financial product, his loan to Cameo of $300,000 is not.

[267] I acknowledge that the agreement governing the loan dated 1 September 2008 referred to it as an investment. However, by its terms, the funds lent were not used to generate for the plaintiff a financial return in the sense in which that expression is used in the definition. In reaching that conclusion, I have taken into account the language of the section as well as the examples contained within it.

[268] I acknowledge that the hope or intention was that the funds lent would be used by Cameo to purchase a rent roll, which would generate income for the trust, with the profits ultimately flowing through for the benefit of the unit holders. But the return (or potential return) to be generated by the loan was the interest to be earnt on it. That return was not generated by the use of the loan funds. The plaintiff was entitled to that return regardless of the use to which the $300,000 was put.

[269] By the terms of the agreement, the plaintiff acquired "convertible notes" which, at the end of the two years/24 months, he was able to –

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128 (1990) 169 CLR 594.
129 [2001] FCA 1056.

- convert to "ordinary units" at the agreed value of one share per dollar invested;
- convert all or part of the amount invested to ordinary units; or
- redeem the full amount invested.

[270] Under the agreement, there was no supply of a financial product until the notes were converted to units.

[271] The matter is complicated by the treatment of this "loan" of $300,000 in Polox's books as the plaintiff's equity in the business. However it is plain from the way in which the plaintiff's case was presented, and his own claim for recovery of his debt from the liquidator, that he considered the $300,000 to be a loan to Cameo and not the means by which he was to (immediately) acquire a financial product.

[272] Even if I am wrong, I do not consider that the alleged unconscionable conduct was in connection with the *supply* of a financial service.

[273] The plaintiff relied upon the broadness of the expression 'in connection with' arguing that the defendant's conduct as outlined above at [259] was "in relation to a financial service because all of it relates to a financial product". He argued that the "supply" of the financial service was the management of the product which had been offered.[130]

[274] As I have already noted, no product was offered, or immediately offered, to the plaintiff in exchange for his loan, but for the purposes of argument, I will assume that the convertible notes issued were a financial product.

[275] The legislation prohibits unconscionable conduct – not unconscionable contracts. More precisely, it prohibits a person from "engaging in conduct" that is unconscionable. That expression is defined in section 12BA(2) as follows:

> (2) In this Division:
>
> (a) a reference to engaging in conduct is a reference to doing or refusing to do any act, including:
>
> (i) making, or giving effect to a provision of, a contract or arrangement; or
>
> (ii) arriving at, or giving effect to a provision of, an understanding; or
>
> (iii) requiring the giving of, or giving, a covenant; and
>
> (b) a reference to conduct, when that expression is used as a noun otherwise than as mentioned in paragraph (a), is a reference to doing or refusing to do any act, including:
>
> (i) making, or giving effect to a provision of, a contract or arrangement; or

130 Transcript, 24 October 2018, 1 – 16.

(ii) arriving at, or giving effect to a provision of, an understanding; or

(iii) requiring the giving of, or giving, a covenant; and

(c) a reference to refusing to do an act includes a reference to:

(i) refraining (otherwise than inadvertently) from doing that act; or

(ii) making it known that that act will not be done; and

(d) a reference to a person offering to do an act, or to do an act on a particular condition, includes a reference to the person making it known that the person will accept applications, offers or proposals for the person to do that act or to do that act on that condition, as the case may be.

[276] Section 12CB encompasses not only the act of making a contract, but also pre-contractual conduct such as advertising, and post-contractual conduct such as the exercise of contractual rights. Section 12CB is not confined to procedural unconscionability – that is, unfairness in the bargaining process. It also permits the court to have reference to the terms of the contract, in addition to the bargaining process.[131]

[277] Putting to one side misrepresentations, a defendant's conduct of a business, once a financial product has been supplied, does not seem to me to be within the scope of section 12CB having regard to the provisions of that section and of section 12BA(2), which focus on compliance with the terms of a contract, arrangement or understanding, or covenants.

