

SUPREME COURT OF QUEENSLAND

CITATION: *Westpac Banking Corporation v Knight Property Investments No. 3 Pty Ltd & Anor* [2014] QSC 177

PARTIES: **WESTPAC BANKING CORPORATION**
ABN 33 007 457 141
(plaintiff)
v
KNIGHT PROPERTY INVESTMENTS NO. 3 PTY LTD
ACN 123 215 154
(first defendant)
THOMAS PATRICK HAYES
(second defendant/plaintiff by counterclaim)
SEAN PATRICK DALLIMORE
(first defendant by counterclaim)
BALMAIN NB COMMERCIAL MORTGAGES LIMITED
ACN 074 619 980 trading as **BALMAIN COMMERCIAL NB98174924 (NSW) (a firm)**
(second defendant by counterclaim)
TIMOTHY LEO DOONEY
(third defendant by counterclaim)

FILE NO: BS No 7887 of 2009

DIVISION: Trial

PROCEEDING: Application

DELIVERED ON: 8 August 2014

DELIVERED AT: Brisbane

HEARING DATE: 19 June 2014

JUDGE: Peter Lyons J

ORDER: **The further hearing of this application is adjourned to a date to be fixed.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – DEFENCE AND COUNTERCLAIM – where the second defendant guaranteed a loan to a company of which the second defendant was the sole shareholder – where the plaintiff sues the second defendant for the amount owing under the guarantee, with interest – where the second defendant brought a counterclaim against the plaintiff and three other defendants by counterclaim, alleging losses caused by breaches of s 85 of the *Property Law Act 1974* (Qld) and s 52 of the *Trade Practices Act 1974* (Cth) – where

the defendants by counterclaim applied to strike out the counterclaim – where the defendants by counterclaim submit that the second defendant cannot claim the damages he seeks due to the reflective loss principle – where the defendants by counterclaim further submit that the second defendant has not pleaded material facts to support his counterclaim – whether the counterclaim should be struck out

Property Law Act 1974 (Qld), s 85

Trade Practices Act 1974 (Cth) s 52

Uniform Civil Procedure Rules 1999 (Qld), r 149(1)(c), r 171

Bank of Queensland Limited v Amos & Ors [2010] QSC 237, not followed

Bruce v Odhams Press Ltd [1936] 1 KB 697, cited

Higton Enterprises Pty Ltd v BCF Finance Limited [1997] 1 Qd R 168; [1994] QCA 558, cited

Johnson v Gore Wood & Co (a firm) [2002] 2 AC 1; [2000] UKHL 65, followed

Mio Art Pty Ltd v Macequest Pty Ltd & Ors (2013) 95 ACSR 583; [2013] QSC 211, cited

Roberston v Hollings & Ors [2009] QCA 303, cited

The Beach Club Port Douglas Pty Ltd v Page [2006] 1 Qd R 307; [2005] QCA 475, cited

Thomas v D'Arcy [2005] 1 Qd R 666; [2005] QCA 68, cited

Torrens Aloha Pty Ltd v Citibank NA (1997) 72 FCR 581; [1997] FCA 77, cited

- COUNSEL: E Goodwin for the plaintiff and first defendant by counterclaim
B A Hall for the second and third defendants by counterclaim
J Shaw with leave on behalf of the second defendant
- SOLICITORS: Allens for the plaintiff and first defendant by counterclaim
Minter Ellison for the second and third defendants by counterclaim
The second defendant acted on his own behalf

- [1] **PETER LYONS J:** The plaintiff (*Westpac*) and the first defendant by counterclaim (*Mr Dallimore*) have applied to strike out the counterclaim made against them by the second defendant (*Mr Hayes*). The second defendant by counterclaim (*Balmain*) and the third defendant by counterclaim (*Mr Dooney*) have made a similar application.

Procedural context

- [2] Westpac has sued Mr Hayes on a guarantee. Westpac alleges that on 20 February 2007 it entered into a business finance agreement with Funk Road Developments Pty Ltd (*Funk Road*), pursuant to which it advanced \$10,508,000 to Funk Road. The payment of the advance was secured by a guarantee from Mr Hayes, and a mortgage over a property located at Burnside Road, Gilberton (*Yatala land*). In June 2011, Westpac received \$2,841,322.69 as a result of the sale of the Yatala land. Westpac alleges that as at 27 June 2011, \$10,762,958.98 remained owing on

the loan, which amount it claims from Mr Hayes pursuant to the guarantee, together with interest.

