SUPREME COURT OF QUEENSLAND

CITATION:	*Commonwealth Bank of Aust v Spengler P/L & Ors*; *Spengler P/L & Ors v Commonwealth Bank of Aust* [2003] QSC 391
PARTIES:	**COMMONWEALTH BANK OF AUSTRALIA** ACN 123 123 124 (plaintiff) **v** **SPENGLER PTY LTD** ACN 064 558 970 (first defendant) **DARRYL BEVAN PARKER** (second defendant) **ALLGROUP PTY LTD (FORMERLY KNOWN AS DARRYL PARKER ARCHITECTS PTY LTD)** ACN 010 997 798 (third defendant) **SPENGLER PTY LTD** ACN 064 558 970 (first plaintiff) **DARRYL BEVAN PARKER** (second plaintiff) **ALLGROUP PTY LTD (FORMERLY KNOWN AS DARRYL PARKER ARCHITECTS PTY LTD)** ACN 010 997 798 (third plaintiff) **v** **COMMONWEALTH BANK OF AUSTRALIA** ACN 123 123 124 (defendant)
FILE NOS:	7829 of 2002 6565 of 2001
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	20 November 2003
DELIVERED AT:	Brisbane
HEARING DATE:	12, 13 and 14 November 2003
JUDGE:	Muir J
ORDER:	**The Bank is entitled to judgment on its claim and on the counterclaim in action 7829 of 2002 and on its defence in action 6565 of 2001.**
CATCHWORDS:	CONTRACT - CONSTRUCTION AND

INTERPRETATION OF CONTRACTS – whether it was a term of the subject loan agreement that the sale price of units in the first defendant's development would include a trade dollar component and that following a sale of a unit the plaintiff would allow a partial release of mortgage in respect of that unit – in the alternative whether the plaintiff represented that it would permit partial releases of mortgage where the total trade dollar component of sales prices did not exceed 30 to 40 percent of the plaintiff's valuation of all units – whether there was an implied term of the subject loan agreement that the plaintiff would grant partial releases of mortgage on reasonable terms

COUNSEL: K E Downes for the plaintiff in action 7829 of 2002 and the defendant in action 6565 of 2001
N J Thompson for the defendants in action 7829 of 2002 and the plaintiffs in action 6565 of 2001

SOLICITORS: Minter Ellison for the plaintiff in action 7829 of 2002 and the defendant in action 6565 of 2001
Grays Professional Services Group for the defendants in action 7829 of 2002 and the plaintiffs in action 6565 of 2001

[1] **MUIR J**: In action number 7829 of 2002 the Commonwealth Bank of Australia ("the Bank") claims–

(a) against the first defendant Spengler Pty Ltd, $1,800,032 under a registered mortgage debenture;
(b) against the second defendant Darryl Parker, that sum under a deed of guarantee given by him in favour of the Bank dated 25 August 1999; and
(c) against the third defendant Allgroup Pty Ltd, that sum under a mortgage debenture given by it in favour of the Bank dated 4 September 1998.

[2] There is no dispute that moneys were lent as alleged by the Bank, that the Bank made demand on each of the defendants on or about 12 August 2002 for payment of $1,800,032 plus interest and that the moneys have not been paid.

The allegations in the defence and counterclaim

[3] In their defence and counterclaim the first defendant Spengler Pty Ltd and second defendant Darryl Parker allege that –

1. The first defendant sought finance for the building of an apartment building ("the building") on land situated at 10 Albert Avenue, Broadbeach from the Bank;
2. The finance was sought through Mr Sevdalis, a finance broker trading under the name "VIP Financial Services";
3. An officer of the Bank, Mr Samaras, informed Mr Sevdalis on a date unspecified that the plaintiff was favourably disposed to the finance application made to it by Spengler. In reliance on that assurance, conveyed by Mr Sevdalis to Mr Parker, Spengler paid a deposit of $50,000 pursuant to a contract for the purchase of the land and

continued negotiations with the Bank concerning finance for the project;

