SUPREME COURT OF QUEENSLAND

CITATION:	*Suncorp-Metway Ltd ABN 66 010 831 722 v Nagatsuma & Anor* [2019] QSC 16
PARTIES:	**SUNCORP-METWAY LTD ABN 66 010 831 722** (applicant) **v** **RISA NAGATSUMA** (first respondent) and **WILLIAM JAMES ALEXANDER DAVIDSON** (second respondent)
FILE NO:	BS 1772 of 2018
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	7 February 2019
DELIVERED AT:	Brisbane
HEARING DATE:	28 September 2018
JUDGE:	Ryan J

ORDERS:

1. **Pursuant to section 78(2) of the *Land Title Act* 1994 (Qld), the applicant recover as against the first and second respondents, possession of the property described as Lot 194 on Crown Plan NR401, Title Reference 20647021 and known as 178 Heidke Road, Malanda in the State of Queensland (also known as 178 Heidke Road, North Johnstone in the State of Queensland) (the Heidke Road Property) within 14 days.**

2. **Upon the applicant by its counsel giving the usual undertaking as to damages, an injunction: that the first and second respondents, whether by themselves, their agents, employees or otherwise, be restrained until the sale of the Heidke Road Property by the applicant as mortgagee exercising power of sale under the mortgage bearing dealing number 715361425, without prior leave of the Court from:**

   (a) lodging or procuring the lodgement of any caveat on the title to the Heidke Road Property;

(b) creating or procuring the creation of any other encumbrance in connection with the Heidke Road Property;

(c) otherwise interfering with the applicant's sale of the Heidke Road Property.

CATCHWORDS: MORTGAGES – MORTGAGEES REMEDIES – POSSESSION – Section 78(2) *Land Title Act* 1994 (Qld) – whether respondents had real prospects of resisting claim for possession

EQUITY – GENERAL PRINCIPLES – UNDUE INFLUENCE AND DURESS – DURESS – ECONOMIC DURESS – Where second respondent alleged that bank's employee had dishonestly caused second respondent's company financial loss – where second respondent's company defaulted on loans made to it by the bank – where receivers appointed – where second respondent commenced legal proceedings to have receivers removed, relying on bank's employee's dishonesty – where proceeding settled – where deed of settlement required discontinuance of proceedings and included release of bank from further claims alleging employee's misconduct – where company defaulted again – where heads of agreement signed after Farm Debt Mediation – where heads of agreement released bank from further claims alleging employee's misconduct – whether releases voidable for economic duress

Australia & New Zealand Banking Corp v Karam (2005) 64 NSWLR 149
Berens v Bluescope Distributions Pty Ltd (2012) 39 VR 1
Coldham-Fussell v Commission of Taxation [2011] QCA 45
Crescendo Management v Westpac (1988) 19 NSWLR 40
Davidson & Anor v Suncorp Metway [2017] QCA 317
Electricity Generation Corp t/as Verve Energy v Woodside Electricity Energy Ltd [2013] WASCA 36
Hingst v Construction Engineering (Aust) Pty Ltd (No 3) [2018] VSC 136
McKay v National Australia Bank Ltd [1998] 4 VR 677
Mitchell v Pacific Dawn Pty Ltd [2011] QCA 98
Pao On v Lau Yiu Long [1980] AC 614
Thorne v Kennedy (2017) 350 ALR 1
Westpac Banking Corporation v Cockerill (1998) 152 ALR 267
Woodside Electricity Energy Ltd v Electricity Generation Corp t/as Verve Energy [2014] HCA 7

COUNSEL: D G Clothier QC, with D Ananian-Cooper for the Applicant
S B Whitten for the Respondents

SOLICITORS: Gadens for the Applicant
Celtic Legal for the Respondents

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Overview

[1] The bank, as mortgagee, applies for possession of the property, a mortgaged lot, which is presently in the respondents' possession.[1]

[2] The respondents do not suggest that there has been no default. They submit that they have a claim which, if successful, will establish that the mortgagee has no entitlement to possession of their property.

[3] More particularly, for the purposes of this application, the respondents submit that –

- their prospects of resisting an order for possession lie ultimately in a claim based on an allegation of fraud or misconduct by an employee of the bank;
- although the second respondent, on behalf of the borrower (his company) and as guarantor, has twice released the bank from that claim (in a Deed in 2014 and in Heads of Agreement in 2015) those releases are voidable because of economic duress – that is, illegitimate pressure applied by the bank upon Mr Davidson, compelling him to grant the releases;
- the economic duress claim has real prospects of success; and accordingly
- this application should refused.

[4] The applicant accepts that it may only succeed in this application if the court is satisfied that the respondents have no real prospects of success in their economic duress claim. Real prospects are prospects which are realistic, rather than fanciful.[2]

[5] The bank also applies for an order restraining the respondents from interfering with the sale of the property.

[6] Proof of economic duress requires proof of the application of illegitimate economic pressure upon a person in relation to a transaction or agreement which has caused, or contributed to, the person's entry into the transaction or agreement in circumstances where they had no other reasonable option available.

[7] In this case, I do not consider Mr Davidson's economic duress claim to have real prospects of success.

[8] My detailed reasons follow but by way of overview: the prospects of success of the economic duress claim lie in the evidence of Mr Davidson. While Mr Davidson may well have been feeling overwhelming pressure at relevant times, his evidence was not that he gave the releases as a consequence of pressure applied by the bank.

[9] The releases were contained in documents which, among other things, gave Mr Davidson's company more time to meet its financial commitments to the bank. Mr Davidson said that he did not know, before he signed the documents, that they

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[1] Section 78(2)(c) Land Title Act 1994.
[2] Coldham-Fussell v Commission of Taxation [2011] QCA 45 [98].

contained the releases. He said he did not read them nor did he receive legal advice about them. He misunderstood their effect. He would not have signed them if he had known they contained releases. He said that was something he did not know until November 2017.

[10] His evidence will not support a claim of economic duress by the bank. He cannot have been compelled by illegitimate pressure to, in effect, give in to the bank's demand or request to release it from further claims if he did not know he was releasing the bank from further claims.

[11] Accordingly, I will grant the bank's application and make orders in terms of paragraph 1 and 2 of it.

[12] Costs will follow the event. The applicant seeks costs on an indemnity basis. I will hear from the respondent in that regard.

Background

[13] The first and second respondents are married. They are in possession of property known as the Heidke Road property which is the subject of this application.

[14] In September 2013, the second respondent, Mr Davidson, guaranteed substantial loans, totalling $8,800,000, made by the applicant to his company, Far North Queensland Cattle Company (FNQCC). The loans were made to allow the company to re-finance its existing borrowings and to provide it with working capital.

[15] Mr Davidson's obligations under the guarantee were secured *inter alia* by a registered mortgage over his and FNQCC's property which included the Heidke Road property.[3]

[16] On 4 April 2014, the applicant appointed receivers and managers (from BDO) to FNQCC for reasons which included default and concerns about the safety of the secured property.

[17] Mr Davidson and FNQCC commenced proceedings against the bank on 10 April 2014 (file number 3490/14), seeking declarations that the appointment of the receivers was invalid, void or of no effect. In those proceedings, Mr Davidson made allegations of financial misconduct by Ben Houlihan, an employee of the bank, which had caused him loss. He claimed that Mr Houlihan had transferred more than $700,000 from FNQCC's accounts without his authorisation or knowledge.

[18] On 14 April 2014 – that is, within days of the commencement of the proceedings – the applicant's lawyers (then, Platinum Lawyers) and Mr Davidson's advocate, Geoff Shannon from "Unhappy Banking", initiated negotiations with the bank, seeking to resolve the proceedings.[4]

[3] Affidavit of Colin John Pittorino [6].
[4] Affidavit of Kimberley Jane Arden, exhibits KHA 13, 130.

[19] On 23 April 2014, the bank filed and served affidavits in the proceedings which included the affidavit of the bank's investigator about her investigation into Mr Houlihan's alleged misconduct. The affidavit stated her conclusion, which was that all of the transactions on FNQCC's accounts were authorised by FNQCC/Mr Davidson.[5]

[20] Meanwhile, negotiations with a view to settling the matter continued.

[21] On 28 May 2014, the parties executed a Deed of Settlement,[6] in which Mr Davidson (as "Guarantor 1") and FNQCC (as "Borrower") gave full releases to the applicant in this form (my emphasis):

> The Borrower and the Guarantors **hereby release**, indemnify, **and hold harmless the Bank** and the Receivers from and against any and all claims of whatsoever nature and description which they or any of them may have now against the Bank (or any present or past employee of the Bank) and/or the Receivers howsoever arising with respect to the Facilities, the Transaction Documents, the Amount Owing, the Bank's Current Enforcement Costs, the Securities, the Appointment of the Receivers, the conduct of the Receiver's appointment, **the matters raised in the Proceedings and the Borrower's Claims, including without limiting the generality hereof, the claims made by the Borrower and Guarantor 1 with respect to any actions alleged to have been undertaken by employees of the Bank**.
>
> The Borrower and Guarantors further indemnify the Bank against all claims by any party howsoever arising with respect to any monies alleged to be owing to that party for the supply of cattle, goods or services.

[22] The "Borrower's Claims" were defined in the Recitals to the Deed as follows:

> The Borrower claims the Bank has engaged in unauthorised conduct in the operation of the Facilities as a consequence of which the Borrower claims it has suffered loss and damage. The Borrower also claims that employees of the bank have engaged in conduct which the Borrower claims has caused it to suffer loss and damage, including the non-payment of certain cattle (the **Borrower's Claims**).

[23] To explain the reference to "non-payment of certain cattle": On the evidence, Mr Houlihan purchased cattle for Mr Davidson using money from FNQCC's accounts. One of Mr Davidson's complaints was that – whether or not he authorised the withdrawal by Mr Houlihan of money from FNQCC's accounts to pay for the cattle – some of the sellers of that cattle had not been paid and were chasing payment.

[24] The recitals also stated *inter alia* that –

- the Borrower and Guarantor 1 had commenced the Proceedings (that is the 3490/14 claim);

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[5] Ibid exhibits KJA 13, 131.

[6] Exhibited to the affidavit of Colin John Pittorino, 77 – 96 (and in other affidavits read at the hearing), clauses 6.1 and 6.2.

- the Borrower was in default;
- the bank was entitled to declare all moneys owing as immediately due for payment and to exercise its rights under the securities; and
- the parties had agreed to "settle the matters in dispute, including the Borrower's Claims" on the terms set out in the deed.

[25] The deed contained an acknowledgment that by entering into it, any claims the Borrower and the Guarantors may have against the bank (including any past or present employees of the bank), arising out of any matter existing at the date of the deed – whether known to the Borrower or Guarantors or not – were "fully and finally satisfied and released".

[26] Under the deed –

- the bank agreed to a moratorium on enforcement action until 31 March 2015; to retire the receivers within 10 business days of the date of the deed; to capitalise certain interest and rebate certain other interest; and to debit one of the overdrafts with the bank's enforcement costs.
- the Borrower and the Guarantor were obliged to discontinue the proceedings within three days of the date of the deed (with no order as to costs); and
- the Borrower was obliged to comply with the terms of the loan.

[27] The Borrower's Claims were discontinued as agreed[7] but otherwise, Mr Davidson and FNQCC did not comply with their obligations.

[28] The last payment by FNQCC to the bank was on 16 February 2015.[8]

[29] The bank was prepared to extend its moratorium until 30 September 2015.[9] The bank's position was communicated to Mr Davidson by e-mail on 2 March 2015,[10] and a Deed of Forbearance was prepared and sent to Mr Davidson's lawyers (still Platinum Lawyers) on 3 March 2015.[11]

[30] Mr Davidson thanked the bank for its patience and asked for time to discuss with his lawyer (Clayton Davis from Stack Lawyers) a certain joint venture proposal which would be "highly relevant to the end result".[12]

[31] Also, Mr Shannon asked the bank to extend the time for payment of interest from 31 March 2015 until 30 April 2015 (Mr Davidson had sales scheduled for 19 April 2015). And he asked the bank to offer Farm Debt Mediation if, for any reason, payment was not made by the end of April.

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[7] Ibid, exhibits 131. See also 54.
[8] Ibid [24].
[9] Ibid JBD46, JBD 47.
[10] Ibid JBD 47.
[11] Ibid.
[12] Ibid JBD 47, 181.

[32] The bank agreed to Mr Shannon's proposals and so informed Mr Shannon and Mr Davidson.[13] Other correspondence (in late April)[14] from Mr Davidson indicates that he was hopeful of selling his cattle at a price that would cover the interest owing and hopeful of a joint venture. The documents reveal that he was in discussions with potential investors.