[278] Even if I am wrong about that, I do not find that the defendant has engaged in unconscionable conduct.

[279] The authors of *Securities and Financial Services Law*[132] provide the following elaboration upon the meaning of 'unconscionable' for the purposes of section 12CB and 12CC (as at 2017) –

> In *Tonto Home Loans Australia Pty Ltd v Tavares* (2011) 15 BPR 29, 699 at [291], cited with approval by Gordon J in *Paciocco v Australia and New Zealand Banking Group Ltd* (2014) 309 ALR 249; [2014] FCA 35 at [283], Allsop P said that:
>
> > Aspects of the content of the word 'unconscionable' include the following: the conduct must demonstrate a high level of moral obloquy on the part of the person said to have acted unconscionably: *Attorney General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557 at 583; the conduct must be irreconcilable with what is right or reasonable: *Australian Securities and Investment Commission v National Exchange Pty Ltd* [2005] FCAFC 226; 148 FCR 132 at 140; *Australian*

131 See the discussion in Vout, P, *Unconscionable Conduct*, Thomson Reuters, Sydney, 2017.

132 Baxt, R; Black, A; and Hanrahan, P, Lexis Nexis, Australia, 2017, at pp 657 – 658.

> *Competition and Consumer Commission v Samton Holdings Pty Ltd* [2002] FCA 62; 117 FCR 301 at 316 – 317; *Qantas Airways Ltd v Cameron* (1996) 66 FCR 246 at262; … the concept of unconscionable in this context is wider than the general law and the provisions are intended to build on and not be constrained by cases at general law and equity: *National Exchange* at 140; the statutory provisions focus on the conduct of a person said to have acted unconscionably: *National Exchange* at 143. It is neither possible nor desirable to provide a comprehensive definition. The range of conduct is wide and can include bullying and thuggish behaviour, undue pressure and unfair tactics, taking advantage of vulnerability or lack of understanding, trickery or misleading conduct. A finding requires examination of all the circumstances.

In *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90 at [23] the court said:

> "The task of the Court is the evaluation of the facts by reference to a normative standard of conscience. That normative standard is permeated with accepted and acceptable community values. In some contexts, such values are contestable. Here, however, they can be seen to be honesty and fairness in the dealing with consumers. The content of those values is not solely governed by the legislature, but the legislature may illuminate, elaborate and develop those norms and values by the act of legislating, and thus standard setting. The existence of State legislation directed to elements of fairness is a fact to be taken into account. It assists the Court in appreciating some aspects of the publicly recognised content of fairness, without in any way constricting it … These laws …reinforce the recognised societal values and expectations that consumers will be dealt with honestly, fairly and without deception or unfair pressure. These considerations are central to the evaluation of the facts by reference to the operative norm of required conscionable conduct."

[280] In *Director of Consumer Affairs Victoria v Scully and Gilfillan,*[133] the Victorian Court of Appeal also considered whether statutory unconscionability required "moral obloquy". The Court was concerned with section 8 of the *Fair Trading Act* (1999) (Vic), which was in terms very similar to section 12CB above. At first instance, the trial judge concluded that the relevant conduct had to be more than negligent and involve some deliberate wrongdoing. In applying that test, the primary judge dismissed claims by the appellant that certain of the defendants' conduct was unconscionable.

[281] The appellant appealed against the dismissal, arguing that conduct may be found to be unconscionable if it were found to be irreconcilable with that which was right and reasonable. The argument did not succeed.

[282] In the course of its reasons, concluding that moral obloquy was required, the Court (Santamaria JA, with whom Neave and Osborn JJA agreed) made the following observations and statements which are relevant to the present matter (citations omitted, my emphasis):

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133 [2013] VSCA 292.