- [3] In his defence Mr Hayes admits the business finance agreement, the loan and the guarantee. He alleges that in November 2006, Westpac had made a loan (*KPI loan*) to Knight Property Investments Pty Ltd (*KPI*) for an amount which exceeded the purchase price of the property, for the purchase of which the loan was made, resulting in an adverse “loan to value ratio”. A Mr Girardo was said to be the principal of KPI. Mr Hayes alleges that, to improve its position, Westpac, through Mr Dallimore, sought to have another entity associated with Mr Girardo become a shareholder in Funk Road. In February 2007 Mr Dooney, said to be acting as agent for Westpac, represented to Mr Hayes that Westpac would lend Funk Road the monies required for the purchase of the Yatala land, only if Mr Girardo became a shareholder in Funk Road, and entitled to a share in the profits anticipated from the purchase. At about this time, Mr Dallimore is alleged to have represented to Mr Hayes that Mr Girardo had a “balance sheet to support” the loan, and “was a 100 million wealth client” (*Girardo wealth representations*).
- [4] The defence also alleges that in February 2007 the KPI loan had become overdrawn (as the result of debiting of interest). Mr Dallimore’s failure to advise Mr Hayes of this (*February non-disclosure*) was said to be a fraudulent representation by omission, but for which Mr Hayes would not have entered into the guarantee. The defence alleges that both the business finance agreement and the guarantee, and Mr Dallimore’s requirement that Mr Hayes enter into an agreement with Mr Girardo to give him a fifty per cent interest in Funk Road, were fraudulent, the true intention of Mr Dallimore being to shore up Mr Girardo’s position (apparently intended to refer to the KPI loan), a fact hidden from Mr Hayes by Westpac, Mr Dallimore and Mr Dooney (*disguised intention*).
- [5] The defence alleges that the conduct of Westpac, Mr Dallimore and Mr Dooney was unconscionable conduct, and misleading conduct for the purposes of s 52 of the *Trade Practices Act 1974 (Cth) (TPA)*. The defence also alleges that Westpac breached its duties under s 85 of the *Property Law Act 1974 (Qld) (PLA)* by failing to take reasonable care to ensure that the Yatala land was sold at market value. Mr Hayes’ counterclaim adopts all of these allegations. I shall discuss the counterclaim more fully, later in these reasons.
- [6] These proceedings were commenced in 2009. At times Mr Hayes has had legal representation, and at times he has represented himself. The defence and counterclaim were prepared by lawyers then representing him. It was recognised, at a time when they continued to represent him and not long before the commencement of the trial, that some amendment was needed. However no amendment has been made.
- [7] The trial of this matter commenced on 2 December 2013. Throughout, Mr Hayes has been without legal representation. Mostly he appeared on his own behalf. However, he has had not insignificant health difficulties, with the consequence that on some days the trial did not proceed; and on the days it did, sitting hours were substantially reduced. On some few occasions a relative or acquaintance represented him for limited purposes. Thus far Westpac has called a number of witnesses, including Mr Dallimore, who was cross-examined. It has indicated that it does not intend to call witnesses relating to the case based on s 85 of the PLA,

until Mr Hayes has called his evidence. The trial proceeded until 13 December 2013, before resuming on 8 May 2014. The last sitting day was on 22 May 2014, with the trial again to resume on 20 October 2014.

- [8] On 22 May 2014 the defendants by counterclaim foreshadowed an application to strike out the counterclaim. Directions were then made about this application, including the fixing of a date by which Mr Hayes was to provide his submissions. He was also informed that if his health was likely to prevent his participation at the proposed hearing, he should give notice, and provide medical evidence of his condition.
- [9] When the application came on for hearing on 19 June 2014, Mr Hayes was not present. He was represented by a Mr Shaw, who sought to have the application adjourned. The adjournment application was supported by a medical certificate. It was opposed. Reliance was placed upon the fact that Mr Hayes had not provided his submissions in accordance with the earlier directions, nor had he sought an extension of the time in which to provide them. It was also submitted that it would be of benefit to Mr Hayes to have the application determined well before the resumption of the trial, which would give him time to think about what he wanted to do. I decided to hear the oral submissions on behalf of the defendants by counterclaim; but to allow Mr Hayes a period within which to put in a written submission in response. On 7 July 2014, Mr Hayes provided his written submissions in relation to the application. Before identifying the submissions of the parties, it is convenient to return to the counterclaim.

Mr Hayes' counterclaim

- [10] The counterclaim is very brief. It commences with the adoption of all of the allegations made in the defence. One adopted allegation, potentially relevant, is that in January and February 2007, "there was a substantial equity in the difference between the valuation of the Yatala Land and its purchase price to Funk ('the **Yatala Land Equity**')".¹
- [11] The counterclaim then alleges that as a result of the breaches of s 52 of the TPA and s 85 of the PLA, and of the fraudulent misrepresentations and unconscionable conduct of all four of the defendants by counterclaim pleaded in the defence, Mr Hayes suffered damage. That damage was identified as:
- "Loss of equity in the Yatala land of \$6.28million calculated as follows –
Valuation at time of purchase - \$15million less purchase price of \$8.72million".
- [12] The third and final paragraph of the counterclaim was as follows:
- "3. As a consequence of the loss of the Yatala Land, the second defendant has also lost his equity of \$8 million held in a property in Springwood full particulars of which cannot currently be provided due to the second defendant's previous solicitors holding his files."

¹ See para 11(c).

- [13] This is followed by a prayer for relief against all four defendants by counterclaim, for damages of \$14.28million, together with interest and costs.

Supplementary facts

- [14] Westpac and Mr Dallimore relied on an affidavit of Ms Alana Petty. Mr Hayes took no objection to the affidavit. In part I understood its intention to be to make more intelligible some of the allegations in the counterclaim, thereby indicating defects which might be cured with relative ease by amendment. In part I understood it to be intended to establish facts, unlikely to be able to be controverted, to show some limitations on the amendments which Mr Hayes might be able to make if the counterclaim were found to be defective. I am conscious of the limited utility of affidavit material on an application to strike out a pleading.
- [15] The affidavit identifies the Springwood land as three lots located at Pacific Highway, Slacks Creek. Between May 2007, and mid August 2007 for one lot, and mid July 2010 for the other two lots, this land was owned by a company which, between February 2007 and October 2008, was called Funk Road Developments (2) Pty Ltd (*Funk Road 2*); and which subsequently was called Doviko Developments Pty Ltd. Mr Hayes was a director of Funk Road 2 from February 2007 to July 2011; and Mr Girardo was a director from 26 April 2007 to 3 May 2007. Mr Hayes was identified as a former shareholder of Funk Road 2. The company was deregistered on 17 July 2011. In May 2007 Funk Road 2 gave a charge over all its assets to Capital Finance Australia Limited (*CFAL*) and also granted CFAL a mortgage over the Springwood land. In July 2010 CFAL transferred the Springwood land to Ikea Pty Ltd for \$8,250,000. At no time did Westpac have a registered interest over the Springwood land.

Submissions

- [16] For Westpac and Mr Dallimore it was submitted that the losses identified in the counterclaim were losses suffered by Funk Road and Funk Road 2. By reference to what was described as the reflective loss principle, it was submitted that these losses were not losses for which Mr Hayes could sue. In particular, it was submitted that the destruction of substantially all of the equity of a shareholder in a company (which I take to be by reference to the fact that the shareholder's shares cease to have value) as a result of a wrong done to the company does not provide a basis for a cause of action by a shareholder in the company. For that reason, Mr Hayes could not succeed on any of the causes of action pleaded in the counterclaim.
- [17] In particular, with respect to the alleged loss of equity in the Springwood land, it was submitted that the counterclaim is fatally flawed because it does not allege any relevant connection between Westpac and that land (for example, the granting to Westpac of a mortgage over that land; the sale of that land by Westpac). Further, the counterclaim does not allege facts showing how any loss was incurred in relation to that land; and in particular does not allege facts which would show that any such loss was caused by Westpac. It was submitted that the counterclaim failed to plead facts explaining how the involvement of Mr Girardo in the acquisition of the Yatala land caused loss related to the Springwood land. No facts were pleaded to demonstrate that loss in relation to the Springwood land was foreseeable by Mr Dallimore at the time of his alleged representations to Mr Hayes.

- [18] Apparently on the assumption that the allegation in the counterclaim that Mr Hayes “lost his equity” in the Springwood land is in fact an allegation that Mr Hayes lost the value of his shares in Funk Road 2, it was submitted that it was necessary for the counterclaim to plead the liabilities of Funk Road 2; for otherwise it is not possible to determine the value of its shares. It was submitted that because CFAL in its Notice of Exercise of Power of Sale claimed that Funk Road 2 owed it \$15,422,488, and that CFAL sold the Springwood land for \$8,250,000 there was no real prospect of establishing any equity in the Springwood land (this submission may have been referring to equity as an excess of the value of the land over the debt; or to the net assets of Funk Road 2). It was orally submitted that Mr Hayes should not be permitted, in light of the supplementary facts, to assert that there was any equity available in the Springwood land, in view of the asserted debt to CFAL.
- [19] These submissions were substantially adopted on behalf of Balmain and Mr Dooney; though the submissions made on their behalf pointed out that the claim, so far as it was based on s 85 of the PLA, was not made against them.
- [20] In his written submission, Mr Hayes asserted that he would be denied natural justice if he is not in a position to have legitimate questions responded to, both by Mr Dallimore and Mr Dooney. His submissions refer extensively to evidence whether in affidavit material already filed, or which he expects to be able to call. It is not obvious that all of that evidence deals with matters raised by the defence, or the counterclaim. The submissions also set out a series of statements and questions which Mr Hayes submits should be put to Mr Dallimore, Mr Dooney and Mr Muscolino, an associate of Mr Girardo’s. There are also questions which he submits should be put to “Westpac Banking officials” relating to the sale of the Yatala land; and he sets out other questions without identifying to whom they should be put. The submissions do not directly respond to the matters raised against him on the strike out application.

Principles relating to an application to strike out a pleading

- [21] Although not raised by the submissions of the parties, it may assist Mr Hayes to understand the difficulty raised by his counterclaim if some basic propositions relating to pleadings are stated. A claim for relief, such as a claim for damages, must be based on a cause of action set out in a pleading in which the party claims that relief. A cause of action is the combination of facts which in law is recognised as giving rise to a right to sue.² Those facts are referred to as material facts.³
- [22] A pleading such as a counterclaim must include a statement of all the material facts on which the party relies.⁴ The failure to include a material fact in a pleading has the consequence that the pleading is defective;⁵ and accordingly liable to be struck out. In addition, a pleading must state specifically any matter, that if not stated in the pleadings specifically, might take another party by surprise.⁶ The court may, at any stage of the proceedings, strike out a pleading which discloses no reasonable

² *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234, 245 cited in *Torrens Aloha Pty Ltd v Citibank NA* (1997) 72 FCR 581 (*Torrens Aloha*), 595; and see the other cases cited in *Torrens Aloha*.

³ See *Bruce v Odhams Press Ltd* [1936] 1 KB 697 (*Bruce*), 712.

⁴ See r 149(1)(b) of the *Uniform Civil Procedure Rules 1999* (Qld) (*UCPR*).

⁵ *Bruce* at 712.

⁶ See r 149(1)(c) of the *UCPR*.

cause of action.⁷ That extends to a cause of action pleaded by a party which that party is not entitled to pursue.⁸ An allegation which is neither of a material fact, nor otherwise required by the Court rules (including the requirement to avoid surprise) may be struck out.⁹ Notwithstanding the difficulties in relation to complying with the rules relating to pleadings faced by a person without legal representation, such a person is nevertheless required to comply with them.¹⁰

- [23] Nevertheless it was accepted by the defendants by counterclaim that a case must be “very clear indeed” to justify striking out a pleading, preventing the plaintiff advancing a case at trial.¹¹
- [24] No authority was identified which would support the proposition that a pleading which is inconsistent with the principles set out earlier would nevertheless not be struck out because it would provide a basis for putting to witnesses who will or might be called, questions which one or other party to the litigation considers should be put. Such an approach is inconsistent with those principles.

Claim for damages under s 85 of the PLA: Yatala land

- [25] It is convenient to note first the loss alleged to have been suffered by Mr Hayes in relation to the Yatala land. Although called a “Loss of Equity in the Yatala Land”, it is particularised as the difference between the value of the land at the time of its purchase, and the purchase price, which might be more usually understood as representing profit. There was some similarity between this description of the loss, and the definition of the term “Yatala Land Equity” in paragraph 11(c) of the defence, each being the difference between a value and the purchase price. As a matter of common expression, an owner’s equity in an asset which is charged to secure a debt is often taken to be the difference between the value of the asset, and the amount of the debt.¹² The unconventional, but adequately defined, use of language, however, does not of itself render a pleading defective.
- [26] Putting aside any difficulty relating to the particularisation of the amount of this loss, the defendants by counterclaim have focused on the fact that any loss flowing from any breach of s 85 of the PLA was a loss suffered by Funk Road, and accordingly cannot be claimed by Mr Hayes by virtue of the reflective loss principle. That principle is established by a number of cases and I am bound to follow at least one of them.
- [27] In *Johnson v Gore Wood & Co (a firm)*,¹³ Lord Millett referred with approval to a statement of the Court of Appeal in *Prudential Assurance Co Ltd v Newman*

⁷ See r 171 of the UCPR, see also *Mio Art Pty Ltd v Macequest Pty Ltd & Ors* (2013) 95 ACSR 583, 599 at [67].

⁸ An example is a cause of action pleaded by a shareholder in a company, which the shareholder is not entitled to pursue under the reflective loss principle.

⁹ See Bernard Cairns, *Australian Civil Procedure* (Thomson Reuters, 9th ed, 2011) 248 at [6.610].

¹⁰ *Robertson v Hollings & Ors* [2009] QCA 303 at [10]-[11].

¹¹ *The Beach Club Port Douglas Pty Ltd v Page* [2006] 1 Qd R 307, 315 at [23]; see also *Royalene Pty Ltd v Registrar of Titles* [2007] QSC 059 at [6], cited in LexisNexis Butterworths, *Civil Procedure: Queensland*, vol 1 (at service 82) [171.1].

¹² See for example definition 6 for “equity” in *The Macquarie Dictionary* (The Macquarie Library, 3rd ed, 1997) at p 718.

¹³ [2002] 2 AC 1 (*Johnson*), 62.

Industries Ltd (No 2).¹⁴ It was there stated that a shareholder cannot recover damages merely because a company in which he holds shares has suffered damage; so that even if a wrong done to the shareholder results in a loss to the company, and a diminution of the value of the shareholder's shares, the shareholder cannot recover that diminution in value. Lord Millett expressly applied the statement when discussing the situation where a company suffered loss caused by the breach of a duty owed both to it, and to a shareholder. In part, he explained the rationale for the position by reference to the potential adverse effect on the company's creditors of permitting the shareholder to recover the loss by itself bringing an action.

[28] His Lordship also referred to his earlier decision in *Stein v Blake*,¹⁵ where he had pointed out that a shareholder could not bring a claim where the only loss suffered by the plaintiff consisted of a diminution in the value of his shareholding, which reflected the depletion of the assets of the company.¹⁶

[29] In *Johnson*, Lord Bingham, after reference to a number of authorities, stated three propositions relevant to the question whether a shareholder might sue, when loss is suffered by a company in which the shares are held.¹⁷ The first of them is the most relevant. It is to the effect that where a company suffers a loss caused by a breach of duty owed to it, only the company, and not the shareholder, may sue in respect of that loss. In particular, a shareholder, suing only in that capacity, may not bring any action to make good a diminution in the value of his shareholding, where that merely reflects the loss suffered by the company. All three of Lord Bingham's propositions were adopted in *Thomas v D'Arcy*¹⁸ by McPherson JA, with whose reasons the other members of the Court agreed. His Honour applied those principles to a case where it was alleged that land the subject of mortgages had been sold in breach of s 85 of the PLA;¹⁹ though his Honour recognised that loss suffered as a guarantor may well be in a different category. That that is so was established in *Higton Enterprises Pty Ltd v BFC Finance Limited*,²⁰ it being recognised that a guarantor is a person who, in the language of s 85(3), is "damnified by" a mortgagee's failure "to take reasonable care to ensure that the [mortgaged] property is sold at the market value".²¹ It might however be observed that the specific nature of the guarantors' loss in that case was also recognised, they being principal debtors as well as guarantors. I note that de Jersey CJ decided to the contrary in *Bank of Queensland Limited v Amos & Ors*.²² His Honour did not refer to authority; nor, in my view, does his decision reflect the language of s 85. In my respectful opinion, it should not be followed.

[30] In paragraph 23 of the defence, Mr Hayes alleges that Funk Road purchased the Yatala land. His pleading does not expressly allege his interest as a shareholder, although his written submission asserts that he was the sole shareholder of Funk Road. It might be said that the claim based on a breach of s 85 in respect of the Yatala land is defective, because it does not demonstrate any basis on which Mr

¹⁴ [1982] Ch 204, 222-223.

¹⁵ [1998] 1 All ER 724.

¹⁶ *Johnson* at 64.

¹⁷ *Ibid* 35-36.

¹⁸ [2005] 1 Qd R 666, 671 at [7].

¹⁹ *Ibid* 675 at [16]-[17].

²⁰ [1997] 1 Qd R 168.

²¹ *Ibid* 174.

²² [2010] QSC 237 at [13].

Hayes has suffered a loss as a result of the alleged breach of the section. However that point was not taken against him, apparently because the defendants by counterclaim are prepared to infer that he claims the loss in his capacity as shareholder. Mr Hayes' written submissions do not suggest that they are mistaken. In those circumstances I propose to proceed on the basis that Mr Hayes claims this loss in his capacity as a shareholder in Funk Road. On this basis, it should be held that this claim is not maintainable.

- [31] It might also be observed that the loss which is pleaded is not loss easily identified as loss flowing from a breach of s 85. The usual measure of damages is the difference between the market value of the land, and the price in fact obtained of the mortgagee's sale.²³ No facts are pleaded which would justify a different measure of the loss.
- [32] It should be noted that the submissions for the defendants by counterclaim recognise that it might be possible for Mr Hayes to bring a claim under s 85 of the PLA, because of loss suffered by him in his capacity as guarantor. It was not suggested by any party that the claim, as at present pleaded, was made in this capacity.
- [33] It may be possible to identify some facts pleaded in the defence, and incorporated into the counterclaim, which would perhaps point to a cause of action available to Mr Hayes as guarantor of the loan made by Westpac to Funk Road, in relation to the sale of the Yatala land. If such facts were identified, it would be possible to determine whether, taken together, they are sufficient to constitute the cause of action. That has not been done. In any event, that is not the basis on which the strike out applications were contested. Moreover, there is the difficulty to which I have referred about the damages pleaded in the counterclaim, in respect of the sale of the Yatala land. In those circumstances, it seems to me appropriate to strike out the counterclaim, so far as it relates to an alleged breach of s 85 of the PLA in connection with the sale of the Yatala land; but to permit Mr Hayes to replead the counterclaim against Westpac, based on a breach of s 85 of the PLA, should he choose to do so.

Fraud, misleading conduct and unconscionable conduct: Yatala land

- [34] It is at this point necessary to make some further observations about Mr Hayes' defence. It is convenient to commence with the allegations of fraud.
- [35] Mr Hayes alleges that he was induced to enter into the business finance agreement, and to execute it, by fraudulent statements made by Mr Dallimore and Mr Dooney; and that, but for the February non-disclosure, he would not have entered into that agreement.²⁴ He also alleges that, but for the concealment of the disguised intention, he would not have entered into that agreement.²⁵ Earlier, he had admitted that the business finance agreement was made between Westpac and Funk Road.²⁶ There has been no suggestion that Mr Hayes was a party to the business finance agreement. In those circumstances, these allegations in the defence should be

²³ See *Investec Bank (Australia) Ltd v Glodale Pty Ltd & Ors* (2009) 256 ALR 104, 126 at [102], cited in W D Duncan and R J Vann, Thomson Reuters, *Property Law and Practice in Queensland* (at 4 August 2014) [7.2170].

²⁴ See defence paras 9, 21 and 28.

²⁵ See defence para 32.

²⁶ Statement of claim para 3(a), admitted in para 2 of the defence.

understood as referring to his conduct as the agent of Funk Road. On that basis, the counterclaim might be understood as pleading allegations of fraudulent conduct towards Funk Road, the ultimate outcome of which was a loss resulting from the sale of the Yatala land. However, for reasons, discussed earlier, that is a loss suffered by Funk Road; and the counterclaim does not identify any basis on which Mr Hayes might be said to suffer this loss, save as a result of the diminution in the value of his shareholding. On that basis, and leaving aside any question about a causal link between it and the alleged fraudulent conduct, the counterclaim by Mr Hayes for this loss would not be maintainable.