[33] The 30 April 2015 date passing without payment, on 12 May 2015, in accordance with the request from Mr Shannon, the bank sent to Mr Davidson a Queensland Farm Debt Mediation Scheme Notice.[15]

[34] Correspondence from Mr Davidson in early June reveals his continuing hope of attracting investors.[16] He had, by 6 August 2015, engaged new or other lawyers (Miller Harris Lawyers) to assist him in joint venture negotiations.[17]

[35] The evidence also includes correspondence to the bank from Purcell Taylor Lawyers on Mr Davidson's behalf, outlining his plans for attracting investors and paying out his loan as well as seeking the bank's agreement to a Deed of Priority with 'NWC', which had offered to lend money short term to Mr Davidson to enable him to proceed with the joint venture project.[18]

[36] The mediator selected by Mr Davidson in accordance with the Farm Debt Mediation scheme, George Fox, was, it seems, known to Mr Shannon.[19] I note also the bank's attempts (by Mr Pittorino, Asset Manager Banking Risk, who was at the time responsible for Mr Davidson's business at the bank) to advise Mr Davidson on the steps he was required to take to facilitate the mediation.[20]

[37] The mediation took place on 19 August 2015 and Heads of Agreement (HOA) were signed that day.[21] Mr Pittorino, Mr Davidson and Mr Shannon were at the mediation.[22]

[38] The HOA allowed Mr Davidson and FNQCC more time to pay the amounts owing ($250,000 by 31 October 2015 and $250,000 by 31 December 2015, with the balance to be repaid by 30 April 2016).

[39] The HOA provided for consequences if the payments were not made on time, including allowing Mr Davidson and FNQCC to market and sell the properties within a certain period of time before delivering up vacant possession of the properties.

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[13] Ibid JBD48.
[14] Ibid JBD48, JBD50, JBD51.
[15] Ibid JBD55.
[16] Ibid JBD52.
[17] Ibid JBD54, 240.
[18] Ibid JBD54, 245 – 246.
[19] Ibid JBD60, 281.
[20] E.g. Ibid JBD60, 281.
[21] Ibid, exhibits pages 116 – 119.
[22] Ibid [117].

[40] Clause 8 of the HOA explained that the HOA followed mediation and provided the basis upon which the bank agreed to forbear from taking immediate enforcement action.

[41] Clause 9 of the HOA contained a release:

> In consideration of this Heads of Agreement, the Borrowers [Mr Davidson and FNQCC] release the Creditor [the bank], its servants, agents and employees from and against all or any claims they may have on any basis whatsoever.

[42] The bank co-operated as requested in Mr Davidson's attempts to re-finance. He was represented by Purcell Taylor lawyers in that regard.[23] Anthony Hockings, special counsel at that firm, kept the bank informed about Mr Davidson's refinancing and marketing proposals.[24] Mr Davidson communicated with the bank about potential investors as well.[25] Mr Davidson, through Purcell Taylor, engaged a merchant bank to source joint venture opportunities or the outright sale of the farm.[26]

[43] Problems with re-financing were reported to the bank on 10 February 2016.[27] The bank asked for an update on 23 February 2016.[28] The bank was informed (by Mr Hockings) that discussions involving a purchase of the properties were "on foot" on 24 February 2016.[29] Mr Shannon wrote directly to the bank on 25 February 2016, seeking an extension of "30 days to allow me to provide a solution to the bank by way of refinance".[30]

[44] On 25 February 2016, the bank told Mr Shannon that it did not plan to deviate from the terms and conditions of the Farm Debt Mediation Agreement but that it was unlikely to immediately enforce all of its securities. The bank was happy to talk to Mr Shannon about it.[31] That conversation occurred and Mr Shannon stated that he would send sale contracts and details of the refinance offer by close of business on 29 February 2016.[32] It seems that those documents were not provided.

[45] Mr Davidson and FNQCC breached the terms of the HOA.

[46] In accordance with the HOA, on 24 March 2016, the bank sent Mr Davidson and FNQCC a demand for the total amount owing (approximately $10 million). Further demands were made on 4 November 2016 (to FNQ), and on 9 November 2016 (to Mr Davidson). The demands were not met.[33]

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[23] Donahue affidavit exhibits JBD63.
[24] Ibid JBD63, e.g. 307.
[25] Ibid JBD63, e.g. 336.
[26] Ibid JBD63, 338.
[27] Ibid JBD63, 337.
[28] Ibid JBD63, 340.
[29] Ibid JBD63, 342.
[30] Ibid JBD63, 344.
[31] Ibid JBD63, 345.
[32] Ibid JBD63, 347.
[33] Ibid [32] – [37] and the exhibits referred to therein.

[47] On 7 March 2017, the bank appointed Helen Newman and Andrew Peter Fielding, from BDO, as agents for the mortgagee in possession (AMIP).[34]

[48] On 29 June 2017, Ms Newman and a colleague served upon the first respondent a letter regarding the appointment of the AMIP and a notice to vacate Heidke Road.[35]

[49] Via the AMIP, the bank entered into possession of all of the relevant properties, except the Heidke Road property.[36]

[50] Ms Newman's affidavit refers to some of the correspondence she (or others) received from Mr Davidson and Mr Shannon after her appointment. I will refer to this correspondence (and similar) because of its relevance to the bank's application for injunctive relief.

[51] By way of example, the correspondence included:

- a text message to her from Mr Shannon, on 1 July 2017, which said:[37]

  "Fraud Squad now involved
  Bad move Helen, all parties
  that concealed the crime are
  being investigated. Oh as for HOULIHAN
  detective
  confirmed Jail
  I'm
  Preparing media release for
  Monday morning."

- threatening her with a damages claim;[38]
- e-mailing the newspaper in which some of the properties were advertised for sale and informing it that the advertisements were illegal (subject line: "Julian your paper is involved in a huge crime cover up with Suncorp, Bdo & Colliers that is causing 600 cattle distress with no water at yards also I am also the RSPCA please ring me"); and accusing her (and the bank and others) of misconduct;[39]
- threatening to go to the media;[40]
- accusing BDO of destroying genuine overseas investment;[41]
- accusing her of illegally auctioning the property;[42] and
- on 21 October 2017, telling an auctioneer that the auction was illegal and asserting that he was committing theft.

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[34] Affidavit Helen Newman [4(b)].
[35] Newman affidavit [5].
[36] Pittorino affidavit [39] – [43] and exhibits referred to therein.
[37] Ibid [16] – [18] and exhibit referred to therein.
[38] Ibid exhibits 79, 110.
[39] Ibid exhibits 80.
[40] Ibid exhibits 85 – 86,
[41] Ibid exhibits 94.
[42] Ibid 108.

[52] On 3 July 2017, Mr Davidson telephoned Stacey Quaid, the managing director of Colliers, who had been engaged by the AMIP to market and sell the properties, and told Mr Quaid, that the police were involved; charges would be laid; one to two people were going to jail et cetera. On the same day, Mr Shannon e-mailed Mr Quaid and told him that the matter was "now officially a crime" and any entry onto the property was a trespass. On 6 November 2017, by e-mail, Mr Davidson threatened to sue Mr Quaid and "Dan" (Dan Brown, also from Colliers) for "defamation by an illegal AMIP". In his affidavit, Mr Quaid described other efforts by Mr Davidson to undermine the sale process, and exhibited sarcastic e-mails he had received from Mr Davidson in February 2018.[43] It is not necessary for me to refer to them in detail.

[53] Mr Davidson and FNQCC sought to prevent the bank and the AMIP selling some of the secured properties by way of an application for an injunction, which was heard by Jackson J. The application was dismissed and two properties were sold in December 2017.[44] I will refer to this matter later in these reasons.

[54] The bank was ready, willing and able to complete the sale of a third property (the Russell Road property) on 12 January 2018, but Mr Davidson caused caveats to be lodged on the title to it on 5 January 2018 and 24 January 2018. The caveats were removed by orders of the court which also restrained Mr Davidson, and an entity associated with him, from lodging or procuring the lodgement of further caveats on the Russell Road property or otherwise interfering with the bank's sale of that property.[45]

[55] On 29 January 2018, the (new) date of settlement for the Russell Road property, the first respondent lodged a third caveat on the Russell Road property.

[56] By court order, on 9 February 2018, that caveat was removed and both respondents were restrained from lodging, or procuring the lodgement of, caveats on the titles of any of the secured properties, including the Heidke Road property, or otherwise interfering with the bank's sale of any secured properties.[46]

[57] On 12 February 2018, Mr Davidson wrote to Rawdon Briggs of Colliers, asserting that Colliers was selling properties obtained by forgery, fraud, theft and deceptive conduct – and that charges against the criminals would proceed "soon". He asserted that he would put a claim against the bank into the Supreme Court "very soon" and thereafter would be suing BDO, Gadens (the bank's solicitors) and Colliers for "defamation and damages". He foreshadowed private actions against Stacey Quaid and Dan Brown. He concluded with this statement: "I would advise your firm to seek legal advice very soon as I will do as I say, Remember that."[47]

[58] The applicant's evidence includes other evidence of Mr Davidson's interference with the properties to which I need not refer.

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[43] Affidavit of Stacey Martin Quaid filed 19 February 2018, and exhibits.
[44] Affidavit of Kimberley Arden [70] – [71].
[45] Ibid [70] – [100] and the exhibits referred to therein.
[46] Ibid [102] – [116] and the exhibits referred to therein.
[47] Ibid KJA44, 314. See also affidavit of Rawdon Briggs, filed 19 February 2018.

The present proceedings

[59] The applicant now seeks an order for possession of the Heike Road property and for injunctive relief, to restrain the respondents from interfering in its sale, including by the lodgement of caveats.

[60] The respondents acknowledge their default but claim it was caused ultimately by the dishonest conduct of Mr Houlihan. They claim that Mr Davidson and FNQCC are entitled to damages (because of that dishonest conduct) and an order that the applicant is not entitled to enforce any further securities on the land because, but for the dishonest conduct, they would not have been in default.

[61] As outlined above, on two previous occasions Mr Davidson and FNQCC released the applicant from any claim based on Mr Houlihan's conduct. But the respondents claim that the releases are to be vitiated because Mr Davidson was under "severe economic and actual duress" at the time they were given. The respondents contend that this application should fail because there is a need for a trial of the action alleging (at least as a first step) economic duress.

[62] The applicant contends that its application should be granted because the respondents have no real prospects of setting aside the releases and there is no arguable basis upon which they could resist possession.

[63] At the commencement of the hearing, Counsel for the respondents informed the court that he had no instructions in relation to, and would be making no submissions about, the application for an injunction – his submissions would be confined to the application for an order for possession.

[64] The question for the court is whether the respondents have an argument with real – not fanciful – prospects that the releases should be set aside because of economic duress; and if so, whether they have an argument with real prospects that, but for the conduct of the applicant (or its employee), there would have been no default.

Economic duress

[65] The parties are in agreement about the principles which apply to claims of economic duress.

[66] Zammit J identified the three elements of such a claim in *Hingst v Construction Engineering (Aust) Pty Ltd (No 3),*[48] in which the plaintiff claimed that he executed a deed, which barred him from bringing any claim relating to the termination of his employment, under duress.

[67] The plaintiff Hingst had applied to the Australian Industrial Relations Commission (AIRC) for relief in relation to the termination of his employment. A few months later,

[48] [2018] VSC 136.

he offered to settle his claim with his employer in return for four months' salary. He suggested that he had a strong case, and if he were not paid four months' salary, he would continue with his claim in the AIRC.

[68] Ultimately, he settled his claim for $10,000 on terms that included his signing a release of his employer from any future claims he might have relating to the termination of his employment. In the course of negotiating the settlement, the employer imposed a time limit upon the plaintiff within which to respond to its letter, which threatened to apply to have the plaintiff's claim dismissed were he not to agree to the offer of $10,000.

[69] His Honour found that the Deed was not signed under duress. His Honour said (footnotes omitted):

> [172] In short compass, in order for the plaintiff to make good his duress claim, he would need to establish that the defendant:
>
> (i) used a form of illegitimate pressure, physical, economic or psychological in order to compel him to enter into the Deed;
>
> (ii) the pressure left him with no reasonable alternative but to enter into the Deed: and
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> (iii) the pressure in fact caused him to assent to the Deed or was a cause of him assenting to it.
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> [173] As Kiefel J, in *Westpac Corporation v Cockerill* (with the concurrence of Northrop and Lindgren JJ) said:
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> The point of distinction which is relevant for present purposes is that duress, like undue influence, *focuses upon the effect of pressure upon the quality of the consent or assent of the pressured party*, rather than the quality of the conduct of the party against which relief is sought.
>
> …
>
> In most instances where duress is established the party coerced has had little choice. It is not, however, that inequality of bargaining position, or the reason for its creation, which is the essence of the action – *it is the pressure brought to bear and its wrongfulness. 'There must be pressure the practical effect of which is compulsion or the absence of choice.'*
>
> [174] I do not consider that the effect of the pressure that was brought to bear on the plaintiff to sign the Deed was in any way wrongful or obviated his ability to assent. The plaintiff had a choice: he could have pursued his application. He had legal advice, which had a bearing on the quality of his assent, in that it was informed. The pressure by way of a time line, while tight, was not unreasonable.

[70] As to the nature of the pressure, McHugh JA (Samuels and Mahoney JJA agreeing) explained in *Crescendo Management v Westpac* (citations and footnotes omitted) that it must be "illegitimate":[49]

> … The rationale of the doctrine of economic duress is that the law will not give effect to an apparent consent which was induced by pressure exercised upon one party by another party when the law regards that pressure as illegitimate …
>
> … [T]he overbearing of the will theory of duress should be rejected. A person who is the subject of duress usually knows only too well what he is doing. But he chooses to submit to the demand or pressure rather than take an alternative course of action. The proper approach in my opinion is to ask whether any applied pressure induced the victim to enter into the contract and then ask whether that pressure went beyond what the law is prepared to countenance as legitimate? Pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct. But the categories are not closed. Even overwhelming pressure, not amounting to unconscionable or unlawful conduct, however, will not necessarily constitute economic duress.
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> …
>
> It is unnecessary, however, for the victim to prove that the illegitimate pressure was the sole reason for him entering into the contract. It is sufficient that the illegitimate pressure was one of the reasons for the person entering into the contract …

[71] Inequality of bargaining position is insufficient for relief, as Kiefel J (Northrop and Lindgren J agreeing) explained in *Westpac Banking Corporation v Cockerill.*[50]

[72] *Westpac v Cockerill* was an appeal from a decision that, *inter alia*, the bank had applied illegitimate pressure upon Cockerill and others, inducing them to execute agreements which released the bank from any claims they might have in connection with a foreign currency transaction they had entered into with the bank.

