SUPREME COURT OF QUEENSLAND

CITATION:	*ANZ Banking Group Ltd v Rodgers & Anor* [2003] QSC 304
PARTIES:	**AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (ABN 11 005 357 522)** (plaintiff) **v** **STEPHEN ALEXANDER RODGERS and ROSLYN RODGERS** (defendants)
FILE NO:	S 7655 of 2002
DIVISION:	Trial Division
PROCEEDING:	Civil Trial
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	17 September 2003
DELIVERED AT:	Brisbane
HEARING DATE:	1, 2, 3, 4, 5 September 2003
JUDGE:	Muir J
ORDER:	**Judgment for the plaintiff**
CATCHWORDS:	*Property Law Act* 1974 (Qld), s 84 *Uniform Civil Procedure Rules* 1999 (Qld), r 149 CONTRACT – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – Alteration of Written Instrument – where the defendants defaulted on the repayment of monies and the plaintiff sought to rely on security documents executed by the defendants – where the defendants alleged that either the documents were unenforceable or that the plaintiffs were estopped from relying on the terms and conditions of the loan set out in the offer documents – whether the terms and conditions of the loan could be relied upon by the plaintiff – whether the security documents had been materially altered following execution – whether the security documents had been forged or executed by parties other than the defendants *Armor Coatings (Marketing) Pty Ltd v General Credits (Finance) Pty Ltd* (1978) 17 SASR 259 *FAI Insurances Ltd v Pioneer Concrete Services Limited* (1987) 15 NSWLR 552 *Farrow Mortgage Services Pty Ltd (in liquidation) v Slade &*

Nelson (1996) 38 NSWLR 636
Master v Miller (1791) 4 Term Rep 320
Moody v Cox & Hatt [1917] 2 Ch 71
Meyers v Casey (1913) 17 CLR 90
Warburton v National Westminster Finance Australia Ltd (1988) 15 NSWLR 238

COUNSEL: I R Perkins for the plaintiff
The defendants appeared on their own behalf

SOLICITORS: Minter Ellison for the plaintiff
The defendants appeared on their own behalf

The original allegations in the statement of claim

[1] **MUIR J:** The plaintiff in its claim and statement of claim claims possession of a parcel of land registered in the name of the defendants and mortgaged by the defendants to the plaintiff as security for the indebtedness of Rodgers Family Investments Pty Ltd ("the company"). The following summarises the allegations in the statement of claim.

[2] The mortgage secured repayment to the plaintiff of moneys owing or to become owing to the plaintiff by each of the defendants under separate deeds of guarantee and indemnity dated 5 October 2001 provided by the defendants to the plaintiff. Under each guarantee the defendant guarantors agreed to pay on demand to the plaintiff all moneys owing or which may become owing by him or her to the plaintiff. In May 2002 the company was in arrears in the payments due under three loan facilities provided to the company by the plaintiff.

[3] On 8 May 2002 the plaintiff, by notice in writing, demanded payment by the company of $449,319, being the amount owing by the company to the plaintiff under the facilities. A notice of demand for such sum was also served on each of the defendants under his or her guarantee. The company and the defendants failed to pay in response to the demands and on 16 July 2002 the plaintiff served on each of the defendants a notice pursuant to s 84 of the *Property Law Act* 1974. It required payment of the sum of $475,438 and specified that should such sum not be paid within 31 days the plaintiff would take possession of and sell the land. No payment was made within the time specified and the defendants failed to deliver up possession.

The original defence and counterclaim

[4] The defendants filed a three page defence and counterclaim on 8 October 2002. In it they did not admit most of the allegations in the statement of claim. In particular, they did not admit the allegations concerning the facilities or the giving of the mortgage and guarantees on the grounds that such documents "are currently under investigation for authenticity of the signatures and/or initials by the police, ASIC, and the Stamps Department".

[5] It was further alleged that –

(a) the plaintiff "is unable to rely on" the mortgage for its full terms, true meaning and effect;
(b) the guarantees do not exist;

(c) the amount on the guarantee "supplied by Ms S Stitz[1] shows an amount having been altered from $419,000 to $427,000 without approval of (Mr) Rodgers";

(d) the company is not in default "of any facilities while these documents are under investigation for authenticity of the signatures and/or initials have been verified by the police, ASIC, and the Stamps Departments".

[6] In the part of the document headed "counterclaim" the defendants purported to "reserve the right to enter a counterclaim" on the completion of investigations by the authorities mentioned above.

The amended statement of claim

[7] On 5 August 2003 leave was given to the plaintiff to amend the statement of claim to allege that, if the guarantees and mortgage had not been duly entered into or were otherwise unenforceable, there was an agreement to provide such securities constituted, inter alia, by acceptance of the letters of offer.

The amended defence and counterclaim

[8] On 22 August the defendants filed a 38 page amended defence and counterclaim. The document contains much material of an argumentative and evidentiary nature. It plainly falls short of the requirements of r 149 of the *Uniform Civil Procedure Rules*, and it is not easy to extract from it a coherent body of material allegations.

[9] The following is my summary of what I perceive to be the essence of the defendants' contentions.

1. The letters of offer cannot be relied on as –
   (a) the conditions precedent stated in the letters were not complied with;
   (b) the subject documents were prepared fraudulently by one Cameron Blair on behalf of the plaintiff with full knowledge of "the ATO writ on (Mr) Rodgers";
   (c) the documents were not explained to the defendants;
   (d) the plaintiff advanced to the company more than the sum specified in the letters of offer;
   (e) the plaintiff did not accept "the original copy of the letters of offer";
   (f) the letters of offer did not represent the true agreements between the plaintiff and the defendants "in which some conditions were to be waived".