[39] [t]he word "unconscionable" is an epithet, and, in the provision, it is predicated of "conduct". Care has to be taken when one's attention is drawn to the circumstances that afflict some people. For example, it may said that a party gained 'an unfair or unconscientious advantage', or that a mortgage was 'unfair, unjust or unreasonable'. Obviously enough, **a person's conduct is to be distinguished from the consequences that that conduct may have on the lives of other people**. As the High Court recently said … 'the principle which the appellant invokes is not engaged by the circumstance that a plaintiff's transaction with a defendant has resulted in a loss to the plaintiff, even loss amounting to hardship'. **Well intentioned conduct may have dire consequences for other people; malign conduct may be without consequence; adventitiously, it may have benign consequences. Generally speaking, it will be the consequences of one person's conduct upon others that attracts the attention of the law … However, those consequences having, as it were, attracted the attention of the law, attention then properly shifts back to the nature of the conduct of the putative defendant. The fact that the circumstances of a person or a group or persons, or the circumstances of some transaction they entered into, may reasonably be described as 'unfair' is the commencement of the enquiry, not its terminus**.

…

[46] … [Section] 8 of the Act applies to conduct "in trade or commerce, in connection with the supply or possible supply of goods or services". That context is itself largely governed by existing principle. One is mindful of what Spigelman CJ said in the extract from *Attorney-General (NSW) v World Best Holdings Ltd:* 'If it (the concept of unconscionability) were to be applied as if it were equivalent to what was "fair" or "just", it could transform commercial relationships … The principle of "unconscionability" would not be a doctrine of occasional application, when the circumstances are highly unethical, it would be transformed into the first and easiest port of call when any dispute about a retail lease arises'. The law of contract and that of property, and the principles that constitute them, are the very things which make trade and commerce possible. Without these legal principles, and the existence of institutions such as the courts that are constrained to apply them, the strong would prevail and the weak would go to the wall. **It cannot have been the legislature's intention to interfere with arm's length commercial transactions by reference to loose notions of unreasonableness and unfairness**. The contention favoured by the appellant that conduct may be found to be unconscionable within s 8(1) of the Act if it can be found to be irreconcilable with what was right and reasonable overlooks the force of the observation of Deane J in *Muschinski v Dodds* that judges in equity, whose jurisdiction was discretionary, had long since abandoned recourse to undefined notions of justice and what was fair. The legislature is presumed not to alter basic common law doctrines and not to interfere with proprietary rights.

[47] … [Section] 8(1) uses the phrase 'in all the circumstances'. The characterisation demanded by the provision is one that is to be made 'in all

> the circumstances'. **Consideration of 'all the circumstances' can cast a different complexion on things. A failure to fulfil a contractual promise may visit unwanted consequences on the innocent party. But, under s 8(1), it is the conduct of the contract breaker that must be shown to be unconscionable. That party may have had sound reasons for breaking the contract, reasons that involve no wish to exploit any vulnerability in the innocent party**. While these sound reasons will be of no significance in defence of a claim for breach of contract, they may be highly relevant in a defence to a claim that conduct has been unconscionable.
>
> [48] … **[A] distinctive quality of unconscionable conduct as against unreasonable or unfair conduct is that it is unethical**. The characteristic of unreasonableness or unfairness may form the basis (or a significant part of the basis) of a conclusion that conduct is unconscionable. As Allsop P said, in *Tonto Homes Loans Australia Pty Ltd v Tavares*, it is necessary to show at least '**some degree of moral tainting** in the transaction of a kind that permits the opprobrium of unconscionability to characterise the conduct of the party'.
>
> [49] … [I]t is a noticeable feature of all the cases, thus far, in which conduct has been held to be 'unconscionable' that the conduct has been found to be **unethical** in some manner or other … [His Honour referred to cases in which the relevant conduct had been described as involving a 'deceptive ruse'; 'predatory'; and 'attended by moral fault and lack of moral responsibility'.]

[283] As the authorities explain, the focus is on the conduct of the defendant – not its consequences. To be unconscionable, that conduct must be unethical or morally tainted in some way. To characterise it as unreasonable or unfair is not, of itself, enough.