[73] Cockerill and others (the applicants) entered into two agreements with the bank in 1984 and 1986.

[74] The 1984 agreement was a loan agreement for $2 million – taken in Swiss francs, and repayable in Australian dollars. By the time the principal amount was to be repaid, the value of the Australian dollar had fallen considerably, and the cost of repayment, plus arrears of interest, was $5.75 million. The applicants could not pay that amount and their securities were in danger of being enforced.

[75] In February 1988, the applicants agreed to borrow from the bank at a concessional rate to pay out the amount owing. The bank had threatened, in the alternative, to appoint receivers and managers to sell the applicants' business and assets. In agreeing to borrow

[49] (1988) 19 NSWLR 40 at 45 – 46.
[50] (1998) 152 ALR 267.

at a concessional rate, the applicants were required to sign a letter which released the bank from any claim or cause of action the applicants might have in connection with the foreign currency loan.

[76] The financial position of the applicants did not improve. In 1991, they brought proceedings against the bank, claiming that their entry into the foreign currency loan was brought about by misrepresentations, by bank employees, about likely changes to currencies relative to the Australian dollar.

[77] In its defence, the bank relied upon the release given to it by the applicants.

[78] The applicants claimed that the release had been given in circumstances which prevented the bank from relying upon it; namely, it had been induced by the bank's unlawful conduct, negligence, breach of contract, illegitimate pressure or duress.

[79] Ultimately, the Court of Appeal held that the case as pleaded (that the applicants had been misled by representations that they had no other choice) was different from the case found by his Honour of wrongfulness constituted by unconscionable dealing and the appeal was allowed.

[80] The primary judge's view was that the bank's proposal – to bring the loan onshore and to offer the applicants finance at a concessional rate in return for a release – was designed to minimise the risk of loss to the bank and to remove the threat of litigation. The only option available to the applicants was to negotiate a sufficiently low interest rate for such a period as would enable the businesses to survive and to avoid a sale of their assets. The applicants' alternative proposals to the bank were met with a threat that the bank would take legal action for recovery. The applicants could do no more than make the best of a bad situation.

[81] The primary judge found that the applicants were unable to obtain other finance and unable to litigate their rights. Although legal advice was available to them, it could not have altered the situation which confronted them. They could not obtain interlocutory relief to restrain the appointment of receivers and managers because they could not offer a worthwhile undertaking as to damages. The appointment of receivers and managers would have destroyed their businesses. The applicants signed the release contained in a first letter with the notation "under duress" on it. They were told if they did not sign it without the notation, a receiver and manager would be appointed.

[82] The primary judge found that pressure by the bank was a significant cause of the applicants granting the release. His Honour concluded that the pressure was illegitimate. The conduct of the bank caused the applicants parlous financial state: they had no bargaining power. The bank took advantage of the huge disparity between them to obtain the release – which was not necessary to secure its position as lender – in exchange for a benefit of doubtful worth to the applicants in their parlous financial circumstances (because they might default on the new loan). The bank went beyond driving a hard bargain. It acted unconscionably.

[83] The bank submitted that there could be no finding of economic duress because (a) it gave valuable consideration for the release by way of an interest rate reduction; (b) it acted in good faith; and (c) the threat made or pressure applied was lawful.

[84] As to the pressure applied, the primary judge considered whether lawful pressure could be illegitimate, and concluded that it could be. In her judgment, Kiefel J considered whether the lawful pressure "supposedly applied" by Westpac was illegitimate.[51]

[85] Her Honour referred to *Crescendo Management* and the statement by McHugh JA quoted above and explained the distinction between duress and unconscionable dealing (citations and footnotes omitted, my emphasis):[52]

> The point of distinction which is relevant for present purposes is that duress, like undue influence, focuses upon the **effect of pressure upon the quality of the consent or assent of the pressured party**, rather than the quality of the conduct of the party against which relief is sought … The cases, apart from *Crescendo Management*, which recognise the possibility of "economic" duress … emphasise the feature that the pressure applied is so coercive of the will that consent is treated as vitiated.
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> …
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> … [D]uress focuses attention on the quality of assent.
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> An approach which inquires whether, in all the circumstances, it is unconscientious to retain a benefit wrongfully procured might be thought to encompass the situation where improper pressure is brought to bear on one party, since it would have regard to that conduct and its relationship to the advantage obtained … Relief will not be granted, however, only on the basis of an inequality, even a great inequality, of bargaining position. Relief may, however, be appropriate when the disparity was substantially brought about by the other party's antecedent conduct. The exploitation of the inequality could then be described as "unconscientious" … And, it seems to me, this was in large part the approach taken by his Honour.

[86] Her Honour held that the primary judge had found unconscionable dealing – not duress. The primary judge's focus was on the position of *financial disadvantage* in which the applicants found themselves.

[87] However, her Honour did not agree that the pleaded case of duress relied upon the bank's conduct in the negotiation of the earlier loan: "The only pressure identified … was said to arise from the representations themselves and the applicants' belief that they were liable to the bank and had no choice but to accede to the bank's demands as otherwise it was entitled to appoint receivers and managers". The case put forward was distinctly different from the case found by the primary judge. Her Honour continued:[53]

> And, with respect, the facts as applied by his Honour could not establish such a case. In most instances where duress is established the party coerced has

[51] Ibid 289.
[52] Ibid 289 – 291.
[53] Ibid 292.

> had little choice. **It is not, however, that inequality of bargaining position, or the reason for its creation, which is the essence of the action – it is the pressure brought to bear and its wrongfulness: "There must be pressure the practical effect of which is compulsion or the absence of choice"** … Putting to one side the limitations imposed by the pleading referred to above … neither the threats of appointment and sale nor the demand for release were themselves wrongful nor could they have operated as coercive. The critical matter was the applicants' lack of choice. The essence of the wrong identified by his Honour was in the creation of that position.

[88] Lindgren J concurred with her Honour but refrained from expressing an opinion whether or not the illegitimacy of the pressure at the heart of duress may be furnished by unconscionable dealing arising from earlier conduct of the kind said to be present in the case – that is, the bank's wrongful conduct in connection with the 1984 contract.[54]

[89] The proper use of legal process does not constitute duress. In the context of a debtor/creditor relationship, a threat by a creditor to pursue legal remedies to recover the debt could "seldom" of itself be a wrong. "A bona fide threat by a secured creditor to exercise rights conferred by the security can scarcely be relevantly different from a bona fide threat to sue": per Tadgell JA in *McKay v National Australia Bank Ltd.*[55]

[90] Referring to this statement in *McKay,* Nettle JA in *Berens v Bluescope Distributions Pty Ltd* said, "Generally speaking, it is not improper pressure to threaten recovery proceedings, including bankruptcy and winding-up proceedings, in good faith, in order to persuade a debtor to pay what is due".[56] In that same case, also referring to *McKay*, Tate JA said, "[I]n general, a payment made in response to the threat of legal proceedings in a commercial context by a party with a bona fide belief in its entitlement is not coerced or compelled".[57]

[91] While there is appellate authority to the effect that the "pressure" is limited to threatened or actual *unlawful* conduct, which would avoid the vagueness of the terms "economic duress" and "illegitimate pressure" (*Australia & New Zealand Banking Corp v Karam*),[58] in *Thorne v Kennedy*,[59] a case concerning a pre-nuptial and post-nuptial agreement, Nettle J observed that *Karam* had been followed without demur but expressed the following reservations (footnotes omitted):

> [71] … [S]o to observe is not necessarily to accept that *Karam's* rejection of illegitimate pressure by lawful means is doctrinally valid. To the contrary, there appears to be much to be said for the view that, rather than persist with a blanket restriction of illegitimate pressure to pressure exerted by unlawful means, it would better accord with equitable principle, and better align with English and American authority, if the

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[54] Ibid 278.
[55] [1998] 4 VR 677 at 689, 690.
[56] (2012) 39 VR 1 at [43].
[57] Ibid [151].
[58] (2005) 64 NSWLR 149 at [66].
[59] (2017) 350 ALR 1.

> test of illegitimate pressure was whether pressure goes beyond what is reasonably necessary for the protection of legitimate interests.

[92] His Honour noted that *Karam* was a significant departure from the preponderance of Australian authority and that the concept of illegitimate pressure was no more uncertain that the equitable conceptions of unconscionable conduct and undue influence. His Honour continued:[60]

> [74] Nevertheless, there would need to be detailed argument and deep consideration of the ramifications of departing from *Karam* before this Court would contemplate that course.

[93] In *Karam*, the New South Wales Court of Appeal found that the Karam family did not sign a certain acknowledgment under duress. The primary judge held that the Karam's company's desperate financial circumstances, which were not the bank's doing, provided the opportunity to bring pressure to bear upon the Karams to sign certain documents by the threat to cut off funding and collapse the business, forcing a sell off of the securities. The primary judge found that to be illegitimate pressure, which amounted to economic duress. His Honour's decision was reversed on appeal: the Court found it "unsupportable".[61] The Court said:[62]

> [95] … Once it is accepted, correctly, that the perilous financial circumstances of the Company were "not the Bank's doing", there is no basis for saying the Bank, in a legal sense, subjected the Karams to pressure. Rather, it was the Karams who were seeking that the bank provide additional credit, without which the Company would have to cease trading. The Bank was under no obligation to extend the credit facilities already granted, nor to do so without securing its own position.

[94] It was not necessary in *Thorne* for the High Court to address arguments for or against the conclusion of the New South Wales Court of Appeal that duress at common law requires proof of threatened or actual unlawful conduct.[63] That question remains unanswered and the way in which the present applicant presented its case meant that it was not something I was required to deal with.

[95] The applicant referred me to an authority to the effect that relief for economic duress may be subject to circumstances where the agreement said to be impugned was a bona fide compromise of a disputed claim, namely, *Mitchell v Pacific Dawn Pty Ltd,*[64] referred to by Murphy JA in *Electricity Generation Corp t/as Verve Energy v Woodside Electricity Energy Ltd*.[65]

[96] *Mitchell* concerned a dispute between a builder (Mitchell) and a contractor (Pacific Dawn). Mitchell did not bring the work to practical completion until about 33 weeks after the due date. A dispute arose about Pacific Dawn's entitlement to liquidated

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[60] Ibid [74].
[61] Ibid [96].
[62] Ibid [95].
[63] Ibid [29].
[64] [2011] QCA 98 at [50] – [52].
[65] [2013] WASCA 36 at [197].

damages for the delay, which was resolved by a settlement agreement. Mitchell ultimately challenged that agreement, alleging that it was unenforceable because he had entered into it as a result of Pacific Dawn's unconscionable conduct.

[97] The trial judge found that both parties were financially stretched and that Mitchell was not in a position of special disadvantage. Pacific Dawn's "threat" that it was only able to pay a certain amount, and it was that or nothing, with the further threat of its bringing an action against Mitchell for damages for delay, was, the trial judge found, an expression of its bargaining position; its doubts about the legitimacy of Mitchell's claims against it; and its own right to claim damages.

[98] The trial judge held that the settlement agreement was a compromise of competing claims and that Pacific Dawn did not apply economic duress or enter into an unconscionable bargain with him. The trial judge was satisfied that Mitchell was not "compelled by duress or economic coercion … to sacrifice a valuable claim for the immediate satisfaction of receiving only a fraction of what was really due to him".[66] Mitchell appealed on grounds which included that the trial judge was wrong to conclude that the settlement agreement was a compromise of legitimate, competing claims. He was not successful and the trial judge's conclusions about the settlement agreement were affirmed (footnotes omitted):

> [52] In deciding whether a threatened breach of contract involves illegitimate pressure or merely part of the "rough and tumble of pressures of normal commercial bargaining" it is necessary also to take into account whether the persons allegedly exerting such pressure did so in good or bad faith. Accordingly, even if (which Mr Mitchell did not prove) Pacific Dawn's insistence upon the terms of the settlement involved any breach or threatened breach of contract it would not follow that the settlement agreement should not be enforced. When account is taken of the reasonableness and honesty of Pacific Dawn's position such pressure as was felt by Mr Mitchell was plainly not "illegitimate pressure".

[99] In *Verve Energy*, the Western Australian Court of Appeal found that Woodside exerted illegitimate pressure over Verve Energy by Woodside's actual and threatened failed to perform a contract to supply gas.

[100] In 2004, Woodside entered into a contract with Verve to supply Verve with a minimum daily requirement of gas at a certain price. Woodside was also obliged to use reasonable endeavours to supply Verve with additional gas above the minimum daily quantity, at Verve's request, for the same price.

[101] In June 2008, there was a fire at the premises of Woodside's only other competitor, causing it to shut down. The demand for gas thereafter exceeded supply and Woodside was able to sell gas at prices significantly higher than the price Verve paid under the contract. Woodside refused to sell additional gas to Verve at the contract price and required it to pay a higher price, under a short term agreement. Verve agreed, under

[66] As quoted in the decision at Ibid [9].

protest, then later claimed the difference in price arguing that it entered into the short term agreement under economic duress brought about by Woodside's unlawful conduct in refusing to comply with the "reasonable endeavours" term of the 2004 contract.