[10] In another set of allegations it is alleged, in the alternative, that if the letters of offer are valid the plaintiff is estopped from relying on them because of the plaintiff's "misconduct". There then follows a series of complaints about the internal processing of the subject loan transactions by the plaintiff with reference to "risk grade worksheets" and allegations –

(a) of failure to explain the contents of a proposal letter from the plaintiff of 3 September 2001;

(b) of delay in presenting the letters of offer to the defendants;

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1 Ms Stitz is a solicitor in the employ of the plaintiff's solicitors.

(c) that Mr Blair misrepresented the company "with the plaintiffs (sic) intention to support RFI[2] in the commercialisation of Wodda.com Limited";

(d) that the plaintiff's records show that the plaintiff did initially allow "the director of RFI to believe that the flexibility was acceptable and that (Mr) Blair was aware that this was necessary for the director of RFI to agree to move the company's lending facilities from the National Australia Bank to the ANZ Bank";

(e) that on 28 November 2001 the plaintiff advanced a further $11,716 to Baroona Computer Centre without providing the company with a further letter of offer;

(f) that Mr Blair took the company's file with him when he was transferred to Darwin, the company was not informed of the file's removal and the plaintiff's documents show some inconsistencies concerning the date of signing of the security documents;

(g) that the company's file was sent to Rockhampton and back to Brisbane without the company being informed;

(h) that the plaintiff agreed that the company would pay the plaintiff $50,000 by 21 May 2001 but "the plaintiff did not correspond with the company to say that otherwise, making it impossible for the defendants to know what the plaintiff's true intentions were";

(i) that Mr Ashe informed Mr Rodgers, on behalf of the defendants, after 2 May 2002 that the giving of notice of default in a letter of 2 May 2002 "was just a procedure that the bank carried out" as the bank was not aware of the company's trading history;

(j) that on 21 June 2002, the plaintiff provided the company with an inaccurate notice of demand in that it failed to have on it the company's correct ACN;

(k) that the plaintiff did not correct the notice and appointed a receiver and manager on 19 June 2002;

(l) that the plaintiff refused to provide the defendants with a copy of the mortgage debenture under which the receiver and manager was allegedly appointed.

[11] Other allegations are that –

(a) the acknowledgments, acceptances and letters of offer "were presented to the defendants for the first time at the meeting on 5 October 2001, and signed in the plaintiff's office and remained at the plaintiff's office, immediately after the defendants signed these documents";

(b) the guarantees were "prepared, executed and altered by the plaintiff without the authority" of either of the defendants;

(c) the form S6/148 (letter depositing documents in support of guarantee) and the mortgage were "prepared, executed and altered by the plaintiff without the authority" of the defendants.

[12] It is alleged also that the matters set out in paragraph 3.2(i) to (xxxvii) of the amended defence which are summarised above –

(a) constitute "misconduct" disentitling the plaintiff to equitable relief;

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[2] An acronym for the company.

(b) constitute "misconduct" by which "the plaintiff is estopped from relying upon the letter of offer".

[13] Relying on the same pleaded allegations, the defendants admit to signing the acknowledgments by guarantors in respect of each of the letters of offer but allege that having regard to such matters –

(a) the acknowledgements are part of the letters of offer which are invalid and of no legal effect;
(b) the plaintiff is estopped from relying on the letters of offer (including, implicitly, the acknowledgments) by reason of its misconduct;
(c) the plaintiff because of its misconduct ought be denied equitable relief;
(d) the various notices issued under the securities are ineffective.

The defendant's evidence as to the documents signed on 5 October 2001

[14] The defendants admit that in Mr Blair's office in the Bolsover Street branch of the plaintiff on 5 October 2001 they were provided with the letters of offer and that the signatures on them purporting to be those of the defendants are authentic and were placed there that day.

[15] I find that Mrs Rodgers signed on behalf of the company the following attachments to each letter of offer: an acceptance of the terms and conditions of the letter of offer; an attached form of "consent to providing information to a guarantor" and an attached form of "guarantor acknowledgement". She signed the last mentioned document also in her capacity as guarantor. Also signed by her in each case was an attached "extract of minutes by a company approving letter of offer", certifying it to being a true copy of minutes of a duly held meeting of the board of directors of the company. Mr Rodgers signed the form of "guarantor acknowledgement" attached to each letter of offer as guarantor.

[16] According to the defendants, no other documents in relation to the subject loan transaction were signed at the meeting.

Mr Blair's evidence as to the documents signed on 5 October 2001

[17] Mr Blair's agrees with the defendants that the only persons present at the meeting on 5 October in which letters of offer were signed were the defendants and him. His evidence is that at the meeting each of the defendants signed: their guarantee, a related form S6/148,[3] a mortgage and a mortgage debenture. He swears also that he witnessed the signatures on these documents at the meeting. Mr Blair said that he told the defendants, before they signed the guarantees, that they could take them away and obtain legal advice and that they responded with an observation to the effect that they had "signed enough guarantees already to know about them".

[18] The plaintiff's records contain a form of statutory declaration in which Mrs Rodgers makes a declaration as to the value of the assets of the company. The name of the declarant "Roslyn Rodgers" is in handwriting which Mr Blair swears is his. He said

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[3] A form which specified the document or documents deposited by the guarantor in support of the guarantee. The form under the heading "security" described a registered mortgage over the land.

that he witnessed Mrs Rodgers' signature on it and swears that he would not have done so unless Mrs Rodgers had first signed. He professes no recollection however of the actual execution of the document. As described below, when Mr Blair signed in his capacity as witness, the document was uncompleted in some significant respects.

[19] Mr Blair is also unable to recall whether an Australian Securities and Investment Commission form 309 "Notification of details of a charge", which bears signatures purporting to be those of Mrs Rodgers and which is dated 22 January 2002, was signed at the meeting. He swore to a belief, based on his usual practice, that the document would have been signed at the meeting.

