SUPREME COURT OF QUEENSLAND

CITATION:	*Commonwealth Bank of Australia v Davies* [2003] QSC 470
PARTIES:	**COMMONWEALTH BANK OF AUSTRALIA** ACN 123 123 124 (plaintiff) **v** **KENNETH HENRY DAVIES** (defendant)
FILE NO/S:	SC No 176 of 2002
DIVISION:	Trial Division
DELIVERED ON:	18 December 2003
DELIVERED AT:	Brisbane
HEARING DATE:	25, 26, 27, 29 November, 12 December 2002 and 28, 29, 31 January 2003
JUDGE:	White J
ORDERS:	**1. Judgment for the plaintiff against the defendant in the sum of $817,921.01 together with interest at 10.15% from 1 January 2003 until judgment** **2. The counterclaim by the defendant is dismissed**
CATCHWORDS:	BANKING AND FINANCE – BANKS – INSTRUMENTS – LOAN FACILITIES – where Bank provided loan to partnership of accountants to fund litigation – where defendant was a partner when loan was given but subsequently withdrew from partnership – where separate accounts maintained for the loan facility for the litigation and other loan facilities provided to the ongoing partnership of which the defendant was not a member – where defendant and other original partners failed to meet interest repayments – whether Bank entitled to sue for the principal amount TRADE AND COMMERCE – TRADE PRACTICES AND RELATED MATTERS – CONSUMER PROTECTION – MISLEADING, DECEPTIVE OR UNCONSCIONABLE CONDUCT – PARTICULAR CLASSES OF CONDUCT – CONCERNING BANKS AND FINANCIAL INSTITUTIONS – where defendant attended meeting with representatives of the Bank and the other original partners – where the outcome of the meeting was that the defendant would not be liable for repayments to the Bank as long as the other original partners continued to meet interest repayments – whether conduct of the Bank misled the defendant into understanding that he would not be made liable to repay the loan if the other partners were unable to meet repayments

BANKING AND FINANCE – BANKS – INSTRUMENTS – LOAN FACILITES – where one of original partners gave security over his house for both loans – where house sold and proceeds credited to the ongoing partners' account and not the account concerning the defendant – whether the Bank was entitled to allocate the funds as it did

Trade Practices Act 1974, s 82, s 82(2)

Cory Brothers & Co Ltd v Owners of the Turkish Steamship Mecca (The Mecca) [1897] AC 286, referred to
Devaynes v Noble (Clayton's Case) (1816) 1 Mer 572; 35 ER 781, referred to
Karedis Enterprises Pty Ltd v Antoniou (1995) ATPR 41-427, referred to
Simson v Ingham (1823) 2 B&C 65; 107 ER 307, referred to
Wardley Australia Limited v The State of Western Australia (1992) 175 CLR 514, referred to

COUNSEL: R C Allaway QC, with K E Downes, 25, 26, 27 November 2002 for the plaintiff
K E Downes 29 November and 12 December 2002
M M Stewart SC, with K E Downes, 28, 29, 31 January 2003
A J Morris QC for the defendant

SOLICITORS: A J Mullumby for the plaintiff
Gilshenan & Luton for the defendant

[1] The plaintiff ("the Bank") commenced proceedings by specially endorsed writ dated 8 March 1995 against the defendant and his wife as second defendant ("Mrs Davies") to recover an amount of $208,235 lent to the first defendant ("Mr Davies") in 1990, interest charges and costs which bring the amount to in excess of $800,000. Mrs Davies was the guarantor of her husband's indebtedness. She reached a settlement with the Bank prior to trial and the action against her has been discontinued. By his defence and counter-claim Mr Davies contends that certain representations made to him by his former business partners in the presence of officials of the Bank which they did not contradict and upon which he relied when signing the application for the subject advance were false and misleading. The quantum of the claim is challenged.

[2] The pleadings are lengthy and have been amended substantially on a number of occasions. The defence and counterclaim were amended just before the commencement of the trial. It was sought to be amended at the close of the Bank's case to reflect substantial matters put to the Bank's witnesses which were not reflected in the defence and counterclaim and to plead a positive case in respect of the quantum of the Bank's claim. Reasons were given on 12 December 2002 for not allowing the first to be pleaded and to permit amendment about quantum.

[3] As a consequence of those amendments to reflect the challenge to the quantum of the claim the Bank was given leave to file an amended statement of claim on 28 January 2003 when the trial resumed.

[4] The essential events the subject of the litigation took place in 1989 and 1990. What was said at a crucial meeting on 11 December 1990 is important to the outcome of these proceedings. The passage of time has affected the recollection of most, if not all, of the Bank's witnesses. Mr Davies purported to have a relatively clear recollection of those events. Because of the lapse of time the contemporary documents and the conduct of the parties are important in assisting in the resolution of this proceeding.

[5] In 1984 Mr Davies entered into an accountancy partnership with Mr David Hart and Mr Peter Towers to be known as Towers, Hart & Davies ("TH&D"). Prior thereto Mr Hart and Mr Towers were in partnership together and Mr Davies was in partnership with a Mr Schafferius. They all practiced as accountants in Townsville. Mr Schafferius remained as a consultant to the new firm of TH&D for six months before retiring from the practice.

[6] The partnership deed is dated 2 July 1984. It required the firm to do its banking with the Bank. By cl 16 any partner desirous of withdrawing from the partnership was required to give two years notice in writing to the remaining partners who could acquire the retiring partner's interest in the partnership by notice in writing within three months of the retiring partner's notice of intention to retire. A method for calculating the payment to the retiring partner was set out in cl 16.

[7] On 29 November 1984 Mr Davies wrote on partnership letterhead to another firm of accountants in Townsville, Allan Evans and Associates, suggesting that certain conduct by that firm in acting for a former client of TH&D (more precisely of Mr Davies when he was in partnership with Mr Schafferius) was unethical ("the defamation letter"). A writ was issued on 27 February 1985 by Mr Evans against Mr Davies as first defendant and the partnership as second defendant claiming damages for defamation. Until then neither Mr Towers nor Mr Hart knew of Mr Davies' letter of 29 November 1984. The solicitors consulted by the firm advised, erroneously as it turned out, that it was not covered by its professional indemnity insurance policy. As a result the insurers were not notified of the claim and when, ultimately, they were, they declined to indemnify the firm on the ground of delay in notification of the claim.

[8] The trial before Mr Justice Carter and a jury took place in November 1989. Mr Davies provided instructions to the solicitors preparing for the trial and during the trial and gave evidence. Judgment was entered in favour of the plaintiffs (a second-named plaintiff, Mr Ross McLean, had been joined) in the amount of $95,000. There were some unusual features about the judgment to which it is unnecessary to refer but they were such as to cause a new trial to be ordered by the Full Court on 7 September 1990. The defamation proceedings had important consequences in relations between the Bank and TH&D.

[9] It seems to have been thought, erroneously, that it was unnecessary to pay the judgment sum pending the outcome of an appeal. The successful plaintiffs pressed for payment in default of which bankruptcy proceedings were threatened. The firm through Mr Towers approached the Bank for accommodation in respect of the judgment sum and the not inconsiderable costs bill, to which the Bank acceded. Mr Davies maintains that he was not kept informed of these matters.

[10] In the meantime, in November 1986, Mr Robert Tardiani joined the firm. He obtained a loan from the Bank to buy into the partnership. In December 1986 Mr and Mrs Davies guaranteed Mr Tardiani's indebtedness to the Bank to the amount of $50,000. Mr Tardiani was appointed the administration partner. Amongst other things he was responsible for liaising with the Bank. The partners had a close connection with the Bank. In addition to the firm's accounts each partner operated a personal account with the Bank. They also referred clients to the Bank as customers. As was known to the partners, Mr Hart's sister was married to the Queensland State manager. The firm had a facility with CBFC Limited, an associated entity. Mr M Kranas, who was the senior manager of the Bank in Townsville and Mr E Landy who was a friend of Mr and Mrs Davies, were the officers of the Bank who dealt regularly with the partners and who were present at the meeting on 11 December 1990.

[11] In his defence and counterclaim Mr Davies alleges that he ceased to be involved in the business of the practice in March 1989 and that from April 1989 the financial position of the firm deteriorated significantly. Mr Davies maintains that he was not aware of this and the Bank knew that he was not kept informed either by his partners or by officers of the Bank. The significance of this contention is that the alleged implied representation that cash flows had been prepared which showed that payments required to be made under the loan on which Mr Davies is sued could be met out of the business of the practice were false. It will therefore be necessary to consider the financial position of the firm before Mr Davies ceased being involved on a day-to-day basis.

[12] In 1988 the firm was said by the Bank, in an internal memo of 24 February, to be trading profitably but was carrying a number of slow paying debtors and had a significant amount of unbilled work-in-progress. The firm was said to be making efforts to reduce overheads. The Bank approved a working overdraft facility to TH&D of $15,000 on 8 February 1988. Mr Davies and the other partners signed an application for accommodation in relation to the overdraft on 22 February 1988.

[13] On 6 March 1989 Mr Davies informed Messrs Towers, Hart and Tardiani of his intention to retire from the partnership giving the required two years notice under the partnership deed. He told the partners that it was his intention to stand for election to State Parliament at the next election (which was held on 2 December). The Bank received formal notification on 12 July 1991 but was aware of Mr Davies' plans at least by 14 August 1989 where it is noted in an internal memorandum.