4. On or about 14 July 1998 Mr Parker, in a telephone conversation, informed Mr Samaras that the completion date for the purchase of the land was 4 September 1998 and that Spengler was anxious to finalise funding arrangements. Mr Samaras said, in effect, that he saw no problem with the funding;
5. In a conversation between Mr Samaras and Mr Parker on or about 23 July 1998, Mr Parker told Mr Samaras that Spengler had other financiers who were prepared to finance the project at 70% of valuation and that if the Bank wished to provide finance it would need to lend at 70% of PRP valuation.[1] Mr Samaras responded that "the plaintiff wanted to do the deal, that he had been working through the PRP valuation and was happy with their figures". Mr Samaras mentioned "some trade dollar component in the project and asked (Mr Parker) how that worked". Mr Parker then gave an explanation to which Mr Samaras responded "the amount of funded moneys from the Bank will not be affected. I will get a letter of offer to you tomorrow";
6. Mr Parker understood Mr Samaras's response to mean, and the natural meaning of such response was, that the Bank approved Spengler's proposal for using trade dollars and would allow sales of units in the project where the overall trade dollar component did not exceed "the percentage referred to in paragraph 18(i)". That percentage appears to be "between 30% and 40%";
7. On or about 25 July 1998, the plaintiffs executed the relevant security documents and commenced to draw down the loan moneys under the facilities provided by the Bank;
8. A contract of loan was concluded between the Bank and the defendants which had terms that –

   "(a) The agreed loan to value ratio for lending purposes was 70% of the PRP valuation.

   (b) The Bank would take an assignment of the PRP valuation;

   (c) The Bank was to allow partial releases of mortgage on the completion of sale contracts for units in the Project where the purchase price was in accordance with the formula that the trade dollar component of the purchase price would not exceed 15% plus or minus a couple of per cent of the total value of the project contained in the PRP valuation."[2]
9. Alternatively, it was an implied term of the contract that the Bank would grant partial releases of mortgages for units in the project on reasonable terms, having regard to the practices of the plaintiff and other commercial lenders in circumstances where sales of separate

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1 As valuation of the subject property as at 2 July 1998 by Preston Row Paterson Gold Coast Pty Ltd trading under the name PRP Valuers and Consultants. The report in which the valuation is contained is subsequently referred to as "the PRP valuation" or "the PRP report".

2 Paragraph 27 of the defence.

lots in a high rise development to different purchasers was in contemplation;[3]

10. Further or in the alternative, in the premises and by the Bank's acceptance of the PRP valuation, the Bank represented that it would permit Spengler to obtain partial releases of mortgage on the basis of "the formula set out in paragraph (8)[4] on the sale of lots … so as to allow a trade dollar component as set out in the PRP valuation and/or as discussed in the conversation between (Mr Parker and Mr Samaras) …";[5]
11. Spengler completed the project in about October 2000;
12. During the construction period the Bank made further advances to Spengler and obtained further guarantees from Mr Parker. Those guarantees were given in reliance on the representations by the Bank;
13. The Bank "repudiated its obligations under the contract" and "acted contrary to its representation as to future conduct" referred to in paragraph 10 above;
14. As a result of the Bank's refusal to release its securities to enable settlement of the 14 contracts for sale of lots entered into by Spengler as vendor and referred to in paragraph 30 of the Defence, those contracts fell through depriving Spengler of its ability "to discharge the sums owing" to the Bank and to obtain the profits it would have made on the sales;
15. On 28 December 2000 the Bank "wrongfully purported to demand the moneys otherwise due under the advance" and the plaintiff thereby suffered loss and damage "by reasons (sic) of its loss of such contracts occasioned by the (Bank's) breach of contract";
16. The Bank wrongfully purported to appoint receivers to the undertaking of Spengler on 12 March 2001. The "receivers sold the project for less than (Spengler) could have obtained" and Spengler and Allgroup are entitled to set off "the deficiency in price referred to in paragraph 30(f)" which exceeds the amount of the moneys claimed by the Bank;[6] and
17. In the counterclaim Spengler and Mr Parker rely on the allegations in the defence and claim relief under s 87(1E) of the *Trade Practices Act* 1974 "by way of an order refusing to enforce the provisions in the securities referred to in the statement of claim".