[102] Woodside argued that it had acted in good faith. It genuinely believed that it was not in breach of its reasonable endeavours clause. The Court of Appeal held that that genuine belief did not preclude a finding of economic duress. Woodside's refusal to supply the extra gas at the contract price "constituted the application of illegitimate pressure on Verve which was a cause of it entering into the short term gas supply agreements" which were, accordingly, voidable.[67] On appeal, the High Court found that Woodside had not breached its contract.[68]

[103] Of particular relevance for present purposes: In the course of his judgment, Murphy JA referred to a decision of the Privy Council, *Pao On v Lau Yiu Long*, about the evidential matters which might assist in determining whether there has been compulsion – a decision upon which Woodside had attempted to rely:[69]

> In determining whether there was a coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it.

Previous decision of this court about the respondents' prospects of success

[104] The 2017 proceedings before Jackson J, seeking injunctions to restrain the bank from selling some of the secured properties, have been referred to above.

[105] In support of the submission that Mr Davidson's position was arguable, I was referred to his Honour's decision at first instance[70] and an interlocutory decision of the Court of Appeal in the matter.[71]

[106] As explained above, after the appointment of the AMIP, the bank entered into contracts of sale for three of the respondent's properties, which were due to settle in December 2017 and January 2018.

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[67] [2013] WASCA36 at [30] per McLure P. However, Verve had no cause of action in unjust enrichment for economic duress unless and until the short term contracts were rescinded. It would be entitled to damages for the excess paid as a consequence of breach of the 2004 contract but for a damages cap in the contract.
[68] The High Court held (4:1) that Woodside were not in breach: the obligation to use reasonable endeavours was conditioned by what was reasonable in the circumstances, which included circumstances which may affect their business. Also the contract entitled Woodside to take into account "relevant commercial, economic and operational matters". They were not obliged to sell at the lower price: [2014] HCA 7. The High Court was not then required to consider whether there had been economic duress.
[69] [1980] AC 614 at 635 per Lord Scarman.
[70] Davidson & Anor v Suncorp Metway: File number 12841 of 2017, 14 December 2017.
[71] [2017] QCA 317, 20 December 2017.

[107] On 4 December 2017, after the first two contracts were signed, Mr Davidson notified the bank that he had lodged a dispute with the Financial Ombudsman's Service.

[108] On 5 December 2017, he filed proceedings for relief which included declarations to the effect that his releases were unenforceable for economic duress and an order restraining the bank from exercising power of sale or completing the sale contracts. He then sought an injunction from Jackson J restraining the bank, or its servants or agents, from exercising power of sale over the properties until further order.

[109] On 14 December 2017, Jackson J refused the injunction, taking into account "the degree of likelihood of success in obtaining relief which would see the successful challenge to the right of the bank to exercise its powers of sale, and the balance of convenience if an injunction were granted".[72] The relief to which Jackson J referred was dependent upon the respondents successfully challenging the release given in the 2014 Deed of Settlement. His Honour also took into account the respondents' delay in bringing the proceedings and the fact that the respondents had made no payments to reduce their debt since February 2015.

[110] The respondents appealed that decision and sought injunctions from the Court of Appeal while the appeal was pending. They did not obtain the injunctions and the proceedings have not been progressed thereafter.

[111] However, the respondents submit that Jackson J recognised that the respondents had an arguable case, and that the Court of Appeal did not disagree with his Honour's decision and indeed went further, and indicated that his Honour found a serious question to be tried on legal principle.[73] In light of that, it was submitted that this court should not now accept an argument that the respondents have *no* real prospects of success in defending the originating application or in claims to be brought under the *ASIC Act* or the *Australian Consumer Law* to set aside or vary the security documents – that success depending on a finding that the bank had unconscientiously exploited its inequality of bargaining position.

[112] Before Jackson J, the present respondents relied upon the statement of Kiefel J about antecedent conduct, quoted above. In that context, Jackson J said:[74]

> The applicants' counsel were unable to point to any case in which the element of unlawful conduct that is so required [for economic duress] might be satisfied by the conduct of the kind referred to by Kiefel J as antecedent conduct. Nevertheless, I proceed on the footing that it may be arguable in law that antecedent conduct could constitute the basis of relief for common law duress.

[113] In the Court of Appeal, it was argued *inter alia* that his Honour applied an incorrect test in relation to whether there was a serious question to be tried.

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[72] Exhibit KJA – 19 of the affidavit of Kimberley Jane Arden, filed 19 February 2018, page 163.
[73] Transcript of proceedings, 1 – 70, lines 19 – 35.
[74] Arden affidavit KJA19, 160.

[114] Morrison JA referred to Jackson J's statement that he proceeded "on the footing that it may be arguable in law that antecedent conduct could constitute the basis for relief for common law duress", and said:[75]

> In my view, that comment indicates simply that his Honour was accepting, in the sense of a serious question to be tried, that there was an arguable case, at least on the legal principle.

[115] Morrison JA found that his Honour had applied the correct test of whether there was a serious question to be tried and concluded that there arguably was, but that its prospects were not particularly attractive. But Morrison JA noted that Jackson J ultimately refused relief on the balance of convenience.[76] His Honour said:[77]

> The serious question to be tried was accepted by his Honour, it seems to me, though his Honour took a view that it was not a particularly attractive serious question to be tried in the sense of its ultimate strength, though his Honour made no finding about that, and nor do I.

[116] In the light of those remarks, I proceeded on the basis that there was no finding by their Honours Morrison or Jackson that the respondents had real prospects of success in their claim.

Mr Davidson's evidence

[117] The respondents relied upon two affidavits filed by Mr Davidson to establish the prospects of success of the claim for economic duress.

[118] In his first affidavit, filed 18 May 2018, Mr Davidson stated that he approached Robert Dewitt, the applicant's employee, about refinancing in 2012/2013.

[119] Mr Dewitt introduced him to Ben Houlihan – the applicant's District Manager. In the course of his discussions with Mr Houlihan, Mr Davidson told him that he had less than 100 cattle to sell. In June or July 2013, Mr Houlihan advised Mr Davidson that he knew how he could get cheap cattle, from his friends, for about $1 a kilogram. He also said that he would make sure that the "refinance deal" was approved.

[120] The applicant provided FNQCC with finance which included two loans (with first drawdowns on 30 September 2013) and two overdrafts (available from 1 October 2013).

[121] During August and September 2013, cattle arrived at Mr Davidson's properties. He said he was not consulted about, nor did he approve of, their purchase.

[122] On or about October 2013, Mr Davidson received a document from Mr Houlihan "purportedly outlining purchases he had made". Mr Davidson said the weights for the cattle recorded in the document were far in excess of any which had been brought to the

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[75] Ibid KJA 21, 178.
[76] Ibid KJA 21, 179.
[77] Ibid KJA 21, 182.

property. Mr Davidson challenged Mr Houlihan about this but Mr Houlihan said that he had made "handshake deals" with the sellers of the cattle and that "we could not go back".

[123] In late December 2013, Mr Davidson said he became aware that his overdraft facilities were at their limits ($800,000 and $200,000) – even though he had not written cheques in those amounts. He said he did not know before December 2013 that Mr Houlihan had transferred money from the FNQCC accounts into his own company accounts.

[124] He said that in January 2014 he complained to Mr Houlihan about the transactions. He said the cattle were underweight and overpriced and he would never have paid for them. Mr Houlihan told him not to worry and to send him a list of Mr Davidson's most urgent bills to be paid.

[125] Mr Davidson sent that list by e-mail, dated 10 January 2014. At the end of the list, Mr Davidson wrote "You also have cattle total"[78] (I note thereby authorising payment for them).

[126] Mr Davidson said that at around that time, Mr Houlihan, sounding drunk, told him he would return the money he had withdrawn from the overdraft accounts.

[127] The second overdraft facility was extended to $275,000 in January 2014. Mr Davidson said that at this point in time he appreciated the seriousness of Mr Houlihan's conduct and contacted a group known as "Unhappy Banking" about it. He was instructed to lodge a complaint with the Financial Ombudsman Service, which he did. Then he became aware of the extent of Mr Houlihan's conduct, which included (alleged) forged authorities for the transfer of money, including to "Houlihan Rural".

[128] Mr Davidson said he also became aware that Robert Drewitt was ordering, confirming and purchasing goods in the name of FNQCC.

[129] He said that on 5 April 2014, he received an e-mail from Kismet International (a seller of fertiliser (allegedly) purchased by Mr Drewitt) "confirming that at all times the fertilizer orders were placed, confirmed and authorised by your bank manager @ Suncorp Bank, Robert Drewitt … and supported by Kylie Anderson his assistant". Mr Davidson referred to exhibit WAJD19 as that e-mail[79] but it is not.[80]

[130] Mr Davidson said that he was provided with an e-mail which had been sent to his solicitors which advised that the applicant had completed its investigation and that Mr Houlihan had resigned. He referred to exhibit WAJD20 as that e-mail.[81]

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[78] Page 131 of the exhibits to Mr Davidson's affidavit filed 18 May 2018. WAJD9.
[79] See the certificate of exhibit, which indicates that that e-mail is at page 178. The e-mail at page 178 is dated 21 March 2014, and is Kismet's complaint about an overdue account and requiring payment.
[80] WAJD19 suggests that Mr Davidson told Kismet something about "certain Staff/Managers" of Suncorp and that his accounts had been frozen (in March 2014).
[81] Davidson affidavit, filed 18 May 2018, exhibits WAJD20 p 179 - 180.

[131] That exhibit is a copy of a letter sent by Mr Houlihan to Mr Davidson's solicitors (in response to correspondence from them which has not been exhibited), dated 21 February 2014, in which he claimed that he had not been aware of a dispute between him and Mr Davidson; they had been in contact as recently as 17 February 2014; and that he resigned after Suncorp's investigation "due to internal staffing issues". (I note the apparent inconsistency between his assertions that he was not aware of the dispute but was aware of the investigation.)

[132] The exhibit also contains an e-mail from Mr Houlihan to Mr Davidson which seems to threaten legal action (by Mr Houlihan against Mr Davidson) and which concludes with "So much for being mates".

[133] Mr Davidson alleged that Mr Houlihan's conduct placed him under "significant and detrimental financial hardship".

[134] He said that the applicant had a registered Fixed Charge over the cattle "that precluded the sale of the cattle and generation of any income". He said, in effect, that while he understood that his cattle would be part of the security (for the loans) he was led by Mr Houlihan to believe that he was free to sell the cattle without the bank's consent. That was misleading: he needed the bank's consent to sell the cattle. He tried to sell the cattle through Landmark and was "shocked" to discover that authorisation to sell was required. He referred to exhibit WAJD21, which is a short e-mail chain including an e-mail from Landmark which states "Provided Suncorp give Landmark approval, then so long as cattle are booked in to sell through us, we can try and help you as much as possible. Suggest you stress to Suncorp the urgency of them confirming to Landmark that we may hold proceeds from cattle sales to settle your overdue debt with Landmark and release funds to you for other purposes as required".[82]

[135] He said he sought, but did not receive, Suncorp's authorisation to sell the cattle.

[136] Mr Davidson said that he was "stunned" that the GSA included a fixed charge over 6,000 cattle and he would never have agreed to an agreement that did not allow him to trade in the ordinary course of doing business.

[137] It is important to note at this point that Mr Davidson was in fact permitted to "deal" with those cattle in the ordinary course of his business in accordance with clause 7.11 of the General Security Agreement (GSA). His understanding of the need for consent is not correct.

[138] By way of further elaboration on the consent issue: I note that the initial finance proposal[83] nominated registered mortgages over nominated real property and "[a] stock mortgage of cattle owned by W J Davidson and depastured on the above properties" as security.

[82] Ibid WAJD21, 181.
[83] Ibid, WAJD1, 1 – 5.

[139] The Offer of Finance[84] was signed by Mr Davidson in Mr Houlihan's presence on 9 September 2013.

[140] The schedule to the General Security Agreement (also signed that day) contained a reference to the cattle at Items 5 ("PROPERTY INCLUDING COLLATERAL AND PROCEEDS") and 9 ("SPECIFIC PROPERTY SUBJECT TO FIXED CHARGE").[85]

[141] The cattle were described in those items, in handwriting, by number, breed and brand. Mr Davidson said that that the handwriting at items 5 and 9 was not present when he sighed the General Security Agreement (which, by clause 7.4 (x) referred to the fixed charge over the property in schedule 9); and when he did, he had less than 100 cattle.

[142] Returning to Mr Davidson's affidavit: as explained above, receivers were appointed in 2014. Mr Davidson said that, on 10 April 2014, he was "forced to file Supreme Court proceedings numbered 3490 of 2014 in an attempt to have the receivers retired, protect the Land [that is, the mortgaged property] and bring the actions of the Applicant to light".

[143] After "discussions" he entered into the deed.

[144] He said that he was then under "severe stress and strain". He could not fund his lawyers nor his travel to Brisbane for the hearings and negotiations. He could not run his farm because of the receivers and he had no access to money because the bank controlled his accounts.