[284] I make the following observations about the provisions of section 12CB at the relevant time, and in particular, subsection (2):

- the bargaining position of the plaintiff and the defendant were at least equal: the defendant needed the plaintiff to provide funds to Cameo – by way of investment or loan – and in that sense he was in the stronger position.
- the plaintiff lent $300,000 to Cameo at an interest rate of 18%, which was significantly higher than the interest rate required by the CBA, although I acknowledge that the plaintiff was lending unsecured;
- there is nothing to suggest that the plaintiff did not understand any of the relevant documents which established his relationship with the defendant;
- there was no evidence of undue influence or pressure exerted upon the plaintiff by the defendant; and
- there was no evidence of unfair tactics by the defendant.

[285] The plaintiff was a reasonably experienced and apparently successful investor (in the context of financial services acquired for personal, domestic or household use). He was not swayed by the projections contained in the Offer Document. He relied on his own experience to, in effect, ignore the investment warnings it contained.

[286] The evidence about the circumstances in which the plaintiff decided to lend $300,000 to Cameo, within days of the payment of the second and last instalment of his $500,000 investment was limited. The plaintiff's evidence amounted to little more than his assertion that he had been asked to lend Cameo the money and he was prepared to do so in the short term. He led no evidence about the way in which the terms of the loan contract were determined. His evidence about expecting to be repaid once bank finance had been approved was unconvincing.

[287] The plaintiff did not nominate the normative standard by reference to which I was to consider the defendant's conduct. I have nevertheless considered notions of fair dealing – recognising though that conduct which is unreasonable or unfair cannot be the sole basis for a finding of unconscionability.[134]

[288] I have considered whether the defendant's borrowing as she did (from BankWest, via two factoring agreements and from Balmanno) and securing those borrowings against the assets of the trust, was against good conscience or unethical. The plaintiff complains that those arrangements were entered into "behind his back" and at a time when Cameo was unable to meet its interest obligations on his $300,000 loan. He argues, in effect, that it was unconscionable of the defendant to place Cameo in such a financial position as to mean that it would never be able to pay off its debt to the plaintiff.

[289] The evidence suggests that the rent roll purchased by Cameo was overvalued. Thus, the investment was imperilled from the start. Then the global financial crisis struck. It is reasonable to infer that the defendant borrowed additional money in a variety of forms in an attempt to keep the business going. She failed. However, applying the authoritative statements referred to above, I do not find in the defendant's conduct, as it has been revealed in the evidence of the plaintiff, the level of moral obloquy required to allow me to conclude that the defendant engaged in unconscionable conduct. The plaintiff has not established an entitlement to judgment on this basis.

Breach of contract

[290] The plaintiff claimed that the defendant breached the terms of the Unit Owners Agreement because she was not "just and faithful in her activities and her dealings" with him, relying on the conduct complained of in the unconscionable conduct case. He also complained that she had breached the term which required her to ensure that the trust would pay its debts and meet its obligations. With respect to the latter term, counsel for the plaintiff agreed that I ought to interpret it as requiring the defendant, in effect, to act diligently or reasonably in that regard.

[291] I considered the relevant terms to require, in essence, the defendant to act reasonably and in good faith.

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134 *Scully* at [48].

[292] As Allsop CJ observed in *Paciocco v Australian and New Zealand Banking Group*,[135] "good faith" is –

> … an obligation to act honestly and with fidelity to the bargain; an obligation not to act dishonestly and not to act to undermine the bargain entered or the substance of the contractual benefit bargained for; and an obligation to act reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained.

[293] The obligation is "rooted in honest and reasonable fair dealing".[136]

[294] Cameo failed. The evidence suggested that its only income generating asset was overvalued from the start. The defendant made several attempts – ultimately fruitless – to keep the business going. However, I do not find anything in her conduct as revealed in the evidence of the plaintiff to suggest a lack of honesty or fidelity on her part. The plaintiff has not established an entitlement to judgment on this basis.

Costs

[295] Written submissions as to costs may be sent to my Associate within seven days.

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135 [2015] FCFCA 50; (2015) 236 FCR 199 at 273 [288].

136 *Paciocco* at [292].