[20] The mortgage purports to be signed by Mr and Mrs Rodgers and initials, purporting to be those of the signatories, appear in the margin of the form beside the descriptions of the mortgaged land. Mr Blair professes a recollection of seeing the defendants sign the mortgage at the meeting. He swears that he would not have witnessed the signatures on the document if he had not seen it being signed. He states that the document was signed by the plaintiff before being signed by the defendants and that, in accordance with his usual practice, he would have given a copy of the Bank's standard terms of mortgage to the defendants at the meeting.

Mr Sleaford's evidence

[21] Mr Matthew Sleaford, who was the assistant manager at the plaintiff's Bolsover Street branch at relevant times, prepared a securities worksheet dated 28 September 2001 for the purposes of requesting the plaintiff's securities department in Brisbane to prepare a "transfer of mortgage" and other unspecified documents in relation to a proposed loan to the defendants. By another such document dated 2 October 2001 he requested preparation of a mortgage debenture, a standard mortgage, director's unlimited guarantee, director's guarantee limited to $419,000, and linking forms. The worksheet contained a request that the documents be supplied on 4 October.

[22] Mr Sleaford swears that the usual practice in the branch was that, after the execution of securities documentation by a customer in Mr Blair's presence, Mr Blair would give them to him "to tidy up and finalise". He would then check the documents to ensure that they had been duly signed and properly completed. Once he had completed this task the documents would be given back to Mr Blair for checking.

[23] Mr Sleaford's evidence in relation to the documents under consideration is as follows.

The statutory declaration

He recognises the words "Rockhampton" and "Cameron Peter Blair Justice of the Peace" in the attestation clause as his handwriting.

ASIC form 309

He recognises the word "director" where it appears on pages 1 and 2 as his handwriting. It was his usual practice to insert such descriptions before the forms were signed.

ASIC form 350

He recognises the word "director" as his handwriting. It was his usual practice to insert such a description before the forms were signed.

Mrs Rodgers' guarantee

He inserted the date in the space provided for that purpose on page 1 of the guarantee and in the signing clause on page 18 above the words "print name of witness" he printed "Cameron Peter Blair". Above the words "print address of witness" he printed "C/O ANZ Bank Rockhampton" and above "print occupation of witness" he printed "Bank Manager". Although he does not actually recall inserting those words he recognises his handwriting and is "confident" that he would have inserted them shortly after signing as part of "the usual practice of tidying up and finalising the security documents".

Mr Rodgers' guarantee

He completed this guarantee in the way and to the extent that he completed Mrs Rodgers' guarantee, except in respect of the provision in the former guarantee of a limit on the guarantor's liability. On page 1 of Mr Rodgers' guarantee there is a box in which the following appears –

One of these boxes must be deleted. Each guarantor and his or her witness must initial the deletion	X **Limited Liability** $~~$419,000.00~~ $427,000-00 **Amount in words** ~~FOUR HUNDRED AND NINETEEN~~ x ~~THOUSAND DOLLARS~~. FOUR HUNDRED AND TWENTY SEVEN THOUSAND DOLLARS **plus interest, costs and other amounts (refer to clause 2.2)** **Unlimited Liability** [*this has XXX through it*]	**Initials of each guarantor and witness**

The words in bold appear in the printed form. Mr Sleaford crossed out $419,000.00 in words and figures and inserted $427,000-00 in words and figures in his handwriting before the "sign up meeting". He also placed crosses in the places where Mr Rodgers and Mr Blair were to initial the alterations.

The mortgage

[24] Mr Sleaford confirms Mr Blair's evidence that the mortgage document was signed by the plaintiff before execution by the customer, in accordance with the usual practice. He recognises the words "Cameron Peter Blair Justice of the Peace" appearing under Mr Blair's signature as being in his handwriting. He expects that those words would have been inserted as part of the "clean up" process. He also confirms Mr Blair's evidence that, in accordance with the plaintiff's usual practice, a copy of the bank's standard terms of mortgage would have been with the mortgage document he gave Mr Blair prior to the 5 October meeting.

[25] He recalls that after the mortgage had been prepared by the plaintiff's securities department and before its signature by the defendants, he added the description of another parcel of land to the description in the mortgage of the land mortgaged.

Ms Matta's evidence about the completion of the security documents

[26] Ms Debra Matta commenced work at the Bolsover Street branch on 29 October 2001 as an assistant manager. Before Mr Blair departed for Darwin she answered to him. After his departure Mr Nagle became her immediate superior. She recalls that shortly after Mr Nagle replaced Mr Blair, some securities documents relating to the company were found by her in what used to be Mr Blair's office. She does not now recall the precise description of the documents or the extent to which they had been completed. She does recall that the security documents were unregistered.

[27] After Mr Nagle's return from vacation Ms Matta recalls becoming aware of his going to a meeting with the defendants outside the bank on 22 January 2002. She further recalls him giving her "a stack of security documents" after returning to the bank and telling her in effect, that they were ready for registration. Ms Matta assumed that the documents given to her which did not bear a date, had been signed that day. She inserted that date as the date of signing in: the mortgage debenture; an authority to date form signed on behalf of the company; a statutory declaration sworn by Mrs Rodgers and bearing Mr Blair's signature as a witness and in an Australian Securities and Investment Commission form 350. She also wrote the figure 552264 in paragraph 2 of the statutory declaration. She made no additions or alterations to the mortgage or to the guarantees.

[28] Having completed the documentation in this manner she attended to registration.

Mr Mills' evidence about the finding of securities documents and the location of the company's file

[29] Mr Mills was a relationship manager at the Bolsover Street branch at relevant times after September 1999. He recalls having a conversation with Ms Matta at a time after Mr Blair's departure for Darwin whilst Mr Nagle was on vacation. After that conversation, he and Ms Matta searched for the company file without success. He then telephoned Mr Blair in Darwin and it was agreed between them that Mr Blair, whom he ascertained had the file, would continue to deal with it. Mr Mills made a diary note of 7 January 2002 referring to these matters.

[30] A diary note of Mr Mills of 16 January 2002 records the receipt of the company's file from Darwin and makes mention of a temporary limit of $5,000 on an account of Wodda.com due to expire on 18 January.

Mr Nagle's evidence relating to the completion of the securities

[31] Mr Nagle was informed by Mr Blair before the latter's departure that he was taking the company's file with him to Darwin. He does not recall having any dealings with the defendants until after his return from vacation at around 21 January 2002. He then had a conversation with Mr Mills or Ms Matta about securities documents relating to the company. Having obtained the company's file he telephoned Mrs Rodgers and arranged a meeting. At the meeting, according to his recollection, he asked Mrs Rodgers about excesses on the accounts and the manner in which it was proposed that they be cleared. He gave Mrs Rodgers "a short time frame within which to clear the excesses". Mrs Rodgers did not on this occasion or on any subsequent occasion suggest that there was any arrangement with the plaintiff under which there was to be a postponement of the company's obligation to make

repayments of principal or payments of interest. Nor was it suggested that any securities were to remain unregistered until the happening of a future event.

The diary notes of 22 January and Mr Nagle's explanation of them

[32] The following diary notes dated 22 January 2002 appear in the plaintiff's file relating to the company –

> "Called at office of Ros and Stephen Rodgers to discuss current excesses on a number of group accounts.Excesses have been caused by expiry of temporary limits on account of;Rodgers Family Investment P/L T/A Baroona Computers and,Rocknet.
> After lengthy discussions it was identified that original excesses were caused by inadequate working capital when debts were restructured from NAB and financing of personal CC of R Rodgers.
> Both above businesses appear to be profitable however these profits are being used to fund losses of Dot Com business Wodda Ltd.
> I have negotiated all current excesses be cleared by the 31/01/2002 from an injection of working capital via outside silent investor Solly Stanton who is to inject $100000 by that date.
> They have requested we honour drawings up to previously approved limits until full clearance of excesses on 31/01/2002.
> Financial Position
> Full position to be identified once all trading figures are received for all entities.Timing of these will be advised 31/01.
> …
> Security-all security is now in a registrable form and has been sent for registration.
> Risk grade- Approved as a 5E (10/01)
> All excesses since Temporary Limits has expired have been approved under managers CAD
> In view of discussions I decided to complete CRAA on all business entities and this has identified Court Writ by Commissioner of Taxation
> New Risk grade worksheet has been completed and shows in excess of 29 points
> Have recorded 8E until full position is known."

This file note was initialled by Mr Nagle, Mr Williams and Ms Matta.

> "22/01/2002 – Rodgers Family Investments
> 1. RM visited customer and had security documents signed. Documents sent to state securities for stamping and registration. Security Docs Sent out today:
> 1. Release of Mortgage for Marks Road Yeppoon.
> 2. Transfer of Mortgage from NAB for 9/260 Quay Street, Rockhampton.
> 3. RM Debenture over Rodgers Family Investments Pty Ltd.
> 4. ANZ Mortgage over Marks Road and Quay Street
> 5. Standard Unlimited Guarantee given by Ros Rodgers and S148 for Mtg referenced at #4.
> 6. Standard Limited Guarantee to $427,000 by Stephen Rodgers and S148 for Mtg referenced at #4.

> Performed CRAA (commercial) on Stephen (file no. 43287309) and Ros (file no. 155054784).
> Contacted Merchant Services regarding credit policy for new services. It is standard procedure for a CRAA to be done upon receipt of the completed application. Any Defaults/Judgements would need to be paid in full before service being approved.
> (*signature supplied*) (*signature supplied*)
> RM: AN MA: DM"
>
> "Called on Ros and Stephen Rodgers to complete execution of Limited Guarantee $419,000 given by Stephen Alexander Rodgers in favour of Rodgers Family Investment P/L and S148 linking item D1 and D2 to Guarantee, and Unlimited guarantee given by Ros Rodgers supported by security items D1 and D2.Mortgage Debenture was also signed under seal.
> This has not been completed although DN of 5/10/01 advised all documentation was in order.
> They were handed the documents and they were explained in a general way. They were given the opportunity to read or take the documents away or seek legal advice. They stated they understood their liability and executed documents in my presence."

The third diary note was signed by Mr Nagle only.

[33] Mr Nagle accepts that diary notes 2 and 3 are inaccurate insofar as they state expressly or implicitly that securities relating to the company's facilities were signed in the course of Mr Nagle's visit to the company on 22 January. He does not believe that the second diary note was prepared by him and asserts that if the securities had been signed in his presence on 22 January 2002 it would have been his practice to prepare a diary note recording the signing.

[34] I conclude that it was most probably prepared by Ms Matta because she had responsibility of the handling of the securities and related documents. The use of the third person ("RM visited customer …") at the commencement of the note also suggests that the document was not prepared by Mr Nagle. The language of the diary note may be contrasted in this regard with that of the other two notes.

[35] The content of the second diary note is readily explained by a mistaken belief on Ms Matta's part that the documents given to her by Mr Nagle had been executed in the course of Mr Nagle's visit to the defendants' offices on the 22nd.

[36] Mr Nagle cannot satisfactorily explain the third diary note. His recollection is that Mr Rodgers was not present at the meeting on the 22nd. Initially, he was disposed to reject the possibility that Mr Rodgers executed his Webb Publishing guarantee that day. In cross-examination, however, he accepted that he may well have seen Mr Rodgers at some time on the 22nd in relation to the Webb Publishing guarantee. He recalls being told on his return from holidays that securities, including a guarantee from the defendants, supporting the plaintiff's lending to Webb Publishing Pty Ltd had not been signed. He recalls having to arrange for the defendants to sign the guarantee and thinks it possible that when he prepared the diary note he confused the company's securities with those relating to Webb Publishing Pty Ltd.

[37] Mr Nagle did not witness the signatures on any of the documents referred to in the diary note and his handwriting does not appear on them.

[38] The only document on which, relevantly, Mr Nagle's handwriting appears is a form S6/148 signed by Mrs Rodgers. On that form Mr Nagle inserted the date 5/10/01 in a space near the top of the form acting on the belief that, having regard to the fact that that date was written in two other places on the form, it had been signed on that date. He did not recall the circumstances in which he had completed the form. In my view, the likelihood is that he did so on 22 January as part of a process of checking that the documents relating to the company's facilities had all been completed.

[39] The third diary note appears to have been prepared by Mr Nagle. It is precise as to the purpose of the visit to the defendants and as to the documents to be executed. It is impossible to believe that if Mr Nagle completed it on or about 22 January, he did so labouring under a mistake that he was preparing a diary note in respect of a visit to the company's offices for the purpose of having signed documents relating to the defendants' guarantee of the obligations of Webb Publishing Pty Ltd.

[40] I will defer further consideration of these diary notes and of the evidence of Ms Matta and Mr Sleaford until after discussing the evidence of the handwriting expert called by the plaintiff.

Relevant dealings between the parties and events after 5 October 2001

[41] On 16 October 2001, the plaintiff advanced moneys at the direction of the defendants to discharge their obligations and those of the company to the National Australia Bank. The next day Mr Blair wrote to the company advising that settlement took place on 16 October 2001 and that the following sums had been paid –

Baroona Computer Centre	$258,500.83
Rocknet	$82,352.51
Rodgers SA/R	$348,431.34

[42] Also on that day Mr Blair sent letters to the defendants in respect of each of the loans stating the amount of the loan, the loan account number, date of advance, interest rate, monthly repayments and term of loan.

[43] On 8 and 9 January 2002 there was an exchange of emails between Mr Mills and Mr Blair concerning a request by Mrs Rodgers for permission to pay money by cheque to Telstra notwithstanding that the payment would cause the company to breach its overdraft limits. The exchange made reference to the prospect of an infusion of funds by shareholders of an associated company.

[44] As the first diary note of 22 January 2002 shows, a credit risk assessment was done in relation to the subject borrowings. It showed a risk grade of "at least 8" on an ascending scale of one to 10. Because of the level of risk, the plaintiff's operational procedure necessitated that the file be sent to the plaintiff's Portfolio Management Department in Brisbane. It also meant that any lending decisions in relation to that customer were beyond Mr Nagle's discretion. Mr Nagle discussed the matter with an officer in the Portfolio Management Department and was advised to monitor the file for one month and send it to the department if the company's accounts were not in order at the end of that period.

[45] In late February the company's file was transferred to the Portfolio Management Department.

[46] On 21 February 2002 Mr Oakes, an officer in the Portfolio Management Department, wrote to the defendants informing them that he had been "asked to review and take over management of all your accounts". The letter stated, inter alia –

> "I intend to contact you within the next week or two to discuss this matter and start the process of developing an 'action plan' to address the situation referred to above."

[47] The situation to which reference is made was "an adverse change in the conduct of the accounts and the delay in providing the bank with final accounts for all entities in the group". The letter requested provision of certain financial information by 21 March 2002 and imposed a requirement that current accounts be kept in order and loan repayments be met. The letter specified the accounts which were in default and the extent of the default.

[48] On 2 March 2002, Mr Ashe, a manager in the Portfolio Management Department, wrote to the company advising that: the company's accounts had been transferred to that Department, a review of the file indicates that "the facilities are in default" and that the plaintiff's solicitors had been sent the "Bank's security documents" and requested to advise "regarding enforcement". The letter went on to request the provision of specified financial information and made further reference to the plaintiff's "securities".

[49] On about 8 May, 2002 Mr Rodgers telephoned Mr Ashe in order to discuss the letter of 2 May. In the conversation Mr Ashe informed him that the plaintiff was going to appoint an investigative accountant to review the financial position of the "company's group". He requested Mr Rodgers' cooperation and threatened the appointment of receivers and managers should such cooperation not be forthcoming. Investigative accountants were appointed by a deed dated 10 May 2002.

[50] There were written and oral communications between the defendants and Mr Ashe concerning the company's financial affairs and the state of the company's accounts throughout May. In none of them did either of the defendants suggest that no security documents had been executed or refer to the collateral agreement with Mr Blair which they allege. On 24 May 2002, the investigative accountants reported that the company was insolvent. It was recommended that the company be instructed to take immediate steps to pursue either a sale of the business as a whole "or in part by way of an equity investment from a third party". It was further said that Mrs Rodgers had verbally advised that there were persons interested in acquiring the whole or part of the business and recommended that the company be given 21 days to enter into an unconditional contract for the sale of all or part of the business.

[51] Notices of demand dated 8 May 2002 were made by the plaintiff under the mortgage debenture, the guarantees and the mortgage.

[52] Receivers and Managers of the company's assets and undertaking were appointed by deed dated 19 June 2002.

[53] On 26 June, Mr Ashe wrote to the defendants stating the findings of the investigative accountants and explaining the plaintiff's decision to "commence recovery action under security held".

[54] Mrs Rodgers wrote to Mr Ashe on 2 July giving a detailed explanation of the company's financial position but again, made no reference to the alleged collateral agreement and failed to assert that there were no securities in existence. On 15 July 2002, Mrs Rodgers, in her capacity as director of the company, made demand on the plaintiff that it supply specified information, remove receivers and provide certain documents. One of the notices made reference to "your registered mortgage covenant". There was no suggestion by Mrs Rodgers that no mortgage or other securities had been provided.

The expert forensic evidence

[55] Mr Marhene, a forensic document examiner, gave evidence in the plaintiff's case. He compared the signatures of Mr and Mrs Rodgers on the letters of offer (including attachments) with those on the disputed documents and expressed the view that none of the disputed signatures bore any indicia of falsity and concluded that the signatures of Mrs Rodgers on all of the documents were written by the same person. The same opinion was expressed in relation to the signatures of Mr Rodgers. Mr Marhene said that Mrs Rodgers' signature, resembling "a simple tick formation" was "quite capable of successful forgery". I have no reason to doubt that opinion but it would not seem to bear very heavily on the overall likelihood of forgery in this case. If there was any forging of Mrs Rodgers' signature on the subject documents, it follows that Mr Rodgers' signature, where it appears on any such documents, was forged also. Mr Marhene does not conclude that Mr Rodgers' signature was readily forged.

Were any of the defendants' signatures forged?

[56] There are difficulties with the forgery theory. Unless Mr Blair was the culprit, or an accomplice of the culprit, Mr Blair's signature was forged as well as those of the Rodgers. He signed the guarantees, the mortgage and the statutory declaration as a witness. I find it highly improbable, putting aside any assessment of Mr Blair's character, that he would have undertaken such a risky enterprise without fully completing the documents and ensuring that they were sent off for registration. After all, the point of the forgery would have been to put the documentation in order to permit the plaintiff to hold registered securities.

[57] It is also difficult to see why, if the documents were not duly executed by the company and the defendants before 22 January 2002, Mr Nagle could not simply have taken them to the defendants and had them signed that day. On 22 January, the defendants would have been more anxious to retain the goodwill of the plaintiff than to risk confrontation with it. They demonstrated no real reluctance to provide a guarantee of the obligations of a company controlled by their son and, generally, were seeking further assistance from the plaintiff.

[58] I am unable to believe that any of the bank officers who participated in the events in question would have perceived any substantial difficulty in having any omissions in execution or completion in the company's securities rectified by the defendants on request. It is thus improbable that a bank officer would have committed the serious criminal offence of forgery as the defendants allege.

[59] The plaintiff's working documents show that Mr Sleaford requested that the subject securities be prepared by 4 October. The probabilities are that they were so prepared in order to be available for signature on 5 October. As I will discuss shortly, there was no sensible reason why the documents, having been prepared, would not have been signed on 5 October.

[60] The diary notes of 22 January 2002, while puzzling, do not point to a conclusion of forgery. The first diary note of that date is likely to be generally accurate. The second one, as I have mentioned, appears to have been prepared by Ms Matta in the mistaken belief that Mr Nagle had the subject documents signed on 22 January when he called on the defendants. A casual inspection of the documents would have revealed that this could not have been the case. Many of the documents bore Mr Blair's signatures and had been "tidied up" by Mr Sleaford. No signature on any of the documents had been witnessed by Mr Nagle. Moreover, it is quite inconsistent with the defendants' own case that the mortgage, mortgage debenture and guarantees were signed on 22 January 2002.

[61] Insofar as Ms Matta recalls being given a "stack of documents" after Mr Nagle's return from visiting the defendants, I conclude that her recollection is generally accurate. I think that it is probably the case that on 22 January, after his visit to the defendants, Mr Nagle gave Ms Matta the securities in relation to the company and asked her to attend to their registration. He may also have asked her to check them and he probably checked them himself. He did not tell her that these documents had been signed that day, although she may have got that impression from the fact that she was given the documents or from things said about the guarantees of the obligations of Webb Publishing Pty Ltd.

[62] The third diary note, whatever its explanation, is not the work of a forger or forger's accomplice. Like the second diary note, it ignores the fact that the documents contain Mr Blair's signatures, Mr Sleaford's writing and no signatures of Mr Nagle. It is possible that the third diary note was written well after 22 January and as part of a process of "sanitising" the file prior to its despatch to the Portfolio Management Department.

[63] It was not suggested by Mrs Rodgers to any of the bank officers who gave evidence that he or she had forged, or caused to be forged, the signatures in question. And, there does not appear to be the faintest prospect that any other person would have had a motive for or interest in perpetrating such acts.

[64] The foregoing considerations are sufficient to support a conclusion, on the balance of probabilities, that the disputed signatures are the defendants'. There is, however, other evidence which strongly supports that conclusion. Mrs Rodgers had in her possession a copy of the mortgage debenture bearing the company seal and signed by her as a director. She exhibited a copy of it to an affidavit sworn by her in proceedings in matter 352 of 2002, swearing that it was an incomplete copy of the mortgage debenture "returned to our offices for our records". Asked by Mr Perkins, who appeared for the plaintiff, when she signed it and for what purpose she responded –

> "Maybe it was just something I would ask, 'Can I have a copy', I didn't get a copy, I wanted it and when I got it I would have – knowing me, I would have signed it, done everything I was supposed to do, put it in my drawer and figured, well, this is what Richard has

> told me to do, I will do it, I wouldn't know what it means, I wouldn't even know the meaning of it and it really hasn't – it really never crossed my mind again apart from the fact that it must have meant something."

[65] Mrs Rodgers said a little later in the course of her cross-examination –

> "I don't know if I signed this on the 5th. I don't believe I signed it in front of Cameron Blair because I am more likely to have signed this in my own office by myself only because of what Richard Crosland [the manager of the National Australia Bank] had told me to do.
>
> …I don't really recall that this became an issue until Richard Crosland said to me, 'Ask Cameron for this mortgage debenture', because he read this letter and said it was over the first registered mortgage and knowing me I wouldn't have wanted to know any more than if he told me to do that, I would just do it. I really don't want to know what it's about. All I knew it was in my possession and I could prove it and that if the bank has one, well, then, they can provide one that has my writing on it.
>
> Why do you say you signed it, Mrs Rodgers?-- Because that's just what I do. Like, for example, if I had this and I was under the impression that I would keep something like this for my protection I would just do everything that it says to do."

[66] Mrs Rodgers was confronted with an outline of submissions used by her in appellate proceedings in matter 352 of 2002, in which she accepted that "it was conceded on behalf of the appellant before White J that Mrs Rodgers signed that mortgage debenture on behalf of the appellant on or about 5 September 2001 … although this may be a mistaken reference to 5 October 2001".

[67] The evidence makes it plain that 5 October 2001 was the earliest date on which Mrs Rodgers could have received the copy of the mortgage debenture. Her explanation of the circumstances in which it came into her possession and was signed is implausible. Her explanation, in cross-examination, of how the common seal came to be affixed is even less worthy of credit.

[68] Also implausible is the evidence of Mrs Rodgers as to the collateral agreement alleged by her about the provision of securities to the plaintiff in respect of the proposed loan to the company. The substance of the alleged agreement is that the plaintiff would lend a maximum amount of $450,000 to the company which the company would provide in whole or in part to Wodda.com Ltd for use as working capital. When Wodda.com Limited became "cash flow positive", which was expected to be in about six months time, the level of the borrowings the company required would be established and securities would be provided for that amount. In the meantime, the company would, at its option, be able to exceed the $450,000 limit, by an unspecified amount, if it required more money.

[69] At the time of this alleged bargain the company was not a customer of the plaintiff. On Mrs Rodgers' own admission she had made it known to Mr Blair that the company's bank, the National Australia Bank, was refusing to extend the company's credit limit with the result that the company was having to pay excess fees which were sometimes as high as $3,000 a month.

[70] Needless to say, Mr Blair rejected the suggestion that he had entered into any such agreement. To have done so, would have exceeded his banking authority and involved him in conduct so reckless as to threaten his career prospects. Although Mr Blair's attention to detail in relation to this matter left much to be desired, I did not get the impression that he was completely lacking in caution, obviously incompetent, or likely to wilfully exceed his authority as the defendants' account of events would suggest.

[71] Tellingly, the allegation of an agreement or arrangement along the lines of that now alleged first emerged in Mrs Rodgers' affidavit sworn on 16 August 2002 in proceeding 352 of 2002. That was despite the extensive dealings between the defendants and bank officers, demands by the plaintiff that the company's accounts be regularised, the appointment of the investigative accountant and the appointment of a receiver and manager. If the defendants had been of the understanding throughout this stressful period that they had not executed any securities and that the alleged agreement existed, they would have been quick to point these things out to the plaintiff. Mrs Rodgers did not impress me as a person who was likely to submit meekly to an infringement of her legal rights, particularly in a way which gravely impacted on the economic well being of herself, her husband and the company.

Findings on credibility

[72] Mrs Rodgers is an intelligent, articulate woman whose evidence, in my view, is generally quite unreliable. Some of her evidence, aspects of which I have recorded above, was fanciful in nature. I do not find that she consciously gave false evidence. Rather, it seems to me that the emotional stress brought about by her financial misfortune has greatly diminished her ability to make objective assessments in relation to this matter. I consider also that her perceptions of relevant events are shaped by a belief that her financial predicament is the result of misconduct on the part of the plaintiff. This belief causes her to disregard the obvious in favour of conclusions which support her erroneous understanding.

[73] Mr Rodgers has had a much more limited role in relevant dealings with the plaintiff than Mrs Rodgers and the extent of his evidence was quite limited. I formed the view that his perceptions of relevant events are strongly influenced by his wife's beliefs and concluded also that he is lacking in objectivity. I do not accept his evidence about the signing of the subject documents. I do accept, however, that he met with Mr Nagle on 22 January and that the Webb Publishing documents were discussed and signed in his presence.

[74] Mr Sleaford gave his evidence carefully and I conclude that, where he professed a recollection of a matter, his evidence in relation to it was likely to be generally accurate. I did not get the impression that either Mr Blair or Mr Nagle had a detailed or particularly accurate recollection of the events in question. In respect of matters of substance, however, their evidence is likely to be much more reliable than that of Mrs Rodgers. I thought that Mr Ashe's recall of relevant events was reasonable and that his evidence was likely to be generally reliable. I see no reason to doubt the reliability of the evidence of any of the plaintiff's officers concerning identification of signatures and handwriting or about internal bank documentation and procedures.

Conclusions in relation to the defendants' case

[75] I do not accept that Mr Blair, on behalf of the plaintiff, ever entered into any agreement or arrangement under which he agreed that the giving of securities for the proposed loan to the company be postponed or that, apart from specific instances of minor and temporary extensions of limits, he ever agreed that the company could exceed facilities' limits. Nor do I accept that Mr Ashe or anyone else on behalf of the plaintiff agreed that the plaintiff would accept $50,000 or any other sum in order to remedy the company's default or that Mr Ashe or any other bank officer said words to suggest that notices of default or demand would not be relied upon by the plaintiff.

[76] The defendants have not established that any relevant representation was made by any servant or agent of the plaintiff. The evidence does not establish reliance by them or the company on any representation concerning the mortgage facilities, the guarantees, the relaxation of their terms, their enforcement or the rights of the parties in relation to them. Nor do I find any reliance by the defendants on any internal bank procedures or any failure on their part to understand the nature and substance of the guarantees, mortgage or mortgage debenture.

[77] In view of these findings, it is unnecessary to consider the plaintiff's claims for equitable relief and I thus propose to make brief comment only on the claim that the plaintiff ought be denied equitable relief "because of its misconduct". It is sufficient to say that for a "lack of clean hands" defence to apply the impropriety complained of must have "an immediate and necessary relation to the equity"[4] relied on. It appears to be the case also that the principle applies only where the right sought to be vindicated is "one which if protected, would mean the plaintiff was taking advantage of his own wrong".[5] Whatever was done in this case, if there was any relevant impropriety, it was, at best for the defendants, of a peripheral nature only and did not attract the operation of this principle.