[145] He said that his accounts were overdrawn (because of the actions of Mr Houlihan); he was "severely decimated" in his ability to run his properties and it affected his life: he could not pay his expenses or put food on the table. He was not able to sleep and took amitriptyline (an antidepressant).

[146] He asserted that the charge over his cattle meant that he could not sell them without the bank's permission which he did not receive. He wished to continue with the Supreme Court action but his resources were "completely empty". His lawyer told him that if he did not sign the Deed of Settlement, receivers would be appointed by the applicant the following day. He was distraught. He had "no choice" but to sign.

[147] With "great reluctance" he signed the Deed of Settlement. He said he did not receive any advice (from his lawyers) about it, apart from being told that if he did not sign it, receivers would be appointed. He had no opportunity to obtain financial advice – nor did he read the deed, as it had to be signed quickly and returned to his lawyers.

[148] He said that the applicant was aware of his lack of cash assets from an e-mail he sent on 2 April 2014.[86] That e-mail said:

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[84] Ibid WAJD2, 6.
[85] Ibid WAJD2, 25, 28.
[86] Ibid exhibit WAJD22, 182.

> Hello Col. [Col Pittorino, The Asset Manager at the bank] Geoff Shannon has advised he is contacting the Suncorp board of director in regard of the serious issue, I am now confronting and has advised me to leave cattle on the land at present. I have to lay of the workers, as no funds were available last week and I have advised them that maybe indefinitely. The properties are presently uninsured and I have no income, as I need authorisation from Suncorp to sell the stock, as Suncorp have stock mortgage and without consent, no company will sell the stock .ruralco are coming round next week to talk to me about the cattle, but I am sure they will want the same as the other agents. This whole incident is causing me severe stress and there has been no sign of a move on anyone's behalf to resolve this problem. I am going now to see my Cairn solicitor in regard of the whole issues, as Shannon and platinum Lawyers are not getting a resolution. I will leave the FOS complainant with Geoff Shannon and seek further legal advise. Thanks Jim.

[149] Other evidence established that Mr Davidson and FNQCC failed to comply with their obligations under the deed and on 19 August 2015, he attended a farm debt mediation with the applicant in a further attempt to resolve the matter.

[150] After the mediation, he entered into a Heads of Agreement.

[151] He said he had "no choice" but to execute the HOA. He had not been able to find an alternative financier because receivers had been appointed – leading to the perception that he/FNCQQ could not repay any monies lent. He had no cash flow to operate his farm. Had he not signed the HOA, he would have "lost everything". He needed more time to obtain finance. He was still struggling to "rectify" Mr Houlihan's unauthorised payments. He and his wife's health had suffered. He could not think straight and had no opportunity to receive financial advice. He signed the HOA "[w]ith great reluctance and distress".

[152] He lost out on the purchase of a feedlot for which he had paid a deposit of $200,000, and another $230,000 for extensions (the source of those funds is not disclosed in the affidavit). He said he could not complete the contract because of the actions of the applicant and the delay in retiring the receivers.

[153] He said other proposals for joint ventures were rejected by the applicant.

[154] He/FNQCC received a Notice of Exercise of Power of Sale on 19 May 2017.

[155] On 4 December 2017, he instructed Geoff Shannon to lodge a dispute with the Ombudsman and to obtain copies of the applicant's internal investigation into the conduct of Houlihan and Drewitt. He had not been provided with it. He repeated that he was under serious financial stress due to their "fraudulent conduct" and felt he had no other choice but to sign the Settlement Deed and Heads of Agreement.

[156] He said he had commenced proceedings against the applicant seeking orders "affecting the operation of the GSA and the mortgages, and in the alternative for compensation and orders setting aside the Settlement Deed and Heads of Agreement for economic duress, and for misleading and deceptive conduct of Suncorp by their agents and employees".

He acknowledged that he had been unsuccessful in seeking injunctions (before Jackson J) but said those proceedings were still on foot. He had a statement of claim drafted, which, he said, "will be filed and served" on the applicant. That has not occurred. This affidavit was sworn on 14 May 2018.

[157] Mr Davidson's second affidavit added the following information about the 2014 Deed of Settlement –[87]

- He did not receive legal advice "on what [he] was signing" when he was provided with it to sign;
- None of the terms of the deed was explained to him – by a lawyer or anyone else.
- He did not understand the deed.
- He "only understood" that if he signed it, the receivers would be retired;
- It was never mentioned to him, nor was he advised, that he was releasing the bank or the bank's employees from liability and he did not know he was doing that;
- If he had known he was so releasing them, he would not have signed the deed, he would have "sought to negotiate a different clause or the removal of that release clause entirely".

[158] His second affidavit added the following information about the 2015 Heads of Agreement –

- He did not remember the details or circumstances surrounding the signing of the 2015 Heads of Agreement other than that he was under "severe trauma with respect to the financial stress and strain" he was under;
- He did not remember having any of the Heads of Agreement explained to him by his lawyer or anyone else;
- It was not mentioned, nor was he advised, that he was releasing the bank and its employees from liability;
- Had he known that – he would not have signed the Heads of Agreement – he would have "sought a more limited release, if any release was to be in the document at all".

[159] He said that he was only advised about the releases in November 2017, when he first consulted his present lawyers. Evidence referred to in the footnote to this sentence shows that that statement cannot be correct.[88]

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[87] Filed by leave.

[88] In an e-mail to Ms Newman, dated 3 September 2017, Mr Davidson referred to the "quotation of the illegal settlement deed 2014" by Ms Arden (a lawyer with the bank's firm of solicitors). The reference to Ms Arden's quote was, I conclude, a reference to her letter to Sean Kelly, Mr Davidson's lawyer at the time. Ms Arden's letter responded to Mr Kelly's claim for compensation from the bank for Mr Houlihan's conduct. In it, she referred him to the circumstances leading up to the Deed of Settlement and its terms (Arden affidavit, exhibits KJA13, 129 – 130). It follows that Mr Davidson's statement that he did not know about the releases in the Deed (or HOA) until he spoke to the lawyers whom he engaged in November 2017 cannot be correct. Indeed, his instructions about the deed are contained in a letter from this then lawyers to the bank's lawyers dated 6 October 2017 (Arden affidavit exhibits KJA16, 141).

[160] Mr Davidson said that the applicant's proceedings, which were commenced on 19 February 2018, had consumed the resources he intended to spend pursuing the applicant by seeking orders to set aside or vary the security arrangements.

The applicant's evidence

[161] The applicant challenged the claims made by Mr Davidson including by reference to contemporaneous documents.

[162] I note that the applicant's evidence included an e-mail from Mr Davidson to Mr Houlihan, dated 19 December 2013, in which he discussed the weight of the cattle purchased by Mr Houlihan and said (my emphasis) "It's to (sic) expensive to buy this way *from now on* <u>*we*</u> only buy per kilo weighed here on the farm" – which suggests an agreement between them in relation to the buying and selling of cattle.[89]

[163] The applicant referred to Jackson J's observations, that the detail of Mr Davidson and FNQCC's assertion that there would have been no default without Mr Houlihan's alleged conduct was not articulated because that case had not been formulated with precision, and submitted that the position had not changed.

[164] It referred to a letter from Mr Davidson's lawyers (then Kelly Legal), dated 25 August 2017, to the bank's lawyers which referred to the funds allegedly taken without authorisation by Mr Houlihan ($731,979.85); invited discussions about compensating Mr Davidson; and referred to evidence relevant to the assertion that without Mr Houlihan's conduct, there would have been no default. The letter said:[90]

> Our client has appointed an accountant to prepare a report concerning the funds taken and the impact of the missing funds on our client's financial position. We understand that that report will be available in 2 to 3 weeks. We suggest that the appropriate course of action in this matter would be for any action to be held in abeyance until such time as the report is available, and a meeting has been held to discuss how to adequately compensate our client for the wrongdoing.

[165] No such report or other relevant financial information has been provided.

[166] The applicant's material provides evidence of the circumstances leading up to the execution of the 2014 Deed of Settlement. The applicant submits that its evidence establishes that there was no exploitation of Mr Davidson's disadvantage in that context.

[167] The applicant referred to Mr Davidson's lodging a dispute with the Financial Ombudsman Service (on 17 January 2014), which Mr Davidson's affidavit suggested was in the context of his realising the seriousness of Mr Houlihan's conduct.

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[89] Ibid JBD2, 6.
[90] Arden affidavit exhibits KJA12, 125 – 127.

[168] Mr Davidson's complaint to the Ombudsman did not in fact raise a complaint about Mr Houlihan's conduct but instead complained about a block on his trading accounts, imposed on 16 January 2014, which had been imposed because of unpaid rates, which, Mr Davidson alleged, the bank was required to pay.[91] However, it seems that later e-mail correspondence from Mr Shannon to the Ombudsman complained about fraudulent misappropriation by Mr Houlihan.[92]

[169] On 6 March 2014, by e-mail, Mr Davidson complained to the bank about the light cattle purchased by Mr Houlihan and the tight financial situation he found himself in. He asked the bank for immediate funding for wages and to cover a visit to his properties by potential Chinese investors and for medium term funding. He also complained that he was the "victim of abuse" of his "account and business by one of your former employees" but he was determined to put it behind him.[93]

[170] His request for immediate funding was granted, but the bank required updated financial data before it would respond to his request for medium term funding.[94]

[171] On 19 March 2014, Mr Davidson sought the bank's advice about whether to wait until the market improved to sell certain cattle, or to prepare them for live export. The bank said it was not in a position to comment on those options particularly in the absence of updated financial data, which Mr Davidson had previously said he would provide (after the bank request for it),[95] but had not done so.

[172] On 21 March 2014, the bank asked for the financial data "as a matter of urgency" and noted Mr Davidson had indicated that the information would be available to the bank "this coming Monday"[96] (which would have been 24 March 2014).

[173] No data was provided. On 26 March 2014, Mr Davidson advised the bank that Mr Shannon had advised him "not to contact Suncorp".[97]

[174] On 31 March 2014, Mr Shannon asked the bank to "release" FNQCC to sell its cattle and to allow Mr Davidson to "direct where funds are to be paid", to allow him to continue his business.[98] This request related to the Landmark sales referred to above.[99]

[175] As I have noted, approval was not in fact required under the GSA.[100] Regardless, after more correspondence, the bank asked for "the specific wording" required on 2 April 2014.[101] The wording was sent, by Mr Shannon, on 3 April 2014.[102]

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[91] Affidavit of Jayson Bradley Donahue, exhibit JBD1, 3 – 4.
[92] Ibid JBD18, 44.
[93] Ibid JBD2, 6.
[94] Ibid JBD4, 13.
[95] Ibid JBD5, 16; See also Ibid JBD6, 19.
[96] Ibid JBD9, 31.
[97] Ibid JBD10, 33.
[98] Ibid JBD11, 34.
[99] Ibid [25] – [32].
[100] Ibid [26] – [30].
[101] Ibid JBD14, 37.
[102] Ibid JBD15, 39.

[176] Meanwhile, on 2 April 2014, Mr Davidson e-mailed the bank and said that he no longer wanted to "look after cattle bought by a Suncorp employee simply as I have no funds or no wish to".[103] Attached to that e-mail were forwarded e-mails which stated that Mr Davidson had arranged for his staff to put the cattle "in the yards" where they would stay "until this is resolved or whatever"; his workers would be laid off; the properties were uninsured and at risk "from fire or whatever"; and "the cattle would die in the yards".[104]

[177] On 3 April 2014, the Ombudsman advised Mr Shannon that because the allegations he had made about the bank concerned misappropriation, the court was the appropriate place to deal with the dispute.

[178] The Ombudsman also informed him that, having regard to the e-mails sent by Mr Davidson to the bank, about the property being uninsured and the threat of cattle dying in the yards et cetera, Suncorp was permitted to recover possession of the secured properties "and appoint receivers to ensure the welfare of the cattle even while the dispute remained open with them". (While there was an open dispute, the bank was not permitted to take recovery action without the Ombudsman's permission.)[105]

[179] Mr Davidson "retracted" the e-mails and assured the bank that he was a good farmer and the property was not at risk[106] but on 4 April 2014, the bank appointed receivers and managers in accordance with the Ombudsman's permission.

[180] On 10 April 2014, Mr Davidson commenced proceedings and, as noted above, within days, settlement negotiations were initiated on his behalf.[107] He was (or he and FNQCC were) represented concurrently by his lawyers[108] and Mr Shannon who negotiated with the bank directly about the heads of agreement and then the deed. It seems that the lawyers were not, at least initially, aware of the concurrent negotiations going on between Mr Shannon and Mr Pittorino from the bank.[109] But the point is that Mr Davidson was represented by lawyers and a lay advocate at this time.

[181] Heads of Agreement were signed by Mr Davidson on 23 April 2014.[110] Negotiations towards the deed continued.

[182] On 6 May 2014, Mr Davidson's lawyers raised the allegations against Mr Houlihan with the bank's lawyers. They also raised (as they had done so previously) the issue of the bank's fixed charge over the cattle, which Mr Davidson understood prevented him from selling them without the bank's consent.[111]

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[103] Ibid JBD16, 41.
[104] Ibid JBD16, 41 – 42.
[105] Ibid JBD18, 46.
[106] Ibid JBD20, 50.
[107] Affidavit of Judith Anne Hishon exhibit JAH1, 2.
[108] Hishon affidavit JAH1, JAH3; Donahue affidavit [44] – [52].
[109] Hishon affidavit JAH9, 49.
[110] Ibid JAH4, 11.
[111] Ibid JAH5, 20.