The allegations in the reply and answer

[4] Prior to finance being provided by the Bank to Spengler, other than one reference on one page of the PRP valuation, there was no mention of trade dollars by anyone on behalf of the defendants to any employee of the Bank. Nor was any such mention made in copies of parts of contracts of sale provided by Spengler to the Bank at the Bank's request in order to enable the Bank to decide whether to finance the project.

[5] Mr Samaras did not have a conversation concerning trade dollars with Mr Parker as is alleged in the defence.

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3 Paragraph 27A of the defence.

4 Paragraph 27 of the defence.

5 This summarises the allegations in paragraph 28 of the defence.

6 Paragraph 30(f) contains no reference to "deficiency in price" but 30(g) does set out the sale prices in the contracts procured by Spengler as well as Spengler's anticipated net profit.

[6] The matters referred to in paragraph [3](8) above are not terms of the contract of loan between the Bank and Spengler and such contract is wholly in writing.

[7] The implied term referred to in paragraph [3](9) above contradicts the express term in paragraph 3(b)(i) of the application for accommodation dated 25 August 1998 which term was a term of the loan agreement between the parties by reason of clause 3(a) of the application.

[8] Further and in the alternative, if there was an express or implied term such as that alleged in paragraphs 27(c) and 27(a) of the defence the bank was not contractually obliged and did not agree to allow a partial release of mortgage –

(a) Irrespective of the circumstances pertaining at the time the partial release was sought; and

(b) At the expense of its other rights under its securities if Spengler was in default of its obligations and under such securities.

[9] Having regard to the circumstances existing at the time that Spengler sought partial releases, reasonable terms did not exist such that the partial releases of the mortgage requested by Spengler ought to have been allowed by the Bank.

[10] If contrary to the Bank's case, representations as alleged were found to have been made, such representations would have been, and would have been understood by Spengler and Mr Parker to be, representations that the Bank would permit partial releases only if –

(a) The Bank regarded it as being commercially justifiable to allow the partial releases at the time they were sought having regard to existing circumstances; and

(b) Spengler had provided full copies of any trade dollar agreements to the Bank "when asked to supply full copies of the sales contracts prior to the loan being approved".

(c) Spengler had otherwise complied with all of its obligations under the terms and conditions of the securities.

[11] There was no reliance on any alleged representation.

[12] It is denied that the defendants suffered any loss and damage as a result of the Bank's conduct and it is alleged that any loss and damage suffered by the defendants flows from their not meeting their contractual obligations to the Bank.

Action 6565 of 2001

[13] In proceedings 6565 of 2001 Spengler, Mr Parker and Allgroup are the first, second and third plaintiffs respectively. The allegations in the Statement of Claim mirror those in the defence in action 7829 of 2002. It is alleged also that the receivers were wrongfully appointed by the Bank, that the Bank's conduct was in breach of s 52 of the *Trade Practice Act* 1974 and constituted unconscionable conduct in relation to the supply of services within the mean of s 51AC(2) of the *Trade Practice Act* 1974. The plaintiffs claim damages, a declaration that the appointment of receivers was unlawful and consequential relief.

Relevant events prior to the Bank's first advance

[14] Mr Parker is an architect and at all material times was the sole director of the third defendant Allgroup and Spengler. He practised as an architect and also undertook real property development through Spengler.