[14] It appears that Mr Davies had intimated his intention to retire from the partnership to his partners orally at some previous occasion. The continuing partners responded with proposals for acquiring Mr Davies' interest in the partnership predicated upon either his success in the forthcoming Queensland State election or his lack of success in those elections. It was anticipated, if he were elected (as he was), that he would be unable to work out the two year period of notice and the continuing partners offered to accept as the retirement date the date when the poll was declared. It was proposed that Mr Davies should be paid an agreed sum in tranches.

[15] On 6 May 1989 the partners informed the Bank that the partnership previously trading as TH&D was now trading under the name of "Towers, Hart, Davies, Tardiani (THDT)". They wrote

> "The partnership agreement and any other constituent documents remain the same. The change in trading name relates only to the partnership and does not affect any other trading entity associated with the individual partners."

The letter was signed by the four partners including Mr Davies.

[16] On 16 May 1989 the partners sought what they described as "a temporary increase" in their then overdraft facility of $35,000. They sought a facility of $50,000 from May to August 1989. They referred to cash flow projections, work-in-progress projections and debtor projections for the proposed period, as well as financial statements for the 9 months ended 31 March 1989. They added that they were confident that in September 1989 they would be in a position to reduce the overdraft limit back to $35,000. The letter of request was signed by all four partners, including Mr Davies.

[17] The Bank responded on 29 May 1989 approving the temporary increase in the firm's overdraft to $50,000. The application for the overdraft accommodation on a Bank pro forma was signed by the partners of the firm including Mr Davies on 7 July 1989 and included the agreement that the Bank could vary the limit of accommodation from time to time. Mr Davies has pleaded that the deteriorating financial position of the partnership from April 1989 was unknown to him and the Bank was aware of this. These documents indicate that he continued to be informed and involved in the partnership's need for support from the Bank.

[18] By letter dated 2 June 1989 the continuing partners exercised their option to acquire Mr Davies' interest in the partnership setting out the terms and conditions. By cl 24 the continuing partners agreed

> "... that we will arrange for any Bank or other Organisation to which Guarantees have been issued relative to Towers Hart Davies Tardiani, THD Office Services Unit Trust or THD Computer Services Pty Ltd, will be released as at 6th March 1991, or, if you are elected to the Queensland Parliament the date the Poll is declared for the Seat of Townsville."

[19] On 21 June 1989 Mr Tardiani's signature was added to the account authority in relation to account no 233-253 (the partnership account) with the Bank to which Mr Davies still had signing rights.

[20] An internal Bank memo from Mr Kranas, the senior manager in Townsville, to CBFC Brisbane dated 14 August 1989 referred to the "temporary cash flow problem" being experienced by THDT. The firm was seeking a loan of $135,000. Its overdraft was then $111,000. The memo noted that "in addition four large clients aggregating approximately $120,000 require further work to be incurred (approximately $30,000) before the clients will be in a position to finalise the account".

The partners were said to be seeking the assistance of CBFC to cover the cash flow problems with "a conscious endeavour to have the additional borrowing repaid in approximately 12 months". The firm was said to be trading profitably with a

projected net profit for 1989/90 set at $380,043 after providing for partners' salaries and expenses. The memo noted:

> "All partners are involved in the day-to-day operations of the firm and the personal equation is satisfactory. The Branch enjoys an excellent relationship with the partners who have a high public profile and are a good source of referral business. Each of the partners have facilities with the CBA all of which have been conducted in a satisfactory manner."

[21] The writer commented that Mr Davies had served notice that he would leave the practice as at 6 March 1991 when he would be paid approximately $300,000 in eight quarterly instalments over a two year period plus interest of 14% per annum on the balance unpaid and that he was the ALP candidate for the State seat of Townsville in the forthcoming election and might leave the practice earlier if successful in the election. If unsuccessful, it was noted, the proposal was for Mr Davies to continue working in the practice until 6 March 1991.

[22] From this memo it may be inferred that the Bank was under the impression that Mr Davies was involved in the day-to-day operation of the partnership. In a letter dated 29 November 1989 to the professional indemnity insurers after the decision in the defamation action had been given by Carter J, Mr Towers noted that Mr Davies was "currently on leave of absence from the practice". The election was to take place in early December 1989. This letter was subsequently copied to the Bank.

[23] By 20 December 1989 the firm's overdraft had reached $111,716. An internal Bank memo of that date from Mr Kranas to his reporting superior noted that Mr Tardiani had advised the Bank of the current cash flow problems. The collection of fees owed by debtors to the firm was a continuing problem. J E Frost and Associates were expected to pay $85,000 in January the following year. Mr Frost, a Townsville developer, had been Mr Davies' client. He was aware of the basis on which the firm did Mr Frost's work, that is, to give him priority service and to enjoy a "success fee" and that he had not paid outstanding fees. Mr Davies spoke about this client from time to time with Mr Towers who took over the file after Mr Davies ceased his day-to-day involvement in partnership work. The Bank agreed to an extension of temporary excess of $100,000. The financial statements for the four months to 31 October 1989 indicated a modest net profit of almost $80,000 after provision for partner's salaries and other deductions.

[24] After Mr Davies' election to the Queensland Parliament on 2 December 1989, Mr Towers said that he, Mr Hart and Mr Davies met and agreed that Mr Towers would approach the Bank to provide funding for the judgment sum pending an appeal. Mr Davies contends that the other partners sought the facility from the Bank without his knowledge or consent, that is, presumably, he was not at this meeting. It seems surprising that Mr Davies would have been indifferent about who was to pay not only the judgment but the costs. He had given instructions to the solicitors in preparation for the trial, during the trial and was a witness. It was, effectively, his matter. However, his evidence was that at all times he was strongly opposed to any payment being made on the judgment, although he was not able to say that he had made this known except.

[25] An internal Bank diary memo of 3 January 1990 written by Mr Kranas noted the overdraft at $184,843 and the need for urgent assistance to meet the defamation judgment debt. Mr Kranas noted that Mr Evans' solicitors had served notice that bankruptcy proceedings would be initiated if the judgment sum was not paid immediately. In the section under "security" Mr Kranas noted that the practice was worth approximately $1.5m, being mainly goodwill. The CBFC had a claim for $585,000 under its facilities. The comment was "CBA's position is safe" alongside which was the handwritten comment "we hope". Mr Kranas wrote that the balance sheet was typical of most accounting firms with strengths lying in debtors and work-in-progress. He noted that overall the balance sheet position was "satisfactory" and that the individual partners were of some means with significant asset surpluses. Mr Kranas also referred to the collateral advantages that supporting the partnership brought in the form of major businesses giving their work to the Bank. The Bank was prepared to support the partners with a further facility to meet the judgment debt. It was noted that if the appeal did not succeed then the partners would need to sell assets to clear the debt but would be in no position to do so before April 1990.

[26] On 9 January 1990 the Bank wrote to "the partners" THDT approving a bills discount facility of $100,000 to meet the damages awarded against the firm.

[27] A second writ was taken out by Messrs Evans and McLean against Mr Davies as first defendant and TH&D as second defendant for damages for defamation on 9 January 1990. It seems to have related to a second letter but any further explanation for the second writ is not before the court.

[28] By letter dated 25 January 1990 the firm's insurance brokers reported that the professional indemnity insurers had declined to indemnify the partners in the defamation action. They did indicate that if the partners were able to restore the case,

> "... to a defensible position, either by setting aside the judgment or, by succeeding on appeal then your insurers feel that the extent of prejudice will have been considerably curtained and in that event they would view the claim in an entirely different light."

[29] Mr Hart wrote to the firm's solicitors, Connolly Suthers, on 6 February 1990 referring to a conference held on 5 February 1990 "between yourselves and Messrs Towers, Davies and Hart of this firm" about the requirements of the insurer over the provision of the defamation action files. Mr Hart was not an easy witness. He maintained that he simply had no recollection of most of the events about this time and following. I did not doubt that he was being truthful. He, as were the other partners with the exception of Mr Davies, was subsequently made bankrupt from a previous position of relative affluence and standing in the Townsville community. Many adverse things had occurred to him between the events with which the trial was concerned and the hearing of the trial which might explain his want of recollection not just of detail, but at all.

[30] By 7 February 1990 an internal Bank memo by Mr Kranas noted that the overdraft had reached $126,880. The slowness of collecting from debtors was mentioned, the problem having been exacerbated by the Christmas break and the partners' holidays resulting in no accounts being despatched. Debtors were noted to be at $422,294 and work-in-progress at $325,598. The handwritten comment was "this is crazy

bearing in mind their debt load". There was a notation that the Bank was "heavily exposed" but should ultimately be safe in view of the worth of the individual partners and the accounts "should not be allowed to drift and we should monitor progress". It appears that Mr Davies' personal account had exceeded its limit:

> "Mr Davies' account is slowly reducing to within the agreed limit and as the current ALP Member for Townsville receives a parliamentary salary with no further drawings from the accountancy firm."

This makes clear that the Bank understood that Mr Davies no longer participated in the day-to-day operation of the partnership.

