SUPREME COURT OF QUEENSLAND

CITATION:	*Witherspoon & Anor v Hutson & Ors* [2015] QCA 109
PARTIES:	**JOHN CLIVE WITHERSPOON** (first appellant) **SALLY-ANNE WITHERSPOON** (second appellant) **v** **ROBERT WILLIAM HUTSON** (first respondent) **ROBERT WILLIAM BUCKBY** (second respondent) **MARK FRANCIS XAVIER MENTHA** (third respondent)
FILE NO/S:	Appeal No 10501 of 2014 SC No 9450 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – Unreported, 29 October 2014
DELIVERED ON:	19 June 2015
DELIVERED AT:	Brisbane
HEARING DATE:	30 April 2015
JUDGES:	Margaret McMurdo P and Gotterson JA and Flanagan J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed.** **2. The first and second appellants pay the first, second and third respondents' costs of the appeal**.
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – POINTS AND OBJECTIONS NOT TAKEN BELOW – QUESTIONS NOT RAISED ON PLEADINGS OR IN ARGUMENT – GENERALLY – where the appellants held a number of finance facilities with a bank – where the bank appointed receivers purportedly on the basis of non-payment of interest and deregistration of the guarantor company – where the respondent receivers applied for the appellants to deliver up possession of properties and stock pursuant to the relevant financial documentation – where the failure to pay interest was not disputed before the trial judge – where the appellants seek to argue a factual dispute, for the first time, on appeal, as to the payment of interest – whether

the appellants ought to be permitted to dispute the alleged non-payment of interest on appeal notwithstanding the effectual concession at first instance

APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OF COURT BELOW – WRONG PRINCIPLE – PARTICULAR CASES – REFUSAL OF ADJOURNMENT – where the appellants submit that the trial judge wrongly refused an oral application for an adjournment on the day of the respondents' application – where the appellants applied for an adjournment of the application – whether the trial judge wrongly exