SUPREME COURT OF QUEENSLAND

CITATION:	*Wright & Ors v Westpac Banking Corporation* [2010] QCA 190
PARTIES:	**RONALD JOHN WRIGHT** (first defendant/first appellant) **NERIDA VALERIE WRIGHT** (second defendant/second appellant) **SANDRA LOUISE PEPI** (third defendant/third appellant) **SHARON LEE SCHOFIELD** (fourth defendant/fourth appellant) **KYLE JONATHON WRIGHT** (fifth defendant/fifth appellant) **ELLIOTT HARVEY SECURITIES LIMITED** ACN 089 156 605 (second defendant by counterclaim/not party to the appeal) **MICHAEL HARVEY** (third defendant by counterclaim/not party to the appeal) **v** **WESTPAC BANKING CORPORATION previously ST GEORGE BANK LIMITED** ACN 055 513 070 **(deregistered)** ACN 007 457 141 (plaintiff/respondent)
FILE NO/S:	Appeal No 13131 of 2009 SC No 2786 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	27 July 2010
DELIVERED AT:	Brisbane
HEARING DATE:	23 April 2010
JUDGES:	Holmes and Fraser JJA and Ann Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the order made.
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS

CONTRACTS AND OTHER MATTERS – where respondent provided a loan facility to Ronbar Enterprises – where Ronbar required to provide "as is market value 'in one line'" valuation of security – where upper limit of the loan facility based on the security's "as if complete" valuation – where initial drawdown limit of the loan facility set at a loan to value ratio of 70 per cent to be reduced to 65 per cent within 90 days of the initial drawdown – where initial drawdown of 27 September 2007 provided on the basis of "as is market value 'in one line'" valuation – where respondent provided further moneys after the issuing of titles on basis of 'as if complete' valuation – where further moneys provided at the lower loan to value ratio of 65 per cent as 90 days had elapsed from the initial drawdown – where Ronbar defaulted in repayment and appellants defaulted on their guarantees – whether facility agreement required the respondent to provide funds on basis of "as if complete" valuation following either the anticipated completion date or the actual completion date of the works – whether appellants entitled to be relieved from their liability to the respondent

GUARANTEE AND INDEMNITY – THE CONTRACT OF GUARANTEE – CONSTRUCTION AND EFFECT – GENERALLY – where a representation was made to Ronbar that the full amount of the loan facility would be available once single titles were registered – where appellants argued that the representation was a late imposed 'release of titles' condition and amounted to a variation of the loan facility made without notice – where clause 8.1 of the guarantee and indemnity provided that the rights and liabilities of the parties remain unaffected notwithstanding any acts or omissions made by the respondent – whether, despite clause 8.1, the respondent's variation of the facility agreement and failure to notify the appellants entitled the appellants to be discharged from their liabilities under the guarantee and indemnity

CORPORATIONS – FINANCIAL SERVICES AND MARKETS – MARKET MISCONDUCT AND OTHER PROHIBITED CONDUCT – MISLEADING, DECEPTIVE OR UNCONSCIONABLE CONDUCT – where a representation was made to Ronbar that the full amount of the loan facility would be available once titles were registered – where appellants argued that the representation amounted to a variation of the loan facility made without notice – whether respondent's representation breached an implied obligation of good faith – whether representation misleading or respondent engaged in misleading, deceptive, or unconscionable conduct

Australian Securities and Investments Commission Act 2001 (Cth), s 12CC, s 12DA, s 12DB(1)(g)

St George Bank Limited v Wright & Ors [2009] QSC 337, cited

COUNSEL: The appellants appeared on their own behalf
B O'Donnell QC, with D de Jersey for the respondent

SOLICITORS: The appellants appeared on their own behalf
Gadens Lawyers for the respondent

[1] **HOLMES JA**: St George Bank Limited obtained summary judgment against the appellants on their guarantees of the bank's advances to Ronbar Enterprises Pty Ltd, which had defaulted in repayment. Their appeal against that judgment turns on the construction of the facility agreement between St George and Ronbar; in particular, as to the extent of the funds which it obliged St George to advance. (St George has since been acquired by Westpac Banking Corporation which has, accordingly, been substituted as the respondent to this appeal.)