[31] Mr Hart wrote to the Bank on 8 February 1990 seeking a meeting with the Bank about the defamation proceedings and enclosing correspondence from the insurance brokers and the second writ.

[32] Mr Tardiani wrote to the Bank on 13 March 1990 seeking a bill facility of $270,000 to finance the costs involved in the defamation litigation and that "[t]he Bill Facility should be in the name of Towers Hart & Davies". The legal costs were required to be paid that week. Mr Tardiani added:

> "The writer has advised all partners concerned that a revision of this Facility will be made in May with the understanding that repayment may be necessary at that time."

Mr Davies denies that he was informed of this application. Mr Tardiani did not give evidence in the trial but it is hardly believable that having written what is set out above he had not advised Mr Davies since the matter so closely concerned him.

[33] A lengthy internal Bank memo written by Mr Kranas on 14 March 1990 referred to yet another application for increased accommodation for the firm in order to meet the costs of running the appeal in the defamation proceedings. The overdraft was then $141,017. He noted:

> "As a last ditch effort partners have approached the Bank for assistance, however recognise the Bank cannot continue to provide funds and on a "worst case" scenario we have requested clients to provide a list of assets to be disposed of to repay indebtedness."

At p5 of the memorandum it was noted that the practice was worth approximately $1.5m with CBFC having a prior claim for $585,000 for its facilities. Mr Kranas wrote, "[i]n summary security position is considered satisfactory", noting that the balance sheet structure was not unusual for an accounting practice where the personal assets of the partners are excluded and with the strengths lying in the debtors/work-in-progress and goodwill. There were collection problems generally, confirmed by other major accountancy firms in Townsville. The firm was said to be trading profitably with projected net profit for 1989/90 set at $380,043 after providing for salaries and other items. It was again noted that Mr Davies was not involved in the day-to-day operation of the firm. Mr Kranas noted the good relationship with the Bank and that the Bank would not wish to jeopardise "this source of referral of business".

[34] The handwritten comments, presumably by Mr Kranas' regional superior, are revealing.

> "There are a few aspects which are cause for concern with this account, viz,
>
> - The Bank's position is exposed;
> - Despite a history of profitability the firm's debt load has increased substantially over recent years;
> - The financial position of the partners may not be as strong as suggested as it includes the net equity in practice which in any event seems inflated considering business is worth $1.5m and debt load is $955,000.
>
> The Bank should now move to secure its position by taking the following securities...
> Approval is recommended on that basis ..."

[35] The regional manager for the Bank wrote to the Townsville branch expressing considerable concern about the position of the firm noting the level of debt of $826,000 against the stated value of the business of $1.5m. The enthusiasm for the firm which came in large part from the amount of business which it directed to the Townsville branch of the Bank was not shared by the regional manager. Approval was given for $45,000 needed as a matter of urgency to fund the defamation appeal by way of a bill facility.

[36] An internal Bank memo written by Mr Kranas on 10 May 1990 showed the firm's overdraft at $219,562 with $145,000 owing on the bill discount facility related to the defamation litigation. Mr Kranas observed that since the Full Court decision on the appeal was imminent;

> "we are allowing the situation to drift along until Monday 21 May when partners will call to discuss the mooted asset sale in the event of an unfavourable decision being handed down."

He noted that on 30 June Mr Davies would receive an electoral allowance of approximately $30,000 which "should assist with the regularisation of his account." Mr Davies has contended that he was kept uninformed of the dealings with the Bank for funding for the litigation but it is difficult to see how Mr Kranas could have information about Mr Davies' allowance unless it had come specifically from him. Mr Davies' account was in need of rectification and since he and Mr Landy were close social friends it is hard to accept Mr Davies' assertion that at no time were the affairs of the partnership, particularly as related to the defamation litigation, discussed or mentioned between them before 11 December 1990.

[37] The handwritten comment on the memo was that the debt "continues to increase at an alarming rate". The Bank's future attitude would be determined by the outcome of the appeal but the Bank was concerned at the continuing escalation of the debt, that additional security had not been obtained and that a promised amount of $40,000 for fees from the Frost Group had not eventuated. Mr Towers conceded that the firm needed the Frost "success" fee for the survival of the firm financially by the end of 1989 unless the Bank continued to support it. Mr Towers recalled discussing the need for the Frost account to be successful with Mr Davies although he had no recollection of discussing the financial difficulties of the firm with him.

[38] By this time Mr Hart was the administration partner. An internal Bank memo written by Mr Kranas of 5 June 1990 records the overdraft at $212,548 with the limit still being recorded at $15,000 although it had earlier, as mentioned, been permitted to go to $50,000. The outcome of the appeal was still unknown and it was thought to be "pointless" holding discussions with the partners until there was a decision. The partners were continuing to pursue debtors and the large outstanding bills from the Frost Group were noted at well over $150,000. It may be noted that 1989/90 was a financially difficult time in Townsville due to the pilot's strike. The Bank was said to be "heavily exposed here" but generally, the position was holding. On 19 June 1990 the overdraft had reduced to $127,074 and, although some inroads had been made in debt collection there was still $423,912 outstanding with $242,021 for work-in-progress. Group tax of $24,000 was outstanding as well as legal fees of $25,200 to Connolly Suthers for insurance advice. The account, which was being monitored daily, was noted as "not much better than holding". By 12 July 1990 the overdraft had gone up again to $273,180 but since the outcome of the appeal was still unknown the Bank proposed to "follow the clients". Similarly on 18 July 1990 the overdraft was $291,935 with the appeal judgment still awaited. The temporary excess was extended to September 1990.

[39] The regional manager wrote on 23 July 1990 to the Townsville branch of the Bank:

> "The apparent further deterioration in the group's position is cause for major concern. To date no security has been taken and the Towers, Hart and Davies debts now stand at $436,935. As we see it, the overall group has liabilities in the order of $2.75m, the bulk of which is owing to CBA and is substantially outside normal lending margins. Clearly the Bank must now take some firm action. No further increase in the Bank's exposure is to be permitted until the securities required have been given to the Bank and the partners can produce clear evidence as to how the current debt load can be repaid."

Mr Kranas noted that Mr Davies' electoral allowance had passed through his account. He wrote that all partners were calling in a few days for a "full frank and open discussion" centred around the clearance of the debts, the security and a matter relating to Mr Towers. Why Mr Davies would not have been included as he contends has not been explained. He continued, so far as the Bank was concerned, to have some liability for partnership debts.

[40] On 7 September 1990 the Full Court delivered its judgment in the defamation action setting aside the trial judgment and ordering a new trial with a further order that the costs of the first trial and of the appeal were to follow the event of the retrial. By 21 September 1990 the overdraft was $242,849. The Bank was then aware of the outcome of the appeal and noted that the partners had served a notice on Mr Evans to pay (repay) the amount of $97,000. There was some confidence of success on a retrial in advice passed on to the Bank.

[41] The Bank requested Mr Hart on behalf of the firm to have prepared cash flow forecasts for the period October 1990 to June 1991. This was sent to the Bank under cover of Mr Hart's letter of 20 November presenting five different scenarios. The regional manager wrote to the Townsville office on the same date pointing out the Bank's heavy exposure to loss unless the situation with the firm could be held

and reversed. From the Bank's point of view there was little credence to be given to any scenario proposed by the firm other than one which excluded a success fee for the Frost "fiasco" and the recovery of the defamation funds. What the Bank was looking for were cash flows which demonstrated a capacity to service the CBFC and the CBA indebtedness from the normal practice income.

[42] Mr Hart proposed to the Bank, amongst other things, on 20 November 1990 that since the defamation litigation debt did not involve Mr Tardiani it should be separated into the names Towers, Hart and Davies. This had, it seems, been discussed with the Bank in early November. Mr Hart added:

> "Furthermore, payments in connection with this matter have been made from the Working Account of Towers Hart Davies Tardiani totalling $44,785.88 with further accounts recently received totalling $18,450.00 yet to be paid. We attach a Summary setting out details of the manner in which these amounts are calculated. This total liability should be rolled into one amount in the name of Towers Hart & Davies."

[43] An internal memorandum of 26 November 1990 by Mr Kranas noted that the overdraft was $390,437. The state of the defamation litigation was discussed but the Bank appreciated that at best the status quo would be maintained by any settlement. Mr Evans would return the $95,000 and each party would meet his own legal costs. Alternatively the matter would proceed to a new trial with the necessity for funding for legal costs. He wrote, "we have found it necessary to advise debtors [the partners] that under no circumstances will drawings above the current level be permitted." When Mr Kranas wrote of advising the partners he was, in fact, dealing with Mr Hart who as the administration partner was responsible for day-to-day dealings with the Bank. It was not until the meeting on 11 December 1990 that Messrs Kranas and Landy appreciated how poor Mr Hart's communication over the restructuring of the debt matter with Mr Davies had been. Mr Kranas noted that the Bank had received a "worse case" scenario cash flow and,

> "... with this in mind propose a rearrangement whereby existing indebtedness is stabilised in the short term and interests met on a weekly basis and the Court costs encompassed within the names of Towers Hart Davies only as Mr Tardiani is not responsible for the McLean/Evans litigation."