[15] For his proposed development at Albert Avenue, Broadbeach, consisting of nine residential units, one unit to which management rights were attached, one penthouse and 320 square metres of ground floor commercial space, he sought finance through a finance broker, Mr Sevdalis, trading under the name VIP Financial Services. Mr Sevdalis, in turn, contacted Mr Samaras, an officer at the Bank's Bondi branch (with whom he had had a number of dealings in the preceding six months and with whom he had become friendly) with a view to interesting the Bank in providing the finance.

[16] On about 18 June 1998 a finance application was submitted to the Bank, through Mr Sevdalis. Mr Samaras perused it before passing it on to other officers whose roles were to assess it and determine its acceptability to the Bank. The finance application is a bulky document. It includes: an executive summary; project description; costs and sales analysis; cash flow forecast; financial background in relation to Spengler; company résumé; résumé in relation to Darryl Parker Architects; and the PRP valuation report. It also makes reference to "unit purchase contracts" and "builder's price", in respect of each of which it states "(to be forwarded) being prepared".

[17] The document's executive summary makes these assertions –

> "**.** The development cost is $4.51 million.
> **.** The gross value on completion is $5.69 million.
> **.** The land value is $1.4 million."

[18] The contract price for the land was in fact $900,000 or $920,000. A page headed "Costing Analysis" shows sales income of $5,690,000 and a profit of $1,180,000. The following sheet lists the "sales income" for each unit in the block, with one exception. The total of the "sales" was $5,690,000. No contracts had in fact been entered into at the date the application was submitted and none was entered into until after the Bank gave its lending approval.

[19] The only mention of trade dollars in the funding application is to be found on page 15 of the PRP report which values the building as at 2 July 1998. It comprises 18 pages, not counting attachments. It concluded that the gross realisable value of the completed development was $5,527,500. The following passage appears under the heading "Residential Unit Valuation" on page 15 –

> "The sales on the schedule as annexed hereto form a good basis for comparison purposes, however **we would note that all the subject units are supposedly under contract with the exception of the penthouse** which is to be retained. We also note that the contract prices are from $12,500 to $22,500 above our values as found however we would also point out that, **in certain of the sale deals, minor sums of up to 15% of the purchase price were made up of trade dollars which we have been further advised will be transferred to the builder at face value** for part of the construction contract. To the best of our knowledge, **this is the case in approximately half of the residential units** however, based on the evidence as provided to us, the trade dollars are being recouped at full value. We still believe that this would entice a prospective

> purchaser to pay slightly more for the unit as they may well have discovered some difficulty in achieving face value for their trade dollars by other means." (emphasis added)

[20] Mr Branson was the Bank's "Area Manager Credit" at the Bondi Junction Business Banking Centre at relevant times. He was the person who, on the Bank's behalf, approved the subject loan. His evidence was that he did not become aware of the expression "trade dollars" until after these proceedings were commenced. He conceded in cross-examination that he would probably have read the PRP report, including page 15, prior to approving the loan but re-affirmed that he did not understand what trade dollars meant and said that if he had seen the reference to trade dollars he attached no significance to it. The thrust of his evidence, which is plainly supported by documentary evidence, is that in making his calculations and assessments he relied on figures supplied by Spengler concerning contract prices as well as sales income and outgoings and gave no consideration to the ramification of the matters mentioned in paragraph 15 of the PRP report.

[21] It seems plain, both from the evidence of other Bank officers and from the Bank and other documentation tendered in the course of the trial, that prior to the making of the initial loan no Bank officer (putting aside, for the moment, Mr Samaras's state of mind) considered Spengler to be seeking any provision for or allowance in respect of trade dollars in the proposed loan approval or in the related securities documentation.

[22] On 24 July 1998 Mr Samaras wrote to Spengler setting out a list of matters required by the Bank "to progress the proposal to credit approval". Those matters included –

> "confirmation by Solicitors of Lots sold with copy of full contracts being provided.
>
> Confirmation as to whether the solicitors hold the deposits already paid."

[23] Mr Parker, in a fax to his solicitors on the same day sought confirmation of "purchaser names; price and break up of cash to trade dollars" in the contracts for units 3, 6, 9 and 10. The solicitors responded immediately by fax, showing that in respect of each of those lots the whole of the deposit had been paid or was payable in trade dollars and that, in all cases, in excess of $60,000 of the balance purchase price was payable also in trade dollars.

[24] PRP submitted a supplementary report dated 17 July 1998 to the Bank which included two valuations, one on a one line basis adopting "current presales" and the other "in one line assuming no pre sales". No reference was made in this document to trade dollars, although it was stated –

> "The subject property is peculiar in that 10 of the 11 residential units and one of the commercial units are contracted and will settle on completion …".

[25] On 27 July Mr Parker wrote to Mr Samaras enclosing a copy of a letter from his solicitors dated 7 July which stated –

> "1. Lots 1 and 4 – the contract has been executed and deposit paid. The Contract is presently being forwarded to us by the Solicitors for the Purchaser.

2. Lots 3 and 5 to 12 – we presently hold executed Contracts and deposits in relation to each lot."

Mr Parker's covering letter states "copies of contracts are to be forwarded". Notably, information on the trade dollar components of the contracts for units 3, 6, 9 and 10 was not passed on to Mr Samaras and no mention was made of the trade dollar component of any other contract.

[26] In a letter to Spengler of 5 August 1998 the Bank advised approval of "a progressive Bills discount facility of $3,460,000 (gross)" for a term of 12 months from the approval date. The letter stated –

> "We emphasis that funds will not be released until security documentation has been completed."

[27] On 12 August 1998 Mr Parker faxed to Mr Samaras a copy of part of the contract under which Spengler purchased the subject land. It is not clear when copies of parts of the contracts entered into by Spengler for the sale of individual units were sent to the Bank but by the time Mr Will, the credit manager at the Bondi Junction branch, wrote a memorandum of 18 August 1999, the Bank had copies of the front and back sheets of 11 such contracts.

[28] In a letter dated 1 September 1998 to Mr Samaras, Spengler's solicitors advised –

> "We confirm that we now hold duly executed sale contracts in respect of the above Lots.
> Please find enclosed for your information photocopies of pages 2 and 13 of each contract."

[29] The Lots the subject of these contracts were 3, 5, 6, 7, 8, 9, 10, 11 and 12. The parts of the contracts supplied made no reference to trade dollars.

[30] The sum of $1,145,000 was drawn down under the facility on 4 September 1998 after provision of duly executed security documents.

[31] None of the copies of the contracts forwarded the Bank by or on behalf of Spengler prior to the drawing down of the loan made mention of trade dollars. Nor was any mention made to Mr Samaras or any other Bank officer of the fact that in respect of each contract entered into for the sale of a residential unit there existed a supplementary agreement which provided for the whole or part of the deposit and a specified amount for the sale price to be paid in trade dollars. Clause 5.1 of each such supplementary agreement provided –

> "The Seller and Buyer agree not to disclose any particulars of this Agreement to any other person except their solicitors, or as may be required by law."

Relevant events subsequent to the Bank's first advance

[32] In early 2000 Mr Harbrow took over the Spengler files from Mr Samaras. On 12 July 2000, in response to a request from Mr Harbrow, Mr Parker faxed to him a copy of a letter to Spengler from its solicitors with an accompanying "list of current sales" that set out sale prices for each of Lots 1 to 12 inclusive (excluding Lot 2) but which made no mention of deposit trade dollars on supplementary agreements. After receipt of that facsimile, which Mr Harbrow understood to convey that Spengler as vendor was to receive the stated sale price in cash for each of the

nominated units, the Bank approved on 14 July 2000 a further advance to Spengler of $235,000.

[33] In early August 2000 Spengler, which was experiencing cost overruns as a result of the builder's insolvency, sought additional funds to enable it to complete the development. On 28 August 2000 the Bank made a further advance to Spengler of $258,100.