[183] In reply, among other things, the bank's lawyers referred Mr Davidson's lawyers to the relevant clauses of the GSA and explained that while the bank had a fixed charge over the stock, they could be dealt with, without the bank's consent, in the ordinary course of business.[112] Ultimately, that issue was resolved during negotiations, recognising that the bank's consent was not required for dealings in the ordinary course of business.[113] However, it is still claimed in these proceedings that the bank's consent was required to sell cattle and, for that reason, I will elaborate on the matter a little more.

[184] I have already mentioned that the initial finance proposal nominated as security registered mortgages and a stock mortgage of the cattle depasturing the land subject to the mortgage.[114]

[185] The offer of finance listed as security, *inter alia,* a "New Registered General Security Agreement … over stock depasturing [on certain named properties]".[115]

[186] The bank's General Security Agreement provided, in clause 7.4, that it operated as a fixed charge on (*inter alia*) property specified in Item 9[116] – that is, the 6000 head of cattle described in Item 9 as "subject to fixed charge".[117]

[187] The GSA defined "Property" as (*inter alia*) the "personal and other property referred to in Item 5 of the schedule"[118] which included the 6000 head of cattle.[119]

[188] Under the heading "No Disposal of Property or Creation of Security Interests without Consent of Secured Party", clause 7.11 of the GSA states (my emphasis):

> Subject to clause 7.12 of this Security Agreement the Grantor shall not without the prior written consent of the Secured Party deal with the Property **except in the ordinary course of its business** or in order to comply with any obligation under this Security Agreement.

[189] Clause 7.12 is not relevant.

[190] I note that the GSA was made in the context of a loan given to a farmer in the business of buying and selling cattle. Reading clauses 7.4 and 7.11 together, the bank's consent was not required for the sale of cattle in the ordinary course of Mr Davidson's business.

[191] The matter of consent was mentioned in a letter from Mr Davidson's lawyers to the bank's lawyers dated 8 April 2014 which foreshadowed Mr Davidson's application to the court to have the receivers retired.

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[112] Ibid JAH7, 25.
[113] Ibid JAH9, 51 – see second last paragraph.
[114] Davidson affidavit, filed 18 May 2018, exhibits WAJD1, 4.
[115] Ibid WAJD2, 15.
[116] Ibid WAJD2, 43.
[117] Ibid WAJD2, 28.
[118] Ibid WAJD2, 40.
[119] Ibid WAJD2, 28.

[192] In that letter, the lawyer's wrote (errors in original):[120]

> We note under the General Security Agreement has caused a fixed charge over the cattle thereby making the sale of the cattle always subject to your clients consent. Despite verbal address by Suncorp that our clients is free to sell cattle no written has been provided despite repeated requests. The lack of consent has caused our clients financial difficulties given that he does not have the ability to sell the cattle since the removal of Mr Houlihan as his bank manager. The cause of our client's problems rests with squarely with Suncorp.

[193] On 23 May 2014, in the course of negotiating the Deed, Mr Shannon e-mailed Mr Pittorino and referred to the "very important matter" of Mr Davidson being able to sell cattle without the bank's authorisation as something which had to be resolved (errors in original):[121]

> The other very important matter is being able to sell Cattle without seeking authorisation for each transaction which as I understand the GSA prohibits that. Helen though has advised that she has a document that clears that up,so maybe that will suffice.

[194] The next day, Mr Davidson's lawyers wrote to the bank's lawyers about the same issue:[122]

> … Please bear in mind that our client, Mr Davidson and his companies have been severely affected by the actions taken by Suncorp and their former employee, Mr Houlihan.
>
> Despite verbally being told that he is able to sell stock, this is contrary to the fixed charge which Suncorp holds over the cattle. This is why Mr Davidson sought our assistance to restore his cash flow.

[195] The issue was referred to again in the lawyer's letter –

- under the heading "Paragraph 3 Details of cattle located on each property and anticipated fluctuations:

  > … 130 steers, weighing at 250 kilograms, were sold by Landmark around 28 March 2014. However, Landmark still retain the funds received from the sale of that mob of cattle, in their trust account, because of the way the fixed general security agreement operates.

- under the heading "Paragraph 6 Details of any livestock illnesses, husbandry issue currently affecting the herd":

  > … the General Security Agreement … needs to be amended to enable our client to trade in cattle as a matter or urgency.

- under the heading "Paragraph 8 Undertaking":

[120] Hishon affidavit exhibits JAH15, 123.
[121] Donahue affidavit JBD34, 99.
[122] Hishon affidavit exhibits JAH4.

> With respect to the undertaking that livestock will not be moved from their existing location or trading without prior written consent of the receivers, our client is unable to sell any cattle as previously outlined. The GSA does not allow it …

[196] Mr Davidson's lawyers raised the matter again on 6 May 2014:[123]

> One of the major problems we have identified and is commonly acknowledged is our client's inability to trade cattle because of the way the GSA was set up in the first place.

[197] On 15 May 2014, by e-mail, the bank's lawyers explained to Mr Davidson's lawyers the operation of the GSA:[124]

> It is not necessary to amend the Bank's General Security Agreement. While clause 7.4 of the General Security Agreement dated 9 September 2013 creates a fixed charge over the stock, clause 7.11 provides that the grantor will not deal with the stock without the prior written consent of the Bank "except in the ordinary course of its business". Providing your client deals with the stock in that fashion the consent of the Bank is not required.

[198] On 21 May 2014, at 4.25 pm, Mr Davidson's lawyers pressed again for amendment of the GSA by replacing the fixed charge with a floating charge so as to enable Mr Davidson to trade in cattle.[125]

[199] However, at 4.41 pm, Mr McLelland (the lawyer with carriage of the matter at Platinum Lawyers) sent another e-mail to the bank's lawyers explaining that he had only just become aware that Mr Shannon had been negotiating directly with Mr Pittorino over the last 24 hours. He asked the bank's lawyers to "disregard the proposed terms as outlined in my letter" – which included the change to the charge suggested.[126] A letter marked "URGENT" was enclosed.

[200] That urgent letter refers to settlement negotiations between Mr Shannon, Mr Pittorino and the receivers; sets out the agreed terms of the deed; and includes this paragraph about the bank's consent to the sale of cattle:[127]

> We are also instructed that it has been verbally agreed that should Mr Davidson have any issues with the sale of any cattle in relation to the General Security Agreement then Suncorp will provide assurances by drawing any parties attention to references in the General Security Agreement and the Settlement Deed which allow Mr Davidson or his trading entities to buy and sell cattle in the normal course of business.

[201] It is reasonable to infer that, as long ago as May 2014, those acting for Mr Davidson were aware that the bank did not require Mr Davidson to ask for its consent prior to the sale of

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[123] Ibid JAH5, 20.
[124] Ibid JAH7, 25.
[125] Ibid JAH8, 47.
[126] Ibid JAH9.
[127] Ibid, exhibits page 51.

his cattle in the ordinary course of his business and the bank would so inform any prospective purchaser who was concerned about it.

[202] Given the importance placed upon this issue in negotiations, it is reasonable to infer that Mr Davidson was made aware of the outcome of this aspect of the negotiations. Also it may be inferred from the evidence that the bank's consent was not an issue in the sales scheduled for 19 April 2015 (which prompted Mr Shannon to ask the bank to extend time for the payment of interest until 30 April 2015, which it did). It is difficult to understand why it is now suggested that the bank's 'withholding consent' is an aspect of its illegitimate pressure.

[203] Returning to the issue of Mr Davidson's position of inequality, while his financial inequality vis-à-vis the bank is obvious, it is plain from the evidence that Mr Shannon appreciated that the strength of Mr Davidson's negotiating position lay in the fact that, at any time, he could proceed with his legal action. It is also plain from the evidence that Mr Shannon and Mr Davidson's lawyers were receiving instructions and information from him in the course of negotiating the terms of the deed.

[204] By way of example of Mr Shannon's appreciation of Mr Davidson's bargaining position, on 18 May 2014, he e-mailed the bank and said:[128]

> The position is that there is nothing in this for our client, other than retirement of receivers via the Deed and we arrange a refinance within 8 months, and interest being capitalised.
>
> As for what has occurred, we feel that Suncorp has not fully recognised the impact of the actions by the Suncorp branch manager.
>
> Given the Deed as currently presented, where as Suncorp requests all parties to put the past behind us without any compensation, we can not nor will not ask Mr Davidson to execute given the amount of evidence and witnesses whom have come forward recently regarding the actions of your branch manager in which Mr Davidson has suffered.
>
> Our previous telephone conference where as I advised what it would take to settle this has not been adopted. If Suncorp is willing to agree to those terms please advise your lawyers. If not please advise us and we will have the Affidavits prepared and executed and continue with the court process.
>
> I await your reply.

[205] Negotiations continued and there had been, from Mr Shannon's perspective, progress by 21 May 2014 – with Mr Shannon suggesting to the bank that they were "half way there in relation to the four major points". Again, reflecting his appreciation that the strength of Mr Davidson's position lay in his ability to continue with the proceedings (and perhaps thereby to attract adverse media attention) he said:[129]

> To disengage any further Court appearances and any Media in relation to this matter, I see that if SUNCORP can review its position in respect of the prior

[128] Ibid JBD31, 94.
[129] Ibid JBD32, 96.

> interest, whether it be a credit or an offset at least something due to the circumstances Mr Davidson was placed (sic) and also amend the GSA so Cattle can be sold … I feel that the matter could be settled asap.
>
> I am led to believe the other matters … being a time of 8 months to enable Mr Davidson to refinance and the appointment issue of Receivers has been agreed upon.
>
> In light of the remaining two items, I can advise that Mr Davidson has made arrangements for $50,000.00 for legal expenses, then maybe to resolve this issue is that we use that $50,000.00 to cover previous interest and all parties move on rather than on further litigation.
>
> Please be advised that I would like to resolve this by 2 pm, prior to 2 pm you have my undertaking that we will not be making any statements about this case.

[206] After agreement on the deed's terms was reached, Mr Shannon thanked Mr Pittorino for "working together and resolving the previous issues" which he found "refreshing to say the least".[130] His e-mail including that thanks was copied to Mr Davidson and to Helen Newman.

[207] There is no evidence of even a *reluctant compromise* on Mr Davidson's part in the documents tendered in evidence, which were contemporaneous with the negotiations towards, and the execution of, the deed.

[208] The Deed of Settlement was executed on 27 and 28 May 2014 and the receivers were retired on 12 June 2014.[131]

[209] Although Mr Davidson asserted that he did not read the deed before he signed it, the applicant's evidence establishes that its terms reflected the heads of agreement as developed throughout the negotiations in which he took part, via his lawyers and Mr Shannon.

[210] Thereafter, Mr Davidson corresponded with the bank about his attempts to refinance or to arrange joint ventures, but nothing eventuated. As outlined above, at Mr Shannon's request, the matter was referred to the Farm Debt Mediation Scheme and, after mediation, Heads of Agreement were signed, the terms and conditions of which Mr Davidson and FNQCC did not meet.

The respondents' submissions

[211] Mr Davidson's case, on behalf of both respondents is, as expressed in his counsel's written submissions, as follows:

> … he was the subject of fraud and misconduct by at least one (and possibly three) of the Bank's employees (the first being Mr Ben Houlihan, a Manager),

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[130] Ibid JBD36, 102.
[131] Ibid [50], [52].

> and this misconduct was a, if not the only, cause of a significant inequality in bargaining position Mr Davidson suffered which the Bank knew of, which is compounded by **firstly**, installing Receivers thereby adversely affecting Mr Davidson's ability to refinance, and **secondly** by not consenting to Mr Davidson being able to sell cattle to try and generate cashflow to help pay down the loans all the while whilst seeking to enforce the securities.
>
> This conduct, it is submitted, amounts to an unconscientious exploitation of the inequality at the time of the 2014 Deed and 2015 Deed were entered into, both of which should be set aside or varied because Mr Davidson entered into them as a result of the economic duress he was then under.
>
> That conduct not only included the fraud and misconduct of the Bank's officers in taking around $750,000 of Mr Davidson's money from the overdrafts without any benefit to him, but also placing a fixed charge over the cattle which he has been unable to sell, despite being led to believe by the Bank Manager that he could, because the Bank has not provided its consent, despite request.

[212] Mr Davidson argued that his evidence – if accepted on its face – provided a "sound basis" for a case in economic duress, to set aside the releases given on 2014 and 2015.

[213] As to the bank's knowledge of Mr Davidson's financial circumstances, Mr Davidson submitted that the bank knew he was "destitute and financially devastated through no fault of his own [and] that his situation would get worse if he could not get a consent to sell cattle. The Bank also must have known that this situation had not improved by the 2015 Deed".[132]

[214] As I have already noted, under the GSA, Mr Davidson *was* able to deal with his cattle in the ordinary course of his business without the bank's consent. This was ultimately accepted by him in the course of negotiations leading to the execution of the Deed in 2014. Regardless, it seems that he only sought the bank's consent with respect to the Landmark sales,[133] and the bank was on its way to providing him with whatever consent he needed when he revealed that the secured property was uninsured and he would let his cattle die in the yards et cetera, which led to the bank taking steps, with the permission of the Financial Ombudsman Service, to protect the secured property.

[215] Mr Davidson also submitted that the bank had "cherry picked" the documentary evidence which it presented in support of its case. I will deal with that submission now.