The bill discount facility for $145,000 matured on 28 November 1990 and Mr Kranas recommended it be transferred to TH&D and that weekly interest only instalments of $720 would be required pending the outcome of the litigation. Of the THDT fully drawn loan Mr Kranas proposed weekly interest only instalments of $1,200, "pending full clearance from major debtor – Frost Group – when Crystal Creek settlement is effected". It was proposed that security for $120,000 be provided by Wydrone Pty Ltd, a company associated with Mr Frost in respect of the company's indebtedness to the firm for fees and further security from the other partners. The security proposed for the TH&D loan was from Messrs Towers, Hart and Davies. The overall balance sheet position was described as "satisfactory".

[44] Mr Kranas noted that the book balances for November to February demonstrated no capacity to service the proposed CBA repayments but that Mr Hart was adamant

that the worst case scenario was "ultra conservative" and the position would immediately improve due to a rigorous pursuit of debtors and the expectation that some might come good. Mr Kranas concluded:

> "There is no doubt that if it were not for the personal standing of partners and their assurances the Frost settlement was "just there" we would not have follow[ed] this client to the extent we have. Nevertheless we agree the Bank has reached the limit of its assistance."

[45] On 26 November 1990 Mr Kranas wrote to THDT agreeing to the isolation of the amounts which could be directly attributed to the litigation. That debt was to be in the individual names of Towers, Hart and Davies and would be a fully drawn loan. The Bank would seek weekly interest payments to ensure the debt did not increase beyond the figure of $208,235 (made up of the $145,000 bill facility plus $44,785 for costs already paid out of the THDT working account and $18,450 legal costs yet to be paid) and would require the written acknowledgement of each of the parties. The balance of the approximately $545,000 then owing on the working account would be the responsibility of the working partners.

[46] By its letter of 29 November 1990 after discussions with Mr Towers, the Bank proposed that there should be a fully drawn loan of $208,235 to TH&D relating to the litigation debt and a fully drawn loan of $336,765 to THDT to regularise the working account. The security sought for the loan to TH&D were letters of acknowledgement from Mr Hart, secured by a mortgage over his house property, a company associated with Mr Towers and secured by a mortgage over real property, and Mrs Davies secured by a mortgage over her house property in Townsville. The THDT loan was to be secured by guarantees from Wydrone and Mr Frost secured by mortgages over real property, a letter of acknowledgement by Mr Hart secured by a mortgage over his house property, guarantees from a company associated with Mr Towers and a second mortgage over the assets of the accountancy practice.

[47] A letter dated 29 November 1990 addressed to Mrs Davies at her home signed by Mr R M Grace, acting manager loans at the Bank, required her signature to a letter of acknowledgement of a liability of $208,235 plus interest, costs, charges and expenses in respect of the indebtedness of Messrs Towers, Hart and Davies secured by a mortgage over her house property in Townsville. The letter recommended that Mrs Davies seek independent advice if she were uncertain about her position. Mrs Davies was an employee of the Bank at a different branch from that where the partners did their business. It appears that the letter may have been sent to the firm notwithstanding the home address. The precise sequence has never been made clear.

[48] Mr Hart wrote to Mr Grace on 3 December 1990 undertaking to provide to the Bank at the conclusion of each month a receipt and payments summary to allow performance to be monitored against budget so that variations could be investigated and the Bank kept informed of the working account balance. Mr Hart wrote, "the envelope addressed to Mrs Lynette Davies has been passed on to Mr Ken Davies for his attention and signature and returned to us". What this meant in light of the following facts was not made clear at the trial. Mrs Davies signed the letter after a telephone call from Mr Grace urging her to do so notwithstanding that she had been

unable to consult her husband. Other documentation was attended to by the other partners.

[49] By letter dated 5 December 1990 Mr Kranas wrote to Messrs Towers, Hart and Davies care of the post office box number of the firm noting that the Bank had agreed to isolate the sum of $208,235 pertaining to the legal costs of the defamation litigation and that a fully drawn loan in that amount had been approved on the Bank's "usual terms and conditions" setting out a weekly interest only payment of $720 "pending outcome of court case", the interest rate and the required security earlier mentioned. By a letter dated 6 December 1990 to Messrs Towers, Hart, Davies and Tardiani also care of the post office box of the firm the Bank similarly approved a fully drawn loan of $336,765 to consolidate existing indebtedness for which weekly interest only payments of $1200 were to be made. The security previously mentioned was required.

[50] Mr Hart sent to Mr Grace at the Bank the letter of acknowledgement dated 6 December 1990 signed by Mrs Davies under cover of letter dated 6 December 1990. Again how this came to be in Mr Hart's hands was not explained and Mrs Davies did not give evidence. It seems that Mr Davies was away in Brisbane associated with his Parliamentary duties when he learnt of the circumstances in which Mrs Davies had signed the letter of acknowledgement. He attended on his solicitors in Brisbane, Byrne Nosworthy & Doyle. The solicitors wrote, by facsimile transmission, to Mr Grace at the Bank on 10 December 1990. Relevantly the letter said:

> "We act for Ken and Lyn Davies ... The only details of debt provided in the letter are the figure and the primary debtors. Mr Davies instructs us that the Bank is aware that he is no longer a partner of the firm Towers Hart and Davies. The subject debt appears, however, to be a partnership debt. Neither Mr nor Mrs Davies were given any information by either the remaining partners of Towers Hart and Davies or by the Bank as to the debt. Mr Davies' consent was not obtained to the debt being occurred. Mr Davies does not accept liability for the debt and therefore denies the validity of the letter of acknowledgement presented to his wife for signature."

The "validity" of the letter of acknowledgement was denied because the primary debt was incurred without Mr Davies' consent and the signature of Mrs Davies was procured by "duress and undue influence". Contact with Mr Davies in Townsville that day was recommended.

[51] Mr Davies said that he, Messrs Towers, Hart, Kranas and Landy and, for some of the meeting, Mr Tardiani, were present on 11 December 1990 at the Bank in Townsville. Mr Davies said he was still quite angry and wished to have the debt in the letter of acknowledgement explained. A note handwritten on the solicitors' letter by Mr Landy dated 11 December and countersigned by Mr Kranas stated:

> "The aspects raised by Mr Davies in this letter have been discussed with him and he now accepts the position. There has been a gross lack of communication between Mr Hart and Mr Davies which is the cause of the problem. In no way was Mr Grace seeking to pressure Mrs Davies and the whole matter was blown out of all proportion. Senior Manager Mr Kranas has conveyed in detail what the Bank

> was seeking with the documents and Mr Davies is fully aware of the situation. The whole matter can now be put to rest."

Mr Landy said in evidence that after the meeting on 11 December the Bank retained the acknowledgement signed by Mrs Davies. Mr Davies had not asked for its return. Mr Davies learnt at the meeting that the $208,235 was not a new debt but was made up of the $145,000 bills discount facility which had fallen due at the end of November 1990 and two amounts for legal costs of $44,785.88 paid out of the firm's working account and $18,450 for further legal costs yet to be paid relating to the defamation litigation debts. It is instructive to consider a comparatively contemporary account of what occurred. By an internal memo of 31 May 1991 from Townsville to North Queensland Region signed by Mr David Meiers, senior manager, but written by Mr Landy, information was given about "recent events concerning the execution of the documentation". It stated, relevantly,

> "On Friday evening 7/12/90 Mr Ken Davies telephoned Senior Loans Officer Mark Grace at his home. Whilst Mrs Davies had signed the Letter of Acknowledgement quite willingly he objected vehemently to the Bank seeking its return urgently and having it signed without his knowledge.
>
> Despite assurances given to the Bank by Mr Hart, Mr Davies stated that no communication had been received outlining the proposed rearrangement. The telephone discussion concluded with Mr Davies hanging up and advising that he would put the matter in the hands of his solicitor on Monday.
>
> On Monday 10/12/90 a facsimile was received from Mr Davies solicitor in Brisbane. (Refer Attachment E).
>
> The matter was then discussed with Mr David Hart with a view to rectifying the apparent gross lack of communication that had occurred between the accounting firm and Mr Davies. A round table conference was arranged at this office on 11/12/90 which was attended by all four parties, Senior Manager Mr Kranas and the writer (E Landy).
>
> At that meeting Mr Hart explained the full situation to Mr Davies and Mr Davies agreed for the documentation to proceed. He informed us there and then that his wife had no objection to signing the document, it was more he felt that the Towers Hart Davies situation needed to be explained to his personal satisfaction. He preferred to vet all documentation prior to its execution. Subsequently on 12/12/90 the documentation was returned to the Bank. (Refer Attachments F & G)." (underlining on exhibit but probably not on original document.)

[52] Mr Davies then understood that there was a rearrangement for two facilities, one for $208,235 and the other for $336,765 which isolated Mr Tardiani from responsibility for the defamation litigation debt. Mr Davies recalled that there was a letter present at the meeting which set out the details of that rearrangement. He said that his concern was that the firm could repay the money from its working account. He said

that he asked that question and "someone at the meeting, I am sure, said 'based on the cash flow, yes'". He said he thought it was Mr Kranas who spoke but could not be precise about it. He said there some discussion about cash flow at the meeting. Mr Davies said he was concerned to know if the firm could meet the repayments and added "the response I was getting was, 'based on the cash flow, it can'". He did not recall seeing any cash flows at the meeting but said,

> "Mr Towers I think said that the cash flows had been required to – sorry, had been provided to the Commonwealth Bank. I didn't ask to see those cash flows but he said they'd been provided to the Commonwealth Bank. I wanted assurance from – from them at the meeting that the – that the firm could look after both the $208,235 and the other one $336,765. I got that assurance and Peter Towers said that the repayments of the $208,235 would be coming out of the ongoing practice." t/s 252

Mr Davies said that Mr Landy and Mr Kranas remained silent but Mr Kranas made the comment "based on the cash flows, yes".