[34] A further request for funding was made by Spengler in writing to Mr Harbrow on 19 October 2000. Mr Parker, at the request of Mr Will and Mr Harbrow, attended a meeting with them on 23 October 2000. A diary note of that meeting, prepared by Mr Harbrow and signed by Mr Will, records that in response to Mr Parker's request for an additional loan of $100,000, Mr Will stated that the Bank would provide no further finance and suggested that as the project was completed and had been pre-sold other creditors could wait "in line behind the Bank for settlements to occur". Mr Parker was told that the Bank had advanced almost $4,000,000 against pre-sales of $4,420,000 and that no further credit would be extended. Both Mr Parker and Mr Will swore that at no time in the course of that meeting was any mention made of trade dollars. Neither of them was challenged on this point in cross-examination.

[35] On 18 October 2000 Spengler overdrew its working account above the Bank's temporary limit of $493,100 with the consequence that cheques to a value of $9,000.00 were dishonoured.

[36] Mr Harbrow wrote to Spengler on 16 November 2000 advising of the maturity of certain bills and the discounting of a new bill. He said that in a telephone conversation he had that day with Mr Parker concerning the bill facility, no reference was made to trade dollars. I accept his evidence in this regard.

The Bank's refusal to execute partial releases of mortgage without payment to it of deposit moneys and other nett proceeds of sale without allowance for any trade dollar component

[37] On 22 November 2000 the defendants' solicitors wrote to the Bank concerning the settlement of sales of three lots in the building. Settlement statements listing the cheques required on settlement were provided with the letter. The settlement statements, which were in respect of units 3, 11 and 5, provided respectively for subtraction from the moneys payable by the purchaser on settlement of $63,000, $97,500 and $97,500 on account of "trade dollar as per agreement".

[38] Mr Harbrow on reading the settlement statements sent an email to the defendants' solicitors stating that the Bank would not settle for anything less than the amount specified in the email and asserting –

> "You will note that we will require the deposit moneys to be available at settlement and CBA as first mortgagor has not consented to any 'trade agreement'."

Mr Harbrow gave the same advice to the solicitors by telephone.

[39] A copy of that email was faxed by Mr Harbrow to Mr Parker. The Bank's conditions were not met and the settlements did not proceed.

[40] On 29 November 2000 Mr Harbrow had a telephone conversation with a person who said that he was the father of a purchaser of one of the units the subject of the Bank's refusal to settle. That person made mention of an agreement in respect of trade dollars and on Mr Harbrow's request sent him a copy of it.

[41] On 30 November 2000, in response to a number of unanswered calls from Mr Harbrow in preceding days, Mr Parker telephoned Mr Harbrow who handed the phone to Mr Will. Mr Parker was apologetic and made no criticism of the Bank's conduct. A diary note, which I accept as being substantially accurate, was made of the conversation. It records –

> "Mr Will enquired as to how the delay in settlements could be resolved in the short term, for as Darryl was aware, the Bank was now applying penalty interest rates to his debts.
> Mr Parker responded that he is confident of resolving the situation this side of Christmas and with a little bit of luck by the 13th of December 2000. He will provide a schedule to demonstrate how he proposes to clear the Bank debt."

[42] On 11 January 2001 Mr Parker wrote to the Bank enclosing copies of contracts for Lots 3, 5, 7, 8, 10, 11 and 12 and notifying that he was negotiating with the purchaser of lots 3 and 7 "to rescind contracts to enable full cash sales." In a letter on the same day Mr Parker advised the Bank that it would be paid out from settlements and long term funding in the near future.

[43] That did not happen and the Bank appointed receivers and managers to the assets of Spengler by deed dated 12 March 2001. The Bank's files in relation to the subject transactions created prior to the appointment of the receivers contain no reference to any assertion by or on behalf of Spengler that an arrangement existed between the Bank and Spengler, along the lines of that alleged in paragraph [3](8) above. Nor is there any reference in the Bank's records to a representation to that effect or to matters which might evidence the making of such a representation.