- [36] Mr Hayes in his defence has also attributed his entry into the guarantee to the fraudulent conduct referred to earlier. However, the only loss pleaded as a result of that conduct is that identified in the counterclaim. So far as the Yatala land is concerned, the counterclaim does not identify any connection between the alleged loss and Mr Hayes. On the basis on which the application was conducted, it might be said that he has suffered a loss to the value of his shareholding. However on that basis, by reference to the principle of reflective loss, the claim is not maintainable.
- [37] The written submissions for Westpac point out that a party claiming damages whether for fraud or misleading conduct, or claiming equitable compensation, must demonstrate a sufficient connection between the loss, and the conduct on which the claims are based, to satisfy the legal tests for causation. Putting aside the difficulty which arises because the Yatala land was owned by Funk Road, it is not obvious that the alleged loss was caused by the conduct pleaded in the defence. No connecting causal factors are pleaded. However the submission was not developed, and accordingly I do not propose to decide the applications on that basis.
- [38] The claims against Westpac and Mr Dallimore for damages for unconscionable conduct, and for misleading conduct in breach of s 52 of the TPA, are essentially a re-characterisation of some or all of the allegations of fraudulent conduct to which these reasons have previously referred. Accordingly these claims may be analysed in the same way, with the same result.
- [39] The claims made against Balmain and Mr Dooney for fraud, unconscionable conduct, and misleading conduct in breach of s 52 of the TPA are the same in character as the claims made against Westpac and Mr Dallimore. An analysis of them produces the same result.
- [40] Accordingly, I am prepared to strike out the counterclaim, so far as it claims loss in respect of the Yatala land, for fraud, unconscionable conduct and misleading conduct under s 52 of the TPA.
- [41] I am, however, prepared to hear submissions from Mr Hayes on the question whether he should be permitted to replead these claims, or some of them.

Springwood land

- [42] The counterclaim includes what might be described as a bare allegation of a loss of equity in the Springwood land. That, however, can only be a conclusion to be reached from establishing some other facts. None of those facts is pleaded. Accordingly, in my view, Mr Hayes has not properly pleaded the facts he would be required to prove to demonstrate any loss in relation to the Springwood land.

- [43] The counterclaim also alleges, without elaboration, that this loss was suffered “as a consequence of the loss of the Yatala land”.²⁷ It is not clear what was meant by “the loss of the Yatala land”. It may possibly be a reference to the fact that the land was sold; or perhaps be intended to convey that it was sold at less than its true value. The allegation therefore, in my view, does not properly identify the case which Mr Hayes might seek to advance. However, that was not a point raised against Mr Hayes.
- [44] Beyond that, the statement that there was a loss in respect of the Springwood land, as a consequence of the loss of the Yatala land, is itself a conclusion, to be drawn from unspecified facts which have not been pleaded. Nor is any connection between that loss, and Mr Hayes, which would entitle him to claim it, identified in the counterclaim. In my view, the counterclaim for loss relating to the Springwood land does not meet the requirements for a proper pleading. Accordingly, I would be prepared to strike it out.
- [45] The difficulties in so far as the counterclaim is based upon an alleged loss of equity in the Springwood land and the fact that Mr Hayes has not provided a meaningful response to the submissions about this element of his claimed loss militate against granting him any additional opportunity to pursue this loss. On the other hand, Mr Hayes is self-represented. In light of these reasons and with further consideration, he may be able to identify a basis on which a claim for this loss can be properly pleaded. Moreover, the strike out application was made long after the trial commenced. In those circumstances, I am prepared to hear further submissions from Mr Hayes as to whether he should be permitted to replead a claim for this loss.

Conclusion

- [46] In my view the counterclaim should be struck out. I would be prepared to permit Mr Hayes to replead his claim against Westpac on the basis of an alleged breach of s 85 of the PLA. I am prepared, at an appropriate time, to hear submissions from Mr Hayes as to whether he should be permitted to replead the balance of the claims made in the counterclaim.

²⁷

Counterclaim para 3.