The facility agreement and the funds made available under it

[2] Ronbar was the developer of a large commercial and residential development at Miami on the Gold Coast, the "Miami One" project. It had previously financed the project through borrowings from Perpetual Nominees Limited and Elliott Harvey Securities Limited. The Elliott Harvey Securities loan, of $38,437,000, was due for repayment in mid-2007. At that stage, residential buildings 3 and 4 in the Miami One project were substantially complete; building 2 was some way off completion; construction of building 1 was yet to commence. Elliott Harvey Securities reached an agreement with Ronbar that the latter would borrow $24,500,000 from another lender, which would then take first mortgage on the project, those funds to be used to repay part of the principal outstanding to Elliott Harvey Securities. On receipt of the $24,500,000, Elliott Harvey Securities Limited would make another facility of $22,500,000 available to Ronbar, enabling construction of building 1. The arrangement proposed would, however, leave a shortfall of $6,170,000 to be met from Ronbar's own resources. It was anticipated that Ronbar would raise those funds by way of mezzanine financing.

[3] St George agreed to refinance Ronbar's development of the project by discounted commercial bills in two tranches. For each tranche, a "facility limit" was prescribed: for the first tranche, it was $21,187,500; for the second, $27,423,000. Requests for drawdowns were to be made in writing, with details provided the day before the drawdown date. The first tranche was designed to pay out the moneys owed to Perpetual Nominees Limited. The second tranche is the one with which this appeal is concerned. It was to be the source of the repayment of funds to Elliott Harvey Securities.

[4] The facility agreement provided for a "loan to valuation ratio" (LVR) for each tranche. In respect of tranche 2, the relevant clause was as follows:

> "LVR - Tranche 2 Initial funding position is not to exceed 70% LVR based on the Valuation

> amount (ex.GST) of the residual residential unit and office unit stock held as security."

The "residual residential unit and office unit stock" consisted of buildings 2, 3 and 4 in the Miami One project, together with three apartments in another, separate development undertaken by Ronbar. There was further provision for a change in the LVR for tranche 2:

> "65% Sales Trigger The LVR position for Tranche 2 is to be reduced from unit sale proceeds to below 65% within 90 days of initial drawdown. If not achieved, the client is to make a principle [sic] reduction to the facility to reduce the LVR to below 65% within the following 7 days."

[5] The agreement contained, as a "pre-condition" to use of the facility, this requirement for valuation reports:

> "Valuation reports from Savills and Colliers are to be assigned to the Bank for mortgage security purposes and must state that they have been provided on an 'In-One-Line' basis."

Colliers International, the valuers who provided the necessary reports for Ronbar, had previously valued the buildings in the Miami One project on an "as if complete" basis; that is, the market value of the buildings, if their construction were satisfactorily completed. That process gave a valuation of $39,176,364, of which 70 per cent was $27,423,000, the upper limit of the finance offered under tranche 2. For the purposes of the facility agreement, Colliers produced a valuation report treating the Miami One project buildings on an "as is market value 'in one line'" basis; that is, as if the buildings were sold in their present incomplete state, on a single title, "in one line", to an investor. On that basis, the valuation was $26,100,000.

[6] St George acted on the "in one line" valuation in deciding how much to advance under tranche 2. Taking the value of the Miami One Project buildings together with that of the apartments, which were valued at $7,800,000, the total value of the "residual residential unit and office unit stock" was $33,900,000, of which 70 per cent was $23,730,000. That amount was drawn down on 27 September 2007. (The figure included some withholdings, about the propriety of which there was argument before the primary judge, but not here.) It was not, patently, enough to provide the sum of $24,500,000 of which Elliott Harvey Securities required repayment. The learned judge found that Ronbar's agent had been advised of the amount of the initial advance by letter before Ronbar and the appellants signed the facility offer on 19 September 2007, respectively as borrower entering the agreement and as guarantors acknowledging its terms.