Consideration of the evidence

[44] Mr Sevdalis claims not to have been aware, even in general terms, of the provisions in Spengler's proposed contracts relating to trade dollars. He swore that he was not aware at the time he approached the Bank in relation to the application for finance that Spengler proposed to accept trade dollars in part payment for the units in the project. In cross-examination he conceded that he had been party to the discussion with Mr Parker about trade dollars in which Mr Parker told him that the builder was accepting trade dollars in part payment and that trade dollars were to be used to pay "a few subcontractors". I have reservations about the accuracy of Mr Sevdalis' evidence but I doubt that Mr Parker made him privy to the details and extent of what Spengler had in mind in relation to the use of trade dollars in its contracts of sale. I consider it probable that Mr Sevdalis was not told of Mr Parker's intention to have supplementary agreements in respect of the trade dollar component of some transactions.

[45] Reliance was placed by Mr Thompson, who appeared for the defendants, on the passage from page 15 of the PRP report quoted above to support their contentions that the Bank was aware throughout that part of the contract price in many cases

was payable in trade dollars and that the contractual relationship between the parties proceeded on this understanding.

[46] Mr Samaras denied that Mr Parker had ever said anything to him at any time about trade dollars.[7] It was not suggested to him in cross-examination that he had had any discussion about trade dollars with Mr Sevdalis. It is not alleged that Mr Sevdalis was the Bank's agent and his state of knowledge about the trade dollars content of the unit sales agreements is thus of limited significance.

[47] Mr Samaras, in cross-examination, conceded that he may have looked at all of page 15 of the PRP valuation and went on to say "I probably did not understand what it was and didn't think anything of it". He added that the valuation aspect was referred to the Bank's "property consultancy area" for investigation and comment.

[48] I consider it possible that there was some discussion between Mr Parker and Mr Samaras about trade dollars but do not accept that the conversation set out in paragraph [3]5 above or a conversation substantially along those lines took place. Whatever Mr Samaras may have been told about trade dollars, it is plain that he thought the matter had no significance for the Bank's purposes. I do not accept that Mr Parker said anything to Mr Samaras which alerted him to the prospect that Spengler might, as a result of the trade dollar component of contracts of sale, require the Bank to accept payments on settlements which would have infringed the agreed loan to valuation ratio. I find that nothing was said by Mr Parker to Mr Samaras or vice versa which was capable of causing Mr Parker to have the belief referred to in paragraph [3](6) above and that Mr Parker had no such belief. I accept Mr Samaras' evidence to the effect that, if such a proposal had been put to him by Mr Parker, he would have asked Mr Parker to put it in writing and then submitted it to the appropriate Bank officer for investigation.

[49] I infer from: the application for loan documentation; the correspondence which followed it; the provision from time to time of copies of parts of contracts; the provision of incomplete sales information, the failure to advert to trade dollars in discussions with Bank officers and the confidentiality clause in the supplementary agreements that Mr Parker was anxious to avoid raising the existence of the trade dollar component of the contracts with Bank officers. It is probable that he was of the view, which was no doubt correct, that knowledge of the trade dollar proposals would have an adverse affect on Spengler's prospects of obtaining loan approval. As Spengler encountered financial difficulties and became dependent on increased funding by the Bank it became even more unlikely that Mr Parker would think it advisable to disclose the trade dollar arrangements to the Bank.