[53] It is useful to set out the representations which Mr Davies alleges can be implied from the background matters leading to this meeting and what Mr Davies contends was said. They are in para 8 of the further amended defence and counterclaim:

> "(a) an implied representation that cash flow forecasts had been prepared which showed that the payments required under that facility could be met out of the business of the Third Partnership [THDT] and that those cash flow forecasts were reliable, such representation being implied from the following conduct:
>
> (i) Towers, in the presence of Kranas and Landy, made the representation orally to the Defendant;
>
> (ii) Kranas and Landy did not dissent from or correct that representation; and
>
> (iii) in the context of the other representations pleaded in this paragraph, the failure of Kranas and Landy to dissent from or correct that representation constituted an implied representation that it was true;
>
> (b) an implied representation that, whilst the loan documentation was to be in the names of Towers, Hart, and the Defendant, the Defendant would not have to make any of the payments required under the facility, such representation being implied from the following conduct:
>
> (i) Towers, in the presence of Kranas and Landy, made the representation orally to the Defendant;
>
> (ii) Kranas and Landy did not dissent from or correct that representation; and
>
> (iii) in the context of the other representations pleaded in this paragraph, the failure of Kranas and Landy to dissent from or correct that representation constituted an implied representation that it was true;
>
> (c) the following further implied representations, which representations are implied from the making of the

representations pleaded in sub-paragraphs (a) and (b) hereof; namely-

(i) that the Plaintiff did not intend that the Defendant would be required to make any payments in respect of the facility;

(ii) that reasonable grounds existed for making each of the preceding representations; and

(iii) that the Plaintiff had no reason to doubt the ability of Towers, Hart and Tardiani to meet the repayments of the facility."

[54] Mr Davies thought he signed the application form for accommodation that day although Mr Tardiani has dated it 12 December. Mr Morris QC, his counsel, asked him,

> "assuming that those things happened [the obtaining of security from Mr Frost and the fresh consent from Mrs Davies] – we know that they didn't but assuming that those things had happened in the ordinary course, what things operated on your mind in deciding that you would sign that application form? – the – promise from Peter Towers in front of the Bank officers that I would not be responsible for the repayments on the loan or for the loan, and the – the other things that were still required to be done." t/s 254

[55] Mr Davies denied that Mr Towers or Mr Hart had ever discussed with or mentioned to him Mr Evans' threat to serve bankruptcy notices upon the partners if the judgment sum of $95,000 was not satisfied in early January 1990. He said his view was that the judgment sum should not be paid because there was to be an appeal and was adamantly against doing so. He denied that Mr Towers and/or Mr Hart either discussed with him that they would borrow money from the Bank to satisfy the judgment or that they proposed paying the judgment. He denied that the litigation solicitors with whom he had regular contact informed him that the judgment had been paid at a meeting he accepts he attended with Mr Towers and Mr Hart on 5 February 1990. Mr Davies' evidence of lack of concern or interest as to who had or was to pay the legal costs associated with the trial and the appeal to the Full Court, in the absence of support by an insurer, does seem somewhat incredible even for a man who was distracted by a new career in politics and who, personally, was feeling some financial strain. It was not as though he was distant from the matter. He had written the defamation letter and had been the partner who had given relevant instructions to the solicitors before and during the trial. Mr Davies said he had assumed that any payments which had to be made would be deducted against his anticipated payment for his share in the partnership. He accepted that none of this was discussed with the continuing partners at the time although it was taken up in the withdrawal from partnership agreement.

[56] Mr Davies maintained that no one at the Bank discussed with him the state of the partnership accounts when he was discussing his personal indebtedness to the Bank during 1990. He was then experiencing some financial embarrassment in dealing with the increased expenses of being a member of Parliament and needed financial accommodation from the Bank. The Bank urged him to rearrange his affairs in order to make some inroads into the temporary accommodation which it had afforded to him. Mr Davies spoke of a long and cordial social relationship with Mr Landy and denied that at any time there were any conversations relating to the

deteriorating position of the partnership after he had been elected to Parliament. He agreed that the letter of 29 November 1990 to the firm from the Bank referring to an earlier letter of 26 November 1990 and discussions with Mr Towers was available and seen by him at the meeting on 11 December. The letter of 26 November spoke of the partnership debt rising "at an alarming rate". Mr Landy who gave evidence at the trial was simply unable to recall if they had spoken of these matters. A consideration of documents generated on Mr Davies' instructions, written by him, and his conduct following the letter of acknowledgment of debt and application for accommodation assists in evaluating Mr Davies' assertions.

[57] An internal Bank memo of 11 December 1990 concerned an application for increased accommodation and rearrangement of affairs for Mr Davies. The comment/recommendation was that the "[f]acilities now sought merely formalise the untidy affairs of this client. Mr Davies clearly understands this is the limit of the Bank's assistance at this time and account is to be conducted strictly within arrangements." Mr Davies said that the Bank's internal comments often were in stronger terms than the expressions used to him in conversation. The handwritten note on the memo describes the value of his interest in the accountancy practice "at present" as all but worthless.

[58] Mr Hart wrote to the Bank on 12 December referring to the conference the previous day and the letters of 29 November and 5 December which "set out full details of the terms of the re-arrangement of indebtedness" and "[w]e hereby confirm our consent to the re-arrangement as outlined in your letters of 29 November and 5 December, 1990, copies of which are attached hereto, the Consents having been demonstrated by the signature of the respective documentation provided as attachments to those letters." The accompanying document is headed "CONFIRMATION" and states:

> "We hereby confirm our Consent to the Facilities advised in your letter of 29 November 1990, and 6 December 1990, and the security documentation provided in support of these Facilities."

The document was signed by Mr Davies, Mr Towers and Mr Hart. A similar letter was sent for the working overdraft loan of $336,765 to the continuing partners. The reference in the document to the letter of 6 December is understood to be a reference to the letter dated 5 December 1990. There is no suggestion that Mr Davies was misled in any way by the reference to the letter of 6 December rather than to that of 5 December which related to the TH&D fully drawn loan. It will be recalled that the letter of 5 December concluded:

> "We point out that this is the limit of the Bank's assistance and working accounts are expected to be conducted on a credit basis. Failure to do so will result in cheques being dishonoured without reference to yourselves."

[59] By letter dated 12 December 1990 Mr Hart enclosed an application for accommodation and authority for periodical payment of $720 per week relating to the TH&D loan. Clause 2(g) of the application provided, "if there is more than one applicant their liability to the Bank will be joint and several." It was signed by Mr Davies. The Banker's order accompanying the application was to take the

interest payments of $720 per week from the working account of the partnership and was signed by Mr Towers and Mr Hart.

[60] In a letter dated 19 December 1990 addressed to Mr Davies at his home address Mr Landy for the Bank informed him that the loan for $208,235 jointly with Mr Towers and Mr Hart was funded on 14 December 1990 and set out the way in which the funds were dispersed. Weekly interest payments of $720 were to commence two days later and to be effected under authority from account number 233-253. The same letter was sent to Messrs Towers, Hart and Davies care of the firm's Townsville post office box. Mr Davies contends that he never received this letter and that he first saw it when he obtained a copy from Mr Hart in 1993. His explanation for denying receiving the letter when it was sent was that sometimes the Bank sent letters for him to the firm's post office address. He therefore surmised that notwithstanding the home address on it, the letter was put in the same envelope as one addressed to himself and Mr Towers and Mr Hart as jointly responsible for the debt. Mr Davies does not suggest that a letter from the Bank written by Mr Landy to him addressed to his home address dated two days later relating to his personal account and a fully drawn loan was not sent to his home address. I was not persuaded that Mr Davies did not receive this letter. It became apparent to Mr Landy at the meeting on 11 December that Mr Hart as liaison partner with the Bank did not keep Mr Davies appraised of, at least, recent dealings and arrangements with the Bank. Mr Landy knew that Mr Davies was not involved in the day-to-day operation of the partnership. Accordingly, two identical letters were sent out on 19 December, one addressed to "Mr K H Davies 7 Acacia Street MUNDINGBURRA QLD 4812" and the other to Messrs P J Towers, D J Hart and K H Davies PO Box 1926 TOWNSVILLE QLD 4810", no doubt to ensure that Mr Davies was kept informed.

[61] It was not until 3 May 1991 that the Bank was formally provided with the documentation from the firm concerning Mr Davies' retirement from the partnership. Clause 11 of the termination agreement related to the defamation actions commenced by Mr Evans. It provided that in calculating the value of Mr Davies' interest in the firm, "no account shall be taken of the liability (if any) of the retiring partner in respect of ..." the Supreme Court actions. It continued:

> "Peter John Towers, David John Hart and Kenneth Henry Davies agree, between themselves, that they are liable, from their private estates, as to one-third each for satisfying any judgment or judgments obtained against the Defendants in the said actions and for all costs of and incidental to the said actions. All moneys payable to the retiring partner under the terms of this Agreement and the Partnership Agreement are hereby charged by the retiring partner with payment of his share of the moneys hereinbefore in this clause referred to and the continuing partners may deduct from each and every payment due to be made to the retiring partner under the terms of this Agreement and pay to the party entitled thereto such an amount or amounts as will satisfy the liability of the retiring partner to pay his share of the moneys hereinbefore in this clause referred to."

[62] This provision that his obligations for the debts arising from the defamation litigation was being "taken care of" by the continuing partnership seems to have affected Mr Davies' view of his liability to the Bank in respect of that loan.

[63] By a letter dated 4 June 1991 to Connolly Suthers from Mr Davies' solicitors, Freehill Hollingdale & Page, a number of matters relating to the withdrawal from the partnership were canvassed. Paragraph 7 relating to the defamation litigation and referred to cl 11 of the agreement is informative.

> "Our client instructs us that the partnership has a loan facility with the Commonwealth Bank with respect to the payment of costs and damages arising out of the Supreme Court Actions referred to in clause 11. That loan currently stands at approximately $208,000.00 and each of Peter John Towers, David John Hart and our client have given joint and several personal guarantees to the Bank.
>
> Our client understands that in proposing to "charge" the money owing to him under the Agreement your clients are endeavouring to protect their exposure under the personal guarantees *if our client fails to meet his liabilities to the bank.* [italics added] Our client instructs us to assure your clients that they need have no concerns in this respect. However, our client understands your clients' desire to protect themselves legally. For this reason, our client wishes to propose for consideration an alternative arrangement as follows:
>
> (a) the balance of the second instalment for the purchase price be set off against our client's portion;
> (b) our client to provide a guarantee and indemnity in favour of Towers and Hart with respect to the balance one third of the loan;
> (c) our client to be released from obligations to the Bank in respect of the Loan;
> (d) the guarantee and indemnity to be conditional upon receipt of sufficient funds under the Withdrawal Agreement.
> (e) our client has not approached the Commonwealth Bank to discuss this arrangement but seeks your clients' response to it prior to doing so. If your clients' response is favourable then he will make the necessary approach to see whether the bank would consent.
> (f) clause 11 should be redrafted to take account of the possibility of the receipt of insurance funds with respect to the Supreme Court actions mentioned. As the liability is split equally between Towers, Hart and our client, we would propose that any insurance moneys be similarly apportioned forthwith.
> (g) clause 11 should be redrafted to take into account any costs which may be incurred and any benefits received in relation to proceedings arising from the advice given to the partnership about the defamation action and the partnership's insurance.
> (h) our client is also concerned that he maintain an involvement in decisions regarding the payments of costs or damages and regarding the institution of further proceedings. In no way is

> this to be seen as a reflection upon the way in which the Supreme Court litigation has previously been handled by David Hart. Our client instructs us that he has no wish to criticise any aspect of Mr Hart's management of the litigation. However, he is concerned that decisions of vital importance will need to be made in the near future regarding the conduct of the Supreme Court litigation and, perhaps, the institution of further legal proceedings. We would suggest that the clause be redrafted to include a requirement that our client be consulted both on the incurring of liabilities and on the institution of further proceedings.
>
> As previously indicated, our client understands your clients' concern to protect themselves from having to meet any liability to the Bank that he may fail to meet. The proposal put forward above is designed to meet this concern whilst giving our client personal control over the way in which and the order in which he meets his personal liabilities."

There is no suggestion, rather the contrary, that Mr Davies did not accept that he was always liable to the Bank and might, ultimately, be required to make payments directly to the Bank. Further there is, at the least, an acceptance of what has gone before about the conduct of the litigation and, it may be inferred, the payment of the judgment sum.

[64] Under cover of a letter dated 6 September 1991 the Bank informed Mr Davies that no payments had been made on the fully drawn loan since 2 April 1991 and included the account statements.

[65] An internal Bank memo signed by Mr Landy and another officer dated 27 September 1991 noted that the withdrawal from partnership agreement had not been signed. The memorandum noted that the partners were reminded that they were each and severally liable for the TH&D debt and that if Messrs Tower and Hart were unable to condition the indebtedness (make arrangements for its payment) it was "... not unreasonable to ask that Davies make some payment towards the debt. We ask this to be passed on to Mr Davies."

[66] The withdrawal from partnership agreement was finally executed on 3 December 1991 with some redrafting. Clause 10 related to the defamation litigation. Clause 10(a), as previously, provided for the private liability of Messrs Tower, Hart and Davies as to one third each to satisfy any judgment. Clause 10(b) was new. Clause 10(b)-(e) provided that:

> "(b) Subject to the agreement of the Commonwealth Bank of Australia to release Kenneth Henry Davies from all liability under or in respect of the amount of principal and interest owing to the Commonwealth Bank of Australia ("Litigation Debt") in respect of the above action:-
>
> (i) the continuing partners shall apply the purchase price referred to in clause 14 [of Mr Davies' interest in the partnership] to reduction of the Litigation Debt up to an amount equal to one third of the said debt as at 11

September 1991 and interest thereon ("Davies debt") and the balance of the purchase price (if any) shall be payable to the retiring partner on the next quarterly date for payment after insufficient funds have been made available for satisfaction in full of the Davies debt; and

(ii) Peter John Towers and David John Hart shall indemnify and keep indemnified Kenneth Henry Davies in respect of any liability arising as a consequence of failure to pay the Litigation debt.

(c) In the event that any continuing partner receives any funds in respect of the said litigation those funds shall be deposited in a trust account for the benefit of Peter John Towers, David John Hart and Kenneth Henry Davies in equal shares. Those funds shall be applied to reduce each partner's respective outstanding proportion of the Litigation Debt and in the case of Kenneth Henry Davies any surplus (after having regard to the amount of the purchase price available to reduce or satisfy the debt aforesaid) shall be paid forthwith to him. For the purposes of this clause the funds received in respect of the said litigation include, without limitation, any funds received from the insurers of the parties thereto and any funds arising in respect of advice given in relation to the litigation and the insurance of the parties thereto.

(d) The continuing partners shall use their best endeavours to obtain the release of Kenneth Henry Davies from any guarantee and indemnity relating to the Litigation Debt and, including without limitation, Peter John Towers and David John Hart shall provide such substituted security as may be reasonably required by the Commonwealth Bank.

(e) Any portion of the purchase price or the funds referred to in paragraph (c) above not paid to the retiring partner shall be deemed to have been applied in reduction of the CBFC debt and the Litigation Debt pro tanto for the purposes of this Agreement."

[67] It is difficult to see how this agreement which was carefully and thoroughly negotiated by Mr Davies with the aid of his solicitors is consistent with an understanding which he maintains he had when he signed the application for accommodation and acknowledgement of debt on or about 12 December 1990 that he was not liable for the litigation loan. Further, at this time, the financial difficulties of the firm were plain. He had received notice from the Bank in September 1991 that interest payments had not been made since April. The retirement agreement noted that the first, second and third instalments of the purchase price of Mr Davies' interest in the partnership due on 6 March, 6 June and 6 September 1991 respectively had not been paid. There is no suggestion that Mr Davies had been misled by anything said at the 11 December 1990 meeting about the firm's capacity to make the repayments on the litigation loan or, ultimately, his liability to the Bank.

[68] On 31 October 1991 the Bank made demand of Mr Davies for the principal and interest and other monies due and payable due under the litigation loan for $234,277.19. The Bank wrote a second letter of demand on 19 November 1991 and issued a notice of demand to Mrs Davies on 5 December 1991. Mrs Davies' solicitors, Freehill Hollingdale & Page wrote on 12 December 1991 denying liability. They wrote on behalf of Mr Davies to Connolly Suthers, the solicitors for THDT, expressing concern that he and Mrs Davies had received demands from the Bank and asking what attempts at been made to have the Bank release Mr Davies from his obligations to the Bank as agreed in the termination agreement. Mr Davies was said by his solicitors to have had discussions with Mr Landy with a view to procuring his release. In evidence Mr Davies said that he then raised with Mr Landy the oral representations which he alleges were made at the meeting on 11 December 1990. Mr Landy did not recall such a conversation when he gave evidence. In a file note of 23 December 1991 he had written:

> "Mr David Hart delivered a copy of a letter received by their solicitors Connolly Suthers on 13/12/91. In it comment was made that Mr Davies had had discussions with the writer with regards the bank releasing him from his indebtedness on the court case debt.
>
> The writer has had no discussions whatsoever with Mr Davies in this regard and it is most disappointing that Mr Davies has obviously communicated this to his solicitor when in fact this is not the case.
>
> Later
>
> Mr Davies telephoned the writer from the Gold Coast on his mobile phone (No 018 778 441) to discuss the matter. The writer raised the contents of the Connolly Suthers letter and Mr Davies agreed that he had not discussed the matter with the writer and had overlooked ringing the bank. He then went on to say that through his solicitor he was issuing letters of demand for approximately $100,000 on the three partners of the accounting firm. This was on legal advice and related to monies they owed him in terms of the partnership dissolution agreement.
>
> Mr Davies then asked that in view of the monies owed to him by the accounting firm whether the bank and CBFC would release both himself and his wife Lynn out of any guarantees/responsibilities to the bank in relation to partnership debts. The writer informed Mr Davies that we had little discretion whatsoever in the accounts at the present time and the accounts were under control of Branch Network for the CBA and CBFC Head Office in relation to the CBFC debts.
>
> He stated that this branch had been his point of contact in the past and he asked if we could relay his requests to the appropriate parties. The writer informed Mr Davies that it was most unlikely whatsoever that the bank would entertain any suggestion of releasing him from any guarantees/responsibilities until other events had crystallised and the position was much more clear.