[7] Over the next seven months, further sums were disbursed, bringing the total advanced to $25,994,350.80. Some of the funds were paid direct to Elliott Harvey Securities, while other payments went towards work on building 2.

It was a condition of the facility agreement that building 2 be completed, with certification that it was to the standard outlined in the Colliers valuation. Another clause of the facility agreement dealt with what was to happen on completion of buildings 2, 3 and 4:

> "On completion of building works, but no later than 31 October 2007, the Borrower must provide to St George Bank a certificate from all relevant authorities that the works have been completed in accordance with all the requirements of those authorities."

No certificate answering that description was put into evidence. It was not clear when building 2 actually was completed, but it was probably early December 2007. A quantity surveyor's report dated 3 December 2007, recommending payment of a progress claim, said that the project

> "has now been completed with only minor rectification works requiring completion before the Certificate of Practical Completion is issued."

St George paid the final progress payment on 12 December 2007.

[8] On 10 December 2007, the "relationship manager" for St George, Mr Morley, sent an e-mail to a Mr Kent, the property finance manager for a firm of mortgage brokers through whom Ronbar had sought finance. The e-mail detailed the payments which had been made to the builder to date and contained the following note:

> "Once the titles have been created, a further $3,693,000 is available."

In fact a lesser amount of $1,950,000 was released by St George on 24 January 2008, after titles had issued for the separate lots in the three buildings. According to the affidavit of a St George officer, that figure was arrived at on this basis: the bank was now able to use the "as if complete" valuations, because the development was completed, but the lower, 65 per cent LVR had come into effect, because more than ninety days had passed from the initial drawdown. The total amount available under the facility (65 per cent of the "as if complete" valuations at $39,176,364) was now $25,464,636.00.

[9] Ronbar defaulted in repayment of the funds advanced under the facility agreement. It is in liquidation. The appellants did not meet St George's demand for payment under their guarantee of Ronbar's obligations.

The guarantee and indemnity

[10] The guarantee and indemnity was in conventional terms. Of particular relevance here were clauses 8.1 and 9(a), which were, respectively, as follows:

> "8.1 Rights given to us under this guarantee and indemnity and your liabilities under it are not affected by any act or omission by us or by anything else that might otherwise affect them under law or otherwise, including:

> (a) the fact that we vary or replace any arrangement under which the *guaranteed money* is expressed to be owing, such as by increasing the credit limit or extending the term… .
>
> ...
>
> 9. As long as any of the *guaranteed money* remains unpaid, you may not, without our consent:
>
> (a) reduce your liability under this guarantee and indemnity by claiming that you or the *customer* or any other person has a right of set-off or counterclaim against us ... ."

The case at first instance

[11] Before the learned judge at first instance, the appellants' (unsuccessful) argument was that Ronbar should have been able to draw down the whole of the facility up to the maximum limit at all times. According to Mr Ronald Wright, the first appellant, Ronbar had expected the full amount of the facility to be immediately available for drawdown. It had already a shortfall of some $6,170,000 under its arrangements with Elliott Harvey Securities. St George's failure to advance the full amount contemplated by the facility agreement increased the deficiency to something of the order of $10,000,000 to $12,000,000, causing Ronbar's inability to complete the Miami One project and, in turn, its default in repayment.

[12] The learned judge rejected that view of St George's obligation to advance funds. He summarised the reasons the funds under the facility were never disbursed to the maximum limit:

> "In short the agreed facility limit for tranche 2 of $27,423,000 was never able to be drawn essentially because of three factors. The first was that the value of the security was upon the 'in one line' basis until separate titles for the lots issued. The second was that the required number of sales was not made until months after the initial drawdown. The third was that by the time the titles issued and further contracts were made, the agreed LVR had become 65 per cent, because more than three months had passed from the initial drawdown."[1]

[13] In any event, the learned judge found, even if there were some failure by St George to advance all the moneys to which Ronbar was entitled under the facility agreement, that omission would not, by virtue of clause 8.1 of the guarantee and indemnity, affect St George's rights against the appellants. Various arguments based on provisions of the *Australian Securities and Investments Commission Act* 2001 (Cth) were also rejected.