[216] The documents and correspondence relied upon by the bank in this hearing are (almost exclusively) documents executed or negotiated by both parties and correspondence *between* the parties (or the lawyers for the parties), which includes many e-mails from Mr Davidson to the bank. Mr Davidson has not suggested that critical correspondence from him (or to him) has been omitted from the applicant's material or that he no longer has access to correspondence sent by him.

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[132] Mr Davidson's counsel's written submissions [14].
[133] Donahue affidavit exhibits JBD11, JBD12, JBD13, JBD14, JBD15.

[217] The volume and nature of the documents exhibited to the affidavits relied upon by the applicant suggest that that which has been provided comprehensively reveals the dealings between the parties.

[218] Mr Davidson submitted that his evidence revealed a real and not fanciful arguable case, which "may well be" supported by disclosure of the internal investigation report. Any delay in bringing proceedings against the bank could be dealt with by directions.

[219] The focus of the submissions made on behalf of Mr Davidson was on his personal feelings of stress and distress. It was submitted that –

- the stress Mr Davidson was under at the time he executed the 2014 Deed was not diminished because he had engaged a solicitor and a financial consultant to assist him;
- he had no choice but to sign it – he could not continue court proceedings and could not refinance while the receivers were in place;
- the only advice he received was a phone call, in which he was told that if he did not sign the deed, receivers would be appointed; and
- he did not receive financial advice about the deed, nor did he read it before he signed it.

[220] It was submitted that at the time of executing the HOA, Mr Davidson was under the same pressure as he had been under in 2014.

[221] His dire financial and personal circumstances (including his wife's pregnancy and the stress she was under) left him, it was submitted, with no choice but to sign the HOA. The bank knew enough about his financial circumstances (and Mr Houlihan's conduct) to appreciate his vulnerability. It was submitted that (my emphasis) –[134]

> It is highly unlikely that **if Mr Davidson knew and understood the content of that document** [the HOA], he would have agreed to release the Bank's fraudulent employees, as that release purports to do. This proposition adds support to his version that he was suffering from distress and bad health, that he was struggling to rectify the unauthorised payments from Houlihan, and that he could not think straight.

[222] The respondents asserted that –

- the bank's employee's misconduct brought pressure to bear on Mr Davidson/FNQCC;
- that pressure was compounded by the bank's failure to consent to his selling cattle, or to his refinancing proposals;
- he (and the company) were thereby financially strangled;
- the disparity was exploited by the bank asserting defaults and pressing enforcement and obtaining the releases;

[134] Respondents' written submissions [70].

- there was an arguable case and there ought to be a trial on the merits; and
- further, the allegations of misconduct gave rise to an arguable case that the finance offer, GSA and mortgages were unenforceable.

[223] Alternatively, it was contended that the court should not grant the applicant "judgment" in the exercise of its discretion. The respondents should be allowed to articulate the issues (by refining the draft statement of claim) in a trial about which directions could be made to ensure that it proceeded efficiently.

[224] In the course of the respondents' counsel submissions, I asked what Mr Davidson had to offer the bank apart from the release. Counsel said that that was a probably an issue for trial.[135] I was referred to Mr Davidson's obligation under the Deed to provide monthly reports and his promise to pay the bank the amount owing. I was reminded that, without pleadings, I was required to focus upon Mr Davidson's evidence, which ought to be accepted unless it was "inherently inconsistent or incredulous".[136]

[225] It was submitted that the bank ought to have known about Mr Davidson's parlous financial state and that it was Mr Houlihan's conduct which reduced him to that state. (I will ignore what is said to be the outcome of the bank's internal investigation.)[137] One aspect of the bank's illegitimate conduct, it was submitted, was then to appoint receivers. The respondents contended that, although Mr Davidson made threats to the safety of the property (including the cattle), the bank should have appreciated those threats as the threats of a distressed man. Duress was at play, it was submitted, from the time the overdrafts were overdrawn.

[226] I asked the respondents counsel what the bank should have done:

> HER HONOUR: And what do you say the bank should have done?
>
> MR WHITTEN: Well, that's a matter which we can't presently answer because we don't have disclosure of what – all of the documents the banks – bank has.
>
> HER HONOUR: Well, if we assume that it disclosed some misconduct on the part of its employees, what do you say it should have done?
>
> MR WHITTEN: Well, it should have reimbursed the money to Mr Davidson and released that fixed charge. That's what it should have done. And if they had done that, he would have had the cash flow to be able to continue on and he says that.
>
> HER HONOUR: And you say unprompted by any claim by Mr Davidson, the bank should have done that?
>
> MR WHITTEN: No. What we say is that once the bank knew that these factors were plain and were placing significant pressure on Mr Davidson, and they ought not to have sought to enforce by the appointment of receivers.

[135] Transcript of proceedings, 1 – 54.
[136] Ibid 1-56, lines 20 – 26.
[137] Ibid 1 – 60 – 1- 61.

> They ought not – they ought to then have attempted to enter into negotiations or discussions with him, in order to try and ameliorate his situation. But none of that was done. What they did was that they enforced their – what they saw was their rights under the security. Then, that, of course, was the camel that broke – the straw that broke the camel's back for Mr Davidson. He had to get some help.
>
> He'd, by that time, understood Mr Houlihan had been up to no good. That that had cost him a significant part of his overdraft that he couldn't sell his cattle. So he couldn't run his business, couldn't pay his expenses, and I'll take you to the evidence from Mr Donahue about all of these complaints. And that – so what else was he to do. So he engaged lawyers, and he got assistance from Mr Shannon. There's no dispute about that. But engaging lawyers and getting assistance from Mr Shannon doesn't translate necessarily into imputed knowledge that he had legal advice. Particularly, when there was no certificate – independent certificate provided from the deed of release.
>
> HER HONOUR: Why not?
>
> MR WHITTEN: Well, the whole purpose of that clause is to ensure that both parties know that they've had independent legal advice. Now, he says that he didn't get independent legal advice on the terms of deed – the certificate, if it had been provided.
>
> HER HONOUR: I'll just find that clause.
>
> MR WHITTEN: Okay. Four point 2A.
>
> HER HONOUR: Okay. And how would the bank have interpreted the correspondence that flowed before this deed of settlement was executed?
>
> MR WHITTEN: The bank would have interpreted that as him receiving some legal advice and legal assistance in relation to the negotiations.

[227] Counsel was, in that last answer, differentiating between advice in relation to negotiations leading up to the deed and advice in relation to the deed itself.

[228] The respondents also submitted that the bank ought not to have placed weight on Mr Shannon's statement that Mr Davidson had $50,000. They knew about the dispute which had been lodged with the Ombudsman and that there was $700,000 in contest. They should have "entered into negotiations with [Mr Davidson] to determine another way to try and resolve the issue for him, rather than just seeking to enforce, by the appointment of receivers, the security when they knew that … there was a substantial amount in dispute".[138] It was argued that they knew Mr Davidson had no access to money. Installing receivers meant that he was faced with two evils: do nothing, or sue. In negotiations, he faced the lesser of two evils: allow the receivers to continue, or sign the deed.

[229] It was suggested that Mr Davidson's circumstances fell within the decision of *Thorne*. I note that while the primary judge in *Thorne* described her conclusion as one of "duress",

[138] Transcript of proceedings 1 – 68, lines 13 – 35.

the High Court explained that her Honour's conclusion was more aptly described as one of undue influence. The High Court held that the agreements in *Thorne* were voidable due to both undue influence and unconscionable conduct.[139] The respondents do not argue that they have a claim in undue influence here.

The applicant's submissions

[230] The applicant emphasises the following facts –

- negotiations with a view to settlement were initiated by Mr Davidson's lawyers and Mr Shannon on his behalf within days of his filing his claim;
- Mr Shannon, on Mr Davidson's behalf, had input into the Heads of Agreement which were a precursor to the Deed of Settlement;
- also, Mr Davidson was represented by lawyers whom he had engaged to restore his cash position;
- the proceedings were adjourned several times to allow negotiations to continue;
- the signed Heads of Agreement were provided under cover of a letter from Mr Davidson's solicitors;
- the Deed of Settlement was the product of negotiations between the lawyers on behalf of the parties and, concurrently, Mr Shannon and the bank directly;
- the Deed went through several drafts before its final version;
- the Deed acknowledged that Mr Davidson and FNQCC had received independent legal advice;
- after the Deed was executed, Mr Shannon sent an e-mail of thanks to the applicant, which was copied to Mr Davidson;
- the Deed was not all one way – Mr Davidson and FNQCC secured the benefit of a moratorium on enforcement action; the retirement of the receivers; and interest concessions; and
- the whole point of the Deed of Settlement was to provide a resolution to Mr Davidson's claims without resort to a hearing. The tone of the negotiations conducted by Mr Shannon on behalf of Mr Davidson made it plain that he appreciated, and used as leverage, the fact that, if the terms of the deed were not satisfactory, then Mr Davidson would proceed with litigation (and go to the media). The claims expressly related to Mr Houlihan's alleged conduct and the releases were drafted from that perspective.

[231] Mr Davidson and FNQCC took the full benefit of the Deed of Settlement by exploring joint venture and refinancing options – as borne out by the evidence tendered by the applicant. He was also able to repay some money.[140]

[139] Thorne v Kennedy 350 ALR 1 [2], [29], [57].
[140] Ibid [53] – [102] and exhibits referred to therein.

[232] The applicant submits that the release in the Deed of Settlement was given in the context of negotiations.[141] There had been no illegitimate pressure upon Mr Davidson, exploiting his position of vulnerability: insofar as the bank understood things, Mr Davidson was not vulnerable to exploitation.

[233] The applicant's Queen's Counsel submitted:[142]

> … despite what Mr Davidson now wishes to say about not receiving legal advice and really misapprehending the notion that he was [granting a release to the bank] … one has to have regard to what the bank knew, even assuming that the bank knew that Mr Davidson was in dire financial circumstances, what the bank knew in reference to the deed was that he was represented by solicitors and another agent, who negotiated on his behalf substantial concessions, who … purported to relay his instructions, resulting in the entering into an agreement which provided substantial benefits to him … in circumstances where he expressly acknowledged having received legal advice, and fundamentally as a result of negotiations he … ostensibly instigated in respect of his own case.

[234] In reply to the contention that illegitimate pressure was applied upon Mr Davidson, exploiting his vulnerability because he was in no financial position to proceed with his claim, the applicant referred to the evidence from Mr Shannon that Mr Davidson had available to him $50,000 for legal fees.[143] Further, nothing suggests that the bank was aware of the circumstances Mr Davidson alleges he found himself in – that is of poor health, unable to put food on the table, without financial and legal advice et cetera. Indeed, all the indications were that Mr Davidson had an advocate from "Unhappy Banking" to assist him with his banking/financial concerns and he was legally represented. Indeed, on the evidence, Mr Davidson engaged several lawyers who communicated with the bank.

[235] Also, even when there was default, the bank did not immediately step in. Instead, it acted in terms of the deed of forbearance which was discussed.

[236] Mr Shannon assisted Mr Davidson in the Farm Debt Mediation which led to the 2015 Heads of Agreement. The applicant pointed to the effective moratorium on action until August 2015 and thereafter the moratorium in accordance with the HOA until 30 April 2016. Even then, Mr Davidson was to be given an opportunity to market the properties himself.

[237] The applicant submitted that Mr Davidson had been making a complaint about Mr Houlihan for years and was yet to "put his best case forward". He was yet to provide evidence of the financial implications of Mr Houlihan's (alleged) conduct even though those acting for him in the proceedings before Jackson J referred to a financial report which was two or three weeks away in August 2017. That Mr Davidson had every

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[141] Transcript of proceedings, 1 – 26, lines 40 – 45.
[142] Ibid 1 – 28, lines 30 – 42.
[143] Donahue affidavit JBD32.

opportunity to present his case but had not done so (for many years) was relevant to any discretion the court might have in this matter.[144]

[238] The applicant argued that the respondents were required to show (i) illegitimate pressure which (ii) *coerced* Mr Davidson to enter into the bargain: not that he did not know what he was doing – but that he had no other option because of the pressure.[145]

[239] The applicant argued that Mr Davidson's affidavit was fatal to his case. He did not say that he was left with no choice. He said he made a choice based on a misapprehension as to the effect of the deed. While that proposition was incredible (having regard to the evidence) regardless, he was not suggesting that there had been coercion.[146]

[240] Even if the inequality of bargaining position was brought about by the conduct of the bank – it was *exploitation* of that position which was critical. All that the bank had done was appoint receivers when Mr Davidson indicated that the secured property was at risk. The respondents did not point to any subsequent threat or pressure by the bank in connection with the settlement negotiations (nor, I note, do the contemporaneous documents reveal anything of that kind). "Everything" was triggered by Mr Davidson's own case, and his instigating settlement negotiations. Thereafter, there were bona fide negotiations in which he succeeded in obtaining the benefits sought by those negotiating on his behalf.[147]

[241] As to whether Mr Davidson had other options – he claims he had none because he could not in fact afford to proceed with the legal proceedings, but that was contrary to the way in which the negotiations were conducted. Indeed, if that were in fact so – then it can hardly be argued that the bank acted unconscientiously in arriving at a settlement with him, of proceedings he could not in fact pursue, which granted him concessions.

[242] When the HOA was signed, the receivers had been retired. On the evidence, Mr Davidson was represented by Mr Shannon and had an opportunity to seek legal and financial advice.