> In any event we doubted whether Messrs Towers Hart & Tardiani would have concurred to release him from the court case debts particularly in view of the events that surrounded the establishment of the debts in the first place. Nevertheless the writer undertook to take his request and pass it on the appropriate sections."

[69] Connolly Suthers replied to Freehill Hollingdale & Page that there had been no attempt by the continuing partners to have the Bank release Mr Davies from liability because they believed that there was no prospect of that occurring. They indicated that no payments had been made because the partners were unable to do so.

[70] By letter dated 23 December 1991 to the Bank after Mr Davies had spoken with Mr Landy about release from his obligations his solicitors referred to their letter of 10 December 1990 to Mr Grace concerning Mrs Davies' acknowledgement of Mr Davies' debt. How that concerned Mr Davies is not made clear but Mr Davies' denial of liability was asserted.

[71] Mr Hart wrote to the Bank on 24 December 1991 seeking the release of Mr Davies "from his responsibilities under the litigation debt to which he is a party".

[72] At the request of Mr Davies' solicitors the Bank forwarded copies of documents executed by Mr and Mrs Davies to secure advances in the name of Towers Hart & Davies under cover of letter dated 6 January 1992. By now the matters were in the hands of the recoveries section of the Bank in Brisbane.

[73] Under cover of letter dated 15 January 1992 the Bank declined to release Mr Davies from his obligations under the security granted to the Bank to support the debt in the name of TH&D.

[74] Sometime in early 1992 CBFC Limited appointed receivers to the partnership practice of THDT.

[75] Ms Smith-Pomeroy from the recoveries section of the Bank in Brisbane spoke with Mr Davies on a number of occasions in 1991, 1992 and 1993, both in person and by telephone. Although he discussed with her whether a possible settlement sum of $70,000 which had been agreed with the indemnity insurers was to be placed with CBFC or the Bank, at no time did he suggest to her that he was not liable for the litigation debt by virtue of an understanding conveyed to him at the meeting on 11 December 1990. Nor did he suggest to Ms Smith-Pomeroy that he was not otherwise liable on the debt. Mr Davies contends that he recommended to Ms Smith-Pomeroy that she should have discussions with people such as Mr Landy "to find out what the arrangement was." This was not put to Ms Smith-Pomeroy in cross-examination. Ms Smith-Pomeroy was a careful and reliable witness. I am confident she would have followed up any exculpatory matters of substance raised by Mr Davies.

[76] Early in 1993 Messrs Hart, Towers and Tardiani became bankrupt. Mr Davies continued to negotiate with their trustees in bankruptcy in an effort to have the $70,000 defamation litigation monies paid to the Bank rather than to CBFC. From a memo written by Ms Smith-Pomeroy dated 2 March 1993 it seems that the Bank had agreed to release Mr Davies from his indebtedness in respect of the TH&D litigation debt if that were to occur.

[77] Mr Davies complained to the Australian Banking Industry Ombudsman on 22 December 1993 about the conduct of the Bank in its dealings with him. The detailed complaint makes no reference to the representations said to have been made on 11 December 1990. It creates quite a different picture from that which the contemporary documents and the oral evidence in the trial gives. There is something of a suggestion that the application for accommodation form dated 12 December 1990 signed by Mr Davies is not his document and that the Bank processed the loan for $208,235 without his knowledge. Mr Davies was concerned about alleged breaches of confidentiality by the Bank to the remaining partners about his personal financial affairs but not about being misled.

[78] Mr Davies wrote a long letter of complaint of 10 type-written pages to Mr Don Nissen, the Queensland manager of the Bank, on 31 May 1993. Mr Nissen was Mr Hart's brother-in-law. The letter complains about the conduct of the Bank and its officers in Townsville. It impliedly criticises the recovery officers in Brisbane. Mr Davies wrote of the Bank's intransigence in not accepting his offers of settlement. The theme of the complaints is that because the Bank allowed the continuing partners to run up huge debts to the Bank by way of various facilities it was grossly negligent particularly with respect to the unsecured creditors of the continuing partnership of which he was one. In effect, he held the Bank responsible for being unable to recover the $200,000 which he said was still owed to him under the retirement from partnership agreement. His complaint about the defamation litigation debt was to a large extent focussed upon the failure of the Bank to apply the proceeds from the sale of the assets of other partners towards a reduction of the TH&D debt. He asserted that neither he nor his wife had requested the provision of funds in relation to the defamation litigation and he did not regard himself as liable for those debts. Nowhere in his lengthy diatribe against the Bank does he make any reference to the meeting of 11 December at which he now contends he understood he would not be responsible for the TH&D litigation debt and that the continuing partnership was in a position to fund the repayments.

The issues

The contract issue

[79] Mr Morris submitted that the Bank failed to prove its case because, in effect, the advance to TH&D was made without satisfying completely the conditions set out in the Bank's correspondence of 29 November and 5 December 1990. He submitted that the regularisation of the firm's (in whatever partnership manifestation) financial obligations to the Bank came as a "package", that is, *all* the requirements for both loans had to be satisfied before the Bank was obliged to lend and the debtors obliged to pay. More particularly it is submitted that because

- There was no "fresh" letter of acknowledgement by Mrs Davies; and
- No security was obtained from Mr Frost or Wydrone Pty Ltd, a company associated with him; and
- The repayment of the principle as an obligation was not clearly spelled out;

the Bank may not recover.

[80] There was no need for a fresh letter of acknowledgement. If what happened on 11 December is analysed in legal terms, Mr Davies as Mrs Davies' agent accepted the explanation of Mr Hart and others at the meeting about the $208,235. The letter was not returned or destroyed. It could be said to have been enlivened that day. The consideration was the isolation of the litigation debt from the other debts of the practice, the accommodation and the release of Mr Davies from any continuing obligation under the bill discount facility or the working overdraft. If that is not how Mrs Davies' acknowledgement should be approached, it was something solely for the Bank's benefit vis-a-vis Mr Davies and its provision could be waived.

[81] The Frost security of $120,000 was not able to be obtained by the partners from Mr Frost. It specifically related to the THDT loan facility and not to the TH&D loan facility. When Mr Davies said that he was reliant on it as part of the total package of assurances that THDT could meet the payments on the TH&D loan I did not believe him. If obtained and had been realised it would have made little, if any, difference to THDT's ability to make the repayments.

[82] It is submitted that as the letter of 5 December 1990 required interest only payments "pending the outcome of the court proceedings" and those proceedings have not, so far as the evidence in this trial revealed, been finalised, there is no obligation to repay the principle. It is quite artificial to contend that because there was no procedure articulated for the payment of the principle, the Bank is precluded from suing for it. Mr Davies acknowledged his indebtedness. The failure to meet the interest payments triggered the demand for the principle which the Bank was entitled to make.

[83] The Bank has made out its entitlement to judgment subject to a consideration of the matters raised by way of counter-claim and set-off.

The misleading conduct issue

[84] I have concluded that Mr Davies had explained to him at the meeting with his partners and the Bank officers most familiar with his and the partnership accounts on 11 December 1990 at the Bank that the funds already advanced to pay the defamation judgment sum of $95,000 and various costs associated with the action were to be isolated as a stand alone debt for which he, Mr Towers and Mr Hart were to be liable. He understood that this was at the request of the continuing partners to "quarantine" Mr Tardiani from it since he was not a member of the partnership when the conduct which gave rise to the debt occurred. He (Mr Davies) was to be relieved of any obligation in relation to the working capital (overdraft) of the continuing partners. There was no animosity between the partners demonstrated in the contemporaneous documentation nor subsequently when the terms of the withdrawal from the partnership agreement were being negotiated. There was no reason at all for his "former" partners or the Bank to be unforthcoming, let alone false and misleading about the state of the partnership accounts at the meeting. It is clear from the internal memos and the annotation to the letter of 10 December 1990 by Mr Landy that the Bank believed that Mr Davies was being kept informed by at least Mr Hart until the meeting when matters were explained.

[85] I was not impressed by what appeared to me to be Mr Davies' evasive manner of answering many questions put to him in cross-examination by repeating the question with some puzzlement and then answering it in a convoluted and often

argumentative fashion. Mr Davies' explanation that he thought the reference to "cash flows" at the meeting was to one cash flow was, at best for him, disingenuous. In the context of a loan to regularise the working account of $336,765 there could be no doubt that the continuing partnership carried a significant debt load and of this Mr Davies was aware. There was nothing misleading to say that based on one or more of the cash flows provided to the Bank which, had he chosen to peruse them, were available, the continuing partnership could meet the interest repayments. There was nothing said or done at the meeting expressly or by implication to lead Mr Davies to understand that he was not *actually* to be made liable should the practice be unable to service the loan. This conclusion is supported by the documentary evidence to which I have referred and his former partners' and the Bank's conduct.