The appellants' argument here

[14] The appellants began their written submissions with an argument quite unrelated to any submission or evidence below: that St George knew or ought

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[1] *St George Bank Limited v Wright & Ors* [2009] QSC 337 at [37].

to have known that the Australian Securities & Investments Commission had placed a stop order on Elliott Harvey Securities' product disclosure statement which was likely to have some impact on the latter's capacity to provide further assistance to Ronbar. In the absence of any evidence about the making of the stop order, let alone its bearing on the St George facility, there is no basis on which this court could or should consider the argument.

[15] In their contentions about the effect of the facility agreement, the appellants took a different tack from that taken below. They argued that the learned judge erred in finding that the "in one line" basis for valuation was apt until separate titles had issued for the buildings. What he had done, it was said, was to treat the facility as if it were subject to a release of titles condition; but there was no such condition. In fact (so the argument went), the facility agreement contemplated that the available facility limit would be calculated with reference to the completion of building 2.

[16] The "on completion" clause of the facility agreement, requiring Ronbar to provide a certificate that the works had been completed no later than 31 October 2007, showed that the parties believed the work would be completed by then. That demonstrated a mutual intention that Ronbar was to have the benefit of the increased valuation from that date. Alternatively, the relevant valuation became the "as if complete" valuation when building 2 was actually completed. At that stage, Ronbar should have been able to draw down the balance of the facility up to the full facility limit, followed by settlement of any contracts entered into and reduction of the facility limit to 65 per cent in the 90 day period. Effectively then, between 31 October and 26 December 2007 (the end of the 90 day period) or, on the alternative thesis, between the completion of building 2 and 26 December 2007, the full facility limit should have been available for drawdown.

[17] The appellants relied on Mr Morley's e-mail to assert that St George had varied the contract to require the release of titles before provision of finance, without notice to Ronbar. The facility agreement permitted St George to vary any provision of the agreement as it chose, but it was required to notify Ronbar, and it had not done so. Nor had it obtained the appellants' consent to the variation, which had prejudiced them: it had denied Ronbar the funds needed to complete the development and had increased their risk. They were entitled, in consequence, to be discharged from liability under the guarantee.

[18] While clause 9of the guarantee and indemnity removed any right of set-off, the guarantors were entitled to be relieved of their liability by reason of St George's conduct. In this respect, the appellants alleged breaches of the *Australian Securities and Investments Commission Act* and of an implied obligation of good faith. Again, this was a departure from the pleadings and argument below, which identified no such obligation and alleged different breaches of the Act, based on the failure to provide initial funding sufficient to meet the required repayment to Elliott Harvey Securities.

[19] The argument here went thus: if there were a condition that the facility was subject to release of titles, the introduction of that condition was unconscionable within the meaning of s 12CC of the *Australian Securities and*

Investments Commission Act. The failure to tell the appellants that the condition existed amounted to misleading conduct or a misleading representation as to the effect of the conditions in the facility, contrary to s 12DA and s 12DB(1)(g) of the Act. Alternatively, if there were no such condition, it was unconscionable, and in breach of an implied obligation of good faith, for St George, through Mr Morley, to send an e-mail indicating that the facility was now subject to the release of titles.