[78] The fact that the guarantees and mortgage were altered after execution in the manner recorded above does not assist the defendants either. The general principle in relation to alteration of deeds is stated in the following terms in *Halsbury's Laws of England* –[6]

> "If an alteration (by erasure, interlineation, or otherwise) is made in a material part of a deed, after execution, by or with the consent of any party to or person entitled under it, but without the consent of the party or parties liable under it, the deed is made void. … A material alteration is one which varies the rights, liabilities or legal position of the parties as ascertained by the deed in its original state or otherwise varies the legal effect of the instrument as originally expressed, or reduces to certainty some provision which was originally unascertained and as such void, or which may otherwise prejudice the party bound by the deed as originally executed.
>
> The effect of making such an alteration without the consent of the party bound is exactly the same as that of cancelling the deed."

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4 *Moody v Cox & Hatt* [1917] 2 Ch 71.

5 *FAI Insurances Ltd v Pioneer Concrete Services Limited* (1987) 15 NSWLR 552 at 561 and *Meyers v Casey* (1913) 17 CLR 90 at 101-102 and 124.

6 4th ed para 1378.

The above doctrine has application to written instruments generally.[7] The contemporary approach is that it should be interpreted "as liberally and reasonably as possible".[8]

[79] The learned authors of *Halsbury* further state[9] that –

> "It appears that an alteration is not material which does not vary the legal effect of the deed in its original state, but merely expresses that which was implied by law or in the deed as originally written, or which carries out the intention of the parties already apparent on the face of the deed, provided that the alteration does not otherwise prejudice the party liable under it."

[80] The mere completion of a date, so long as it does not bring about a material alteration of the obligations of a party bound by the instrument, does not affect its validity.[10] None of the subject alterations affect the operation of the mortgage or guarantees or alter the rights of the parties under them. They are thus not material and do not give rise to invalidity. In any event, the filling in of the blanks did no more than give effect to the intention of the parties. When the documents were signed, the defendants expected that they would be fully completed, dated appropriately and lodged for registration.

[81] In *Armour Coatings (Marketing) Pty Ltd v General Credits Finance Pty Ltd*,[11] Bray CJ made the following observations about the alteration of a document by the filling in of blank spaces –

> "Where, however, an agreement in fact has been reached between the parties and one of them subsequently executes the formal document and hands it over to the other, I think he will readily be regarded as having conferred on that other implied authority to fill up blanks, which he must be taken to know were present in the document when he signed it, and to alter the document if necessary to make it conform to the common contractual intention where by mistake it does not do so."

[82] That passage was referred to with agreement by Hope JA, with whose reasons the other members of the court agreed, in *Warburton v National Westminster Finance Australia Ltd*.[12] The subject documents were signed by the defendants, their signatures were witnessed by Mr Blair and were not dated at the time. In those circumstances, I have little difficulty in concluding that the plaintiff had implied authority to complete the dates and other formal matters left uncompleted.

The plaintiff's case

[83] The evidence establishes the granting of the mortgage and default under it. Mr Ashe deposes to the extent of the default and to the fact that it has not been rectified.

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7 *Master v Miller* (1971) 4 TR 320 and *Farrow Mortgage Services Pty Ltd (in liquidation) v Slade & Nelson* (1996) 38 NSWLR 636 at 646.

8 *Armor Coatings (Marketing) Pty Ltd v General Credits (Finance) Pty Ltd* (1977) 17 SASR 259 at 276 and *Farrow Mortgage Services Pty Ltd (in liquidation) v Slade & Nelson* (supra) at 640

9 In para 1383.

10 *Halsbury (supra)* para 1383 and *Farrow Mortgage Services Pty Ltd (in liquidation) v Slade & Nelson* (1996) 38 NSWLR 640.

11 (1978) 17 SASR 259 at 277.

12 (1988) 15 NSWLR 238 at 247, 248.

There is no dispute as to the accuracy of Mr Ashe's calculations. The amount alleged to be owing is sworn to by Mr Ashe and certified in a certificate issued pursuant to clause 24(2) of the plaintiff's "General Conditions of Use", clause 9.9 of the plaintiff's standard mortgage provisions and clause 38 of the guarantees. Under each of the guarantees, the defendants agreed to guarantee the moneys owing by the company to the plaintiff from time to time and to indemnify the plaintiff against any loss suffered by it in the event that the guaranteed moneys are not paid when they should be paid.[13] The plaintiff may enforce its right of indemnity against the guarantor as a principal debtor.[14] The moneys payable by the guarantor are payable immediately upon the giving of written demand.[15] The making of demand under the mortgage and under guarantees is admitted in the defence. There are arguments about the validity or efficacy of the demands but none have any legal merit. For example, there is a complaint that the demand made on the company did not have the company's correct ACN number on it.

[84] The giving of a notice under s 84 of the *Property Law Act* 1974 and the giving of notices requiring vacant possession are also admitted on the pleadings.

[85] After default under the mortgage, the plaintiff may enter into possession and resell the land.[16] It may also appoint a receiver.[17]

[86] The plaintiff has thus made out its case and is entitled to judgment against each of the defendants under his or her respective guarantee in the sum of $393,662.20 plus interest which has accrued between the date of the certificate and the date of judgment. It is also entitled to an order for possession of the land and to its costs of and incidental to the action to be assessed on the standard basis.

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13 Guarantee part 1, clause 1 and part 4, clauses 4 and 5.
14 Part 4, clause 7.
15 Part 5, clause 11.
16 The plaintiff's standard mortgage provisions part 7, clauses 7.4 and 7.7.
17 Clause 7.8.