[50] It is significant also that Mr Parker did not protest against the Bank's alleged failure to honour its agreements and representations at any time until well after the appointment of receivers. He explains this conduct by his desire to take a conciliatory and pragmatic approach. I am unable to accept that explanation. If Mr Parker genuinely believed that the Bank had made the alleged representations or that the alleged agreement existed it is inconceivable that, at the very least, he would not have raised those matters with Mr Samaras and also with either or both of Messrs Will and Harbrow. I find that he did not do so. Although Mr Samaras had handed Spengler's file over to Mr Harbrow in early 2000 there was no valid reason

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7 Paragraph 6 of Mr Samaras' affidavit.

why Mr Parker could not have attempted either to enlist Mr Samaras's support or to confront him concerning the alleged agreement and representations.

[51] It is also quite unlikely that, had Mr Parker believed Spengler to have been wronged, he would not have caused his solicitors to write to the Bank asserting Spengler's legal rights. Even in the period leading up to and in the weeks following the appointment of receivers there was no mention of the alleged agreement and representations. There is even no evidence that Mr Parker, although in contact with Spengler's solicitors concerning sales and, no doubt other matters relating to the project, sought any advice about Spengler's rights against the Bank. Mr Parker did not even contact Mr Sevdalis in order to complain to him or enlist his assistance.

[52] Acceptance of either version of Mr Parker's proposal would have marked a notable departure from an institutional lender's normal and expected pattern of behaviour. Mr Parker was aware, having been told by Mr Samaras, that the Bank's normal required ratio of the amount of the loan to the value of its security (on an in one line basis) was 70%. He was seeking a loan of 72 to 73% of valuation on that basis, but that was before taking the trade dollars component of the contracts into account. Once the trade dollars component of some of the contracts was taken into account, it would be apparent that, as the sales of these units settled, the Bank would recoup from the sale prices a maximum of 65%[8] of the nett proceeds of sale. It was thus likely that as units were sold the Bank's security position would deteriorate. If one has regard only to the "overall trade dollar component" for all contracts of 15%, it is also apparent immediately that the Bank's security position would be markedly prejudiced if it was obliged to effect partial releases of mortgage without receiving any part of that component.

[53] The defendants sought to surmount these difficulties by referring to an offer by a third party to provide a loan of $616,000 to Mr Parker on the security of a first mortgage over unit 13 in the building and an offer by another third party to lend $1,400,000 on the security of units 1, 2 and 14 in the building. These arrangements were never put into effect and the Bank had no obligation to release its securities to enable the proposals to be implemented.

[54] Mr Parker was an experienced architect and developer. I have no doubt that he was of the understanding that the Bank would be unlikely to accept any such arrangement. I am of the view that this is why Mr Parker refrained from squarely raising the matter with Mr Samaras (if he raised the matter at all) and why he did not mention trade dollars to any other Bank officer. I find also that if, contrary to my finding, any representation such as that alleged was made, none of the defendants relied on it.

[55] There is no evidence which supports the allegation (set out in more detail in paragraph 9 above) that it was an implied term of the contract between Spengler and the Bank that the Bank would grant partial releases of mortgage on reasonable terms. Even if there was such a term it would not have been unreasonable for the Bank to refuse partial releases having regard to its deteriorating security position. Indeed, there is no evidence, which I accept, of any agreement between the Bank and Spengler limiting the Bank's rights under its securities in respect of releases or partial releases of mortgage.

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[8] The mean of 30% and 40%.

Concluding remarks

[56] The defendants' case has other difficulties but, in view of my findings, it is unnecessary to address these in any detail. It is sufficient for present purposes to observe that the evidence does not disclose any impediment to the exercise by the Bank of its rights under its securities. The quantum of the Bank's claim ultimately was not in dispute.

[57] For the sake of completeness, I record my finding that Messrs Harbrow, Will, Branson and Wenck each appeared to give his evidence carefully and to be a reasonably reliable witness. I do not regard Mr Parker's evidence as reliable.

Conclusion

[58] For the above reasons, the Bank is entitled to judgment on its claims and on the counterclaim in action 7829 of 2002 and on its defence in action 6565 of 2001.

[59] It is noted that claims were not pursued by or against Allgroup Pty Ltd (in liq.) in these proceedings.