[243] The respondents make no allegation of illegitimate pressure in connection with the HOA which was the outcome of a mediation conducted, at Mr Davidson's request, and by a mediator chosen by Mr Davidson under the Farm Debt Mediation Scheme.

[244] The applicant also noted that the draft statement of claim referred to Mr Davidson's severe economic and actual duress and a disparity of bargaining position, but did not allege exploitation of that disparity. Its focus is on the lack of independent advice which he received. Mr Davidson may have a claim against his lawyers but the evidence did not establish a case of the bank compelling him to enter into those documents.

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[144] Transcript of hearing 1- 38, lines 5 – 13.
[145] Ibid 1 – 39, lines 1 – 6.
[146] Ibid 1 – 39, lines 25 – 45.
[147] Ibid 1 – 41.

Real prospects of success in a claim for economic duress?

[245] The release given in 2014 was, in a sense, confirmed by the more general release given in 2015.

[246] The respondent's proposed allegations are set out in the draft pleadings exhibited to Mr Davidson's affidavit:[148]

> 18. On 27 May 2014 [Mr Davidson and FNQ] executed a Deed of Settlement with [the Applicant] ("Deed").
>
> 19. On 19 August 2015 [Mr Davidson and FNQ] executed a Heads of Agreement with [the Applicant] after a farm debt mediation ("HOA").
>
> 20. [Mr Davidson and FNQ] were under severe economic and actual duress at the time of execution of the Deed and the HOA as:
>
> (a) A the time of execution of the Deed:
>
> (i) receivers were appointed over the farming operations of [Mr Davidson] and the bank accounts of [Mr Davidson and FNQ];
>
> (ii) [Mr Davidson] was unable to pay for ordinary household expenses and put food on the table;
>
> (iii) [Mr Davidson] could not source any funds from family or friends;
>
> (iv) [Mr Davidson's] health had deteriorated significantly;
>
> (v) [Mr Davidson, FNQ and Ms Nagatsuma] did not receive any independent legal advice prior to the execution of the Deed;
>
> (vi) [Mr Davidson, FNQ and Ms Nagatsuma] did not receive any independent financial advice prior to the execution of the deed.
>
> (b) At the time of execution of the HOA:
>
> (i) [Mr Davidson, FNQ and Ms Nagatsuma] had the same issues as outlined in paragraph 20(a) herein;
>
> (ii) [Ms Nagatsuma] was severely ill due to the stress from [the Applicant's] dealings with [Mr Davidson]; and
>
> (iii) [Ms Nagatsuma] was ill during a pregnancy from stress.
>
> 21. [Mr Davidson and FNQ] had a disparity of bargaining power with [the Applicant] for the reasons outlined in paragraph 20 herein.

[148] Davidson affidavit, filed 18 May 2018, WAJD33, exhibit 270.

[247] I note that they do not allege pressure on the part of the bank. I acknowledge however that they have not been settled by counsel and for that reason, I have concentrated on Mr Davidson's evidence.

[248] At the heart of a claim for economic duress is the use of illegitimate economic pressure to secure a benefit – including assent to an agreement. The law will not give effect to an apparent consent which was induced by illegitimate pressure exercised by one party upon another (*Crescendo*).

[249] The illegitimate pressure nominated in this case includes the bank's "refusal" to consent to the sale of cattle and the appointment of receivers in 2014, against the background of its employee's fraudulent conduct.

The 'refusal' to consent to the sale of cattle

[250] As has been established, the bank's consent was not necessary under the GSA. And regardless, the bank was showing all the signs of being about to give its consent to the Landmark sales when Mr Davidson indicated that the secured property, including the cattle, were at risk. I say "showing all the signs" for the following reasons:

- The tone of the correspondence suggests the bank's preparedness to put something in writing if necessary; and
- It is reasonable to infer that the bank would not have refused to provide written consent to the Landmark sales given its understanding of the GSA.

[251] Also, there is no suggestion in the material, nor was a submission made to the effect, that the bank's 'withholding' of consent interfered with any cattle sales apart from the Landmark sales.

[252] I find that the respondents have no real prospects of establishing that there was illegitimate pressure in the bank's approach to Mr Davidson's request for consent to the sale of the cattle.

The appointment of receivers

[253] The respondents submit, in effect, that the applicant should have realised that Mr Davidson's statements about the risks to the secured property were the statements of an emotional man in dire financial circumstances.

[254] Stress and distress may well have motivated Mr Davidson's statements about the risks to the secured property but, in my view, from the bank's perspective, his state of mind did not lessen the risk to the property.

[255] The respondents also seem to suggest that the bank ought to have acted on the basis that Mr Davidson had been a victim of their employee's misconduct, and held off on taking steps to enforce the securities regardless of the default (see the extract from the hearing above). But the parties were in a commercial/financial relationship and, in my view, the

bank was entitled to act in a timely way to protect its commercial interests, pending the resolution of the dispute over Mr Houlihan's conduct (*cf Mckay, Berens*).

[256] In addition, in my view, it was relevant to the bank's decision to appoint receivers when it did that Mr Davidson had not provided the bank with the financial data it repeatedly requested and (though not as relevant) that he said (on 26 March 2014) that he had been advised not to contact the bank.

[257] Also relevant to the issue of the conscientiousness of the bank's conduct was that it acted with the permission of the Financial Ombudsman Service (*cf Karam*). I acknowledge that the bank's belief about the legitimacy of its conduct does not determine the question whether its conduct amounted to illegitimate pressure (*Verve v Woodside*) – but the bank's seeking and obtaining the permission of the Ombudsman to appoint receivers is relevant to the evaluation of the legitimacy of the pressure applied. It was certainly not unlawful.

[258] Mr Davidson might have been overwhelmed by his financial circumstances. The appointment of receivers might have stifled him financially but that does not mean that the bank's conduct amounted to illegitimate pressure (*Cockerill*). In my view, the bank was entitled to take legitimate steps to preserve its interest in the context of their commercial relationship.

[259] I find that the respondents have no real prospects of establishing that the appointment of receivers, in all of the circumstances, amounted to illegitimate pressure.

In case there was illegitimate pressure

[260] In case I am wrong about the legitimacy of the pressure applied by the bank, I have considered the respondents' case in economic duress *as if* illegitimate pressure had been applied.

[261] While there was a significant financial inequality between the bank and Mr Davidson[149] that is not the "essence" of the action in duress: nor is the illegitimacy of the conduct alleged *of itself* the essence of the action. The essence of the action is the wrongfulness of the conduct *and* its having the practical effect of compulsion or the absence of choice (*Cockerill*).

[262] Thus, even if Mr Houlihan's conduct and the appointment of receivers and the "withholding" of consent to cattle sales amounted to illegitimate pressure – that is not the end of the matter. The illegitimate pressure must be coercive – that is, it must have been a cause of Mr Davidson's decisions to twice release the bank from any claim he might have arising out of Mr Houlihan's conduct.

[263] Mr Davidson is the best witness to the effect of the bank's pressure upon him.

[149] And FNQCC.

[264] An arguable case in economic duress is dependent upon evidence from Mr Davidson that he gave the releases because he was coerced by the conduct of the bank to do so. Mr Davidson does not give that evidence.

[265] His first affidavit deals with his contact with Mr Houlihan and Mr Drewitt and the establishment of the loan. It deals with the underweight cattle and Mr Houlihan's alleged misconduct. He describes the "massive financial hole" he was in;[150] his contacting Unhappy Banking and Mr Shannon; and his referring the matter to the Financial Ombudsman Service.

[266] He alleges fraud and forgery by Mr Houlihan and fraud by Mr Drewitt placing him in a position of financial hardship. He asserted that the fixed charge meant that he could not sell cattle. (I have already dealt with that – but will assume for the moment that it is true.) He alleges fraud in connection with the GSA and the charge over 6000 head of cattle and says that he would not have signed it had he known he could not trade without consent.[151]

[267] He does not mention the circumstances surrounding the appointment of receivers in 2014, but says that he was "forced" to file proceedings to have them removed.[152] He provides no detail about the circumstances leading to his signing the Deed of Settlement in 2014 – apart from saying that it occurred "after some discussions".[153]

[268] He says at the time that he was under "severe stress and stain",[154] at least in part, as a consequence of his not being able to fund his Supreme Court proceedings or his lawyers or counsel or the travel required for hearings and negotiations.[155] (I will assume that he was unable to conduct negotiations over the telephone.) He was also not able to run his farm.[156]

[269] He describes the personal consequences of his difficult financial circumstances and says that he received a phone call from his lawyer advising him that were he not to sign the deed, receivers would be appointed the following day.[157] He says, distraught, he signed the deed:[158]

> I had no choice but to sign the Deed of Settlement as I did not have the funds to continue with the Supreme Court action. If I did not sign it the receivers would be appointed and I would have no money to operate the business I had worked so hard to build up or even pay for living expenses.

[270] That evidence must be understood in the context of the fact that it was Mr Davidson who *initiated* settlement negotiations and they proceeded *as if* he had the ability to continue with his action. By signing the deed, the receivers were retired; he received certain

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[150] Davidson affidavit [24].
[151] Ibid [49].
[152] Ibid [50].
[153] Ibid [51].
[154] Ibid [52].
[155] Ibid [53].
[156] Ibid [55].
[157] Ibid [63].
[158] Ibid [64] – [65].

interest concessions and extra time to comply with his, and FNQCC's, obligations to the bank.

[271] In his first affidavit, Mr Davidson says that he signed the deed with great reluctance without receiving advice on its contents:[159]

> I did not get any opportunity, nor was I requested, to obtain financial advice on the terms of the Deed of Settlement. I did not read the Deed of Settlement as it had to be signed quickly and returned to my then lawyers.

[272] In his second affidavit he says that he did not know that the deed contained a release.

[273] He gave similar evidence about signing the HOA without knowing that it contained a release.

[274] While Mr Davidson's evidence explains how his financial circumstances were affected by the bank's conduct – including the alleged fraudulent conduct of Mr Houlihan – he does not say that he gave the releases under the coercion of that conduct. He says he did not know that he was releasing the bank (and its employees) from any claims he might have arising out of Mr Houlihan's conduct.

[275] Frankly, such a claim is hard to accept, particularly having regard to the documents reflecting the negotiations which took place and the assistance provided to Mr Davidson by Mr Shannon and his lawyers.

[276] Mr Davidson's bargaining position lay in his being able to continue with the proceedings. The initiation of settlement negotiations was, in effect, an offer by Mr Davidson to discontinue the proceedings if the bank were to do certain things. It was discontinuance of the proceedings that he 'brought to the table'. His advocate clearly recognised that and traded upon it. It is also hard to accept that Mr Davidson discontinued the 2014 claim but believed he could bring it again in the future. The offer to discontinue the 2014 proceedings was of limited value without an accompanying release.

[277] I note that in *Thorne,* on the question of causation, the plurality said:[160]

> Where duress, undue influence, or unconscionable conduct is otherwise shown, an inference of the necessary causation or contribution is readily drawn if the particular transaction cannot reasonably be accounted for by "ordinary motives" …

[278] Granting the release in this case, in the context of negotiations initiated by Mr Davidson to settle the legal proceedings he had started, is, in my view, reasonably accounted for by ordinary motives.

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[159] Ibid [68], [71], [72].
[160] Thorne v Kennedy 350 ALR 1 [24] – citing Allcard v Skinner (1887) 36 Ch D 145 at 185 per Lindley LJ.

[279] Assuming however that Mr Davidson's evidence is true, and he did not know that he was releasing the bank from further claims when he signed the Deed in 2014 or the HOA in 2015, the question is whether it provides a basis for an arguable case in economic duress.

[280] Economic duress is the illegitimate application of economic advantage to place another in a position in which they have no alternative but to submit to the demand or request made by the person in the position of economic advantage.

[281] Mr Davidson said more than once that he did not know about the releases. He could not therefore have been feeling that he had no choice but to give them in the face of the economic pressure the bank was asserting. It was, he says, ignorance that was operating on his mind when he signed the documents containing the releases – not coercion.

[282] Accordingly, I find that even if illegitimate pressure were applied, the respondents do not have real prospects of success in a claim to set aside the releases on the basis of economic duress.

[283] I have also considered the matter as if Mr Davidson had alleged coercion.

[284] I note that, from the bank's perspective, he had a reasonable alternative open to him; namely continuing with his legal proceedings. In that light, the release in the 2014 Deed may be viewed as part of a compromise of competing claims (*cf Mitchell*).

[285] Also, there was no "protest" when the releases were given, nor any attempt soon thereafter to avoid them (*cf Pao On*). Also, Mr Davidson took advantage of the other terms of the Deed and HOA.

[286] Further, even if there had been pressure applied, Mr Davidson was, on the evidence, legally advised and robustly supported by Mr Shannon. That is relevant to the quality of his assent to the releases – which is the focus of a claim in economic duress (*Cockerill*).

[287] Even on the basis that illegitimate pressure was applied, I do not consider that the respondents have real prospects of success in their claim based upon economic duress.

[288] For completeness, I note that the evidence did not provide the grounds for an arguable case that, were it not for the conduct of the bank's employees, the respondents would not have been in default. Apart from Mr Davidson's inadmissible statements that he "believed" that to be so, there was no other evidence relevant to that issue presented.

Injunctive relief

[289] The applicant's evidence of the reaction of both respondents to the sale of their other properties provides a basis for the injunctive relief sought. There were no submissions made to the contrary.