[86] He made no objection to signing the letter of acknowledgement and the request for accommodation. There is no doubt that he had every hope and, indeed, expectation that the continuing partners would continue to make the interest payments on the litigation loan which would be deducted from his share of the partnership payment. It was expected that ultimately there would be a satisfactory outcome of the defamation litigation. The letter of 29 November was available at the meeting. The overdraft position of the continuing partners was there for him to see. Since he was being relieved of any obligation to contribute to that repayment it was of no particular importance to him save that he and his wife had guaranteed to $50,000 Mr Tardiani coming into the partnership.

Limitation issue

[87] It is unnecessary to discuss in any detail the submissions of Mr Stewart SC for the Bank that Mr Davies is precluded from any relief under the *Trade Practices Act* because his claim is time-barred. As the provisions of s 82 of the *Trade Practices Act* then stood Mr Davies had three years from the accrual of his cause of action to bring proceedings, s 82(2). It a question of fact as to when a party sustains the loss which activates the cause of action, *Wardley Australia Limited v The State of Western Australia* (1992) 175 CLR 514; *Karedis Enterprises Pty Ltd v Antoniou* (1995) ATPR 41-427.

[88] Mr Morris contended that the cause of action arose when Mr Davies' former partners were made bankrupt in December 1992. Mr Stewart submitted for the date on which Mr Davies received the first acknowledged letter of demand from the Bank in November 1991. Mr Davies delivered his defence and counterclaim raising his claim under the *Trade Practices Act* on 5 May 1995. When the Bank made demand of Mr Davies for the payment of the principle and interest on the litigation loan it could not have been clearer that, contrary to what Mr Davies now contends to have been the true state of affairs, the Bank regarded him as obliged to repay the loan on the failure of the practice to make regular interest repayments. That was the time when his claim for damages and other relief for misleading and deceptive conduct under the *Trade Practices Act* accrued and it became time-barred at the latest in November 1994. It seems irrelevant that Mr Hart and Mr Towers pursuant to cl 10(b)(ii) of the retirement from partnership agreement had agreed to indemnify Mr Davies in respect of any liability arising as a consequence of failure to pay. Mr Davies knew the continuing partners could not pay and might assume that Mr Hart and Mr Towers would personally be in no better position.

[89] In view of the conclusion which I have reached that there was no conduct on the part of the Bank which misled Mr Davies it is unnecessary to discuss the common law claims which are not caught by time limitations.

The quantum issue

[90] The Bank seeks recovery of the principle amount lent of $208,235 together with interest and charges. Mr Davies disputes aspects of the total amount sought to be recovered under two broad headings which, in his pleadings, he has characterised as "disputed debits" and "missing credits".

[91] In its further amended reply and answer the Bank has abandoned its claim to a number of the disputed debits.

[92] Mr Davies does not dispute that the principle amount of $208,235 is the amount of the loan which was drawn down on 14 December 1990. The letter of 5 December 1990 provided that interest was to be calculated daily on the outstanding balance of the loan account and charged quarterly and on the repayment of the loan.

[93] Clause 2(c) of the application for accommodation signed by Mr Davies in 1990 entitled and continues to entitle the Bank to vary the amount of interest it charges in relation to the loan. Although the source of the interest rate is challenged by Mr Morris the rate is clearly set out in exhibit 10 being the Commonwealth Bank loan account transaction documents. When Mr Brett Gordon, the manager of the credit management section of the Bank, calculated the figures he checked the Bank's internal published interest rates over the period to confirm that the correct interest rates had been applied throughout the period of the loan account as set out in exhibit 10. There has been no challenge to the calculations which have been performed relating to those figures.

[94] The letter of 5 December 1990 set out that a loan service fee will be charged quarterly and on repayment of the advance and is assessed by the peak debt during the charging period. The initial fee applicable was $95. The plaintiff claims an amount of $3,205 for loan service fees charged to the loan account from 14 December 1990 until 1 January 2003. No errors have been pointed to in that calculation.

[95] The Bank seeks interest on the outstanding balance at the simple rate of 10.15% per annum, the rate applicable to the loan, which is an amount of $227.44 per day from 1 January 2003 until judgment.

[96] An amount of $5,066.50 was debited to the loan account on 2 January 1991. Mr Davies has challenged some of the components of that amount which the Bank no longer seeks to recover. What remains is an amount of $1,760.90 being the interest charged on the loan account and that amount is not challenged.

[97] A major challenge raised by Mr Davies relates to an amount of $57,683.96 which he contends ought to have been credited to the loan account for TH&D rather than the continuing partnership of THDT. Mr Hart gave security over his house in respect of each of the two loans. His house was sold and the proceeds distributed. In his further amended defence and counter claim Mr Davies contends that the $57,683.96 available after the realisation of Mr Hart's property ought to have been credited to the TH&D loan account. Although not in the pleadings, Mr Morris submitted that

that sum was initially appropriated by the Bank to the TH&D account and was impermissibly credited subsequently to the THDT account. Mr Morris referred to the settlement notice which indicates that Mr Hart's house property was sold on 2 February 1993 with completion on 1 March 1993. At settlement the distribution included a cheque to "Commonwealth Bank of Australia credit account Towers Hart & Davies $57,683.96". The settlement document is dated 18 March 1993. The account record for the loan account of "Towers Hart Davies Tardiani" is credited on 12 March with that sum. Mr Morris submitted that the $57,683.96 was impermissibly credited to an account other than that to which it was initially appropriated.

[98] It may be accepted that there was no direction by Mr Hart about what was to happen to the net proceeds of the sale of his house property. In the absence of any direction (if he were entitled to do so) the Bank as creditor had the right to appropriate, *Clayton's Case* (1816) 1 Mer 572, 529; 35 ER 781 at 792-3; *The Mecca* [1897] AC 286. The debts were incurred on the same day, 14 December 1990, in respect of both loans. No debt is older that the other. A creditor has the right to elect "up to the very last moment", *The Mecca* at 293. Mr Morris submitted that there was an appropriation to the TH&D account on the 1 March 1993. It is not clear that the cheque was paid on that day. The notice is dated 18 March 1993. There is no evidence to support a conclusion that that cheque was actually banked into the TH&D account and then transferred across to the THDT account. The money simply appears in the books of the Bank as having been deposited in to the THDT account on 12 March 1990. Once the party making the appropriation has communicated what he has done to the other party *then* the right to make a further appropriation ceases, *Simson v Ingham* (1823) 2 B&C 65 at 73; 107 ER 307 at 310. There is no evidence of any communication to Mr Davies about the payment. The notice to Mr Hart is dated 18 March which post-dates the deposit into the THDT account. It was, no doubt, a matter of indifference to Mr Hart as to which account the money was paid. He was liable on both.

[99] There is, accordingly, no entitlement to this credit being attributed to the TH&D account.

[100] Mr Davies alleged in para 11(b)(a)(v) of the further amended defence and counter claim that there was no credit in respect of a sum "the exact amount wherefore is unknown ... but which is estimated by [Mr Davies] to be at least $22,000". This concerns the alleged residue of a settlement agreement of 4 March 1998 between the Bank and Mrs Davies. The settlement sum was $150,000. Of that amount $58,000 was to pay out a mortgage over Mrs Davies' house leaving a balance of approximately $92,000. Mr and Mrs Davies gave a guarantee to the Bank in respect of Mr Tardiani's loan to buy into the partnership practice limited to $50,000 plus interest. By cl 4, the guarantee was security for the whole of the money secured but the total amount was not to exceed $50,000 and interest until payment of the loan. The letter of demand was served on Mr Davies in relation to this guarantee on 9 March 1992. Under the terms of the guarantee the Bank could charge interest from one year prior thereto at a compound rate. Exhibit 11 is said to be the Bank's record of the debt owed to the Bank by Mr Davies under the Tardiani guarantee. Mr Morris challenged that description of exhibit 11 but it is reasonably clear that it is not Mr Tardiani's own account since the figures bear no resemblance to the figures in the material relating to the level of Mr Tardiani's indebtedness. It shows that on the 15 April 1998 an amount of $92,260.96 was credited to that

account corresponding to the balance of the settlement sum derived from the sale of Mrs Davies' house and the settlement agreement dated 4 March 1998. An amount of $23,781.35 remained outstanding. Mr Gordon verified the interest rates charged and by a simple interest calculation applied to the debt of $50,000 as at 1 March 1991 calculated the amount of interest owing. It was consistent with the amount in the account still owing. There was no residue to be credited.

[101] I am satisfied that the Bank has established its entitlement to the amounts which it now claims. The final amount of the judgment sum which stood at $817,921.01 at 1 January 2003 may be calculated by counsel and, when communicated to my associate will constitute the amount of the judgment.

[102] The orders are:

1. Judgment for the plaintiff against the defendant in the amount of $817,921.01 together with interest at 10.15% from 1 January 2003 until judgment.
2. The counterclaim of the defendant is dismissed.

[103] Submissions as to costs may be made in writing.