Discussion

[20] The appellants' argument is founded on two false premises: that the facility agreement required St George to act on the "as if complete" valuation at either the anticipated or the actual completion date for building 2; and that there was a late-imposed "release of titles" condition but for which Ronbar would have been entitled to draw funds up to the facility limit. The facility agreement limited the amount to be advanced, not by reference to release of titles, but first, by the requirement that funding not exceed 70 per cent of the LVR and, at 90 days and after, that the ratio be not higher than 65 per cent. The LVR was based on the "Valuation amount", a term not defined in the agreement; the only elucidation of what valuation was contemplated was the requirement that the valuation reports be provided on an "in one line" basis. Nothing in the agreement provided for any different form of valuation, let alone the adoption of the "as if complete" valuation once building 2 in the Miami One Project was completed.

[21] At the highest, one could infer from the fact that the facility limit was set at 70 per cent of the "as if complete" valuation, that it was contemplated that that form of valuation might become applicable at some stage. The clause in the agreement requiring a certificate of completion of the works by 31 October 2007 suggests that it was expected that the project would be finished almost two months before the end of the 90 day period. It would follow that there was also a prospect that separate titles would be available in that period. Significantly, however, neither that clause nor the clause requiring the completion of building 2 contains any reference to a change in the relevant valuation at that point; indeed, the latter clause refers to certification of its consistency with the standards in the Colliers valuation, which, in context, can only be the "in one line" valuation.

[22] Contrary to the appellants' argument, there is nothing in the agreement which would show that a switch to the "as if complete" valuation on the anticipated or actual completion of building 2 was intended. In fact, St George chose to act on the "as if complete" valuation once titles had been released; it was rational for it to do so at that stage. It was then in a position, should it need to realise the properties, to sell them individually; but the agreement itself did not require St George to act on the "as if complete" valuation at any stage. If, in doing so, St George was effecting a variation of the facility agreement, it was a variation which gave Ronbar access to greater funding, rather than restricting its entitlement as the appellants contend.

[23] And the appellants' argument also, with respect, misapprehends the learned primary judge's reasons. His Honour did not find that it was a condition of the facility agreement that separate titles for the residential buildings had to be

released before the entire amount of the facility up to the maximum limit became available. The references relied on in his Honour's judgment were not to any such constraints, but to the valuations on which St George was acting at different times.

[24] The appellants' argument suffers from other difficulties. There was no evidence that the availability of the additional funds, about $4 million, would have made a difference to Ronbar's plight. Mr Ronald Wright in his affidavit deposed to a shortfall of about $10 million which had prevented Ronbar from constructing building 1; which suggests that the advancing of funds to the maximum limit would not have been enough to enable Ronbar to extricate itself from its problems and avoid default. In relation to the second of the appellants' alternative constructions, that the funds were to be available on the actual completion of building 2, there was no evidence that there had been any subsequent written request for an additional drawdown, let alone the refusal of one. And assuming there was a breach of contract causing loss to Ronbar, clause 9 of the guarantee prevented the appellants from relying on any right of set-off. If the claimed variation had been made out, the appellants were still confronted by the obstacle of clause 8.1, which precluded their reliance on the alleged variation.

[25] The claims under the *Australian Securities and Investment Commission Act* are also without merit. As the learned judge pointed out, s 12CC could have no application, because during the life of the facility it did not apply to the supply of financial services above a limit of $10 million.[2] In the absence of any entitlement in the appellants as at 31 October 2007 or on completion of building 2 to the release of funds to the maximum limit, the representations relied on to argue breaches of an implied obligation of good faith and of s 12DA and s 12DB, even if made out, are without consequence.

Conclusion

[26] The learned judge was correct, in my view, in concluding that the appellants had no real prospect of successfully defending St George's claim and that there was no need for a trial of it. I would dismiss the appeal with costs.

[27] **FRASER JA:** I agree with the reasons of Holmes JA and the order proposed by her Honour.

[28] **ANN LYONS J:** I agree with the reasons of Holmes JA and with the order proposed.

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[2] The relevant limit was increased from $3,000,000 to $10,000,000 by Schedule 3 to the *Trade Practices Legislation Amendment Act (No. 1)* 2007 (Cth), effective from 25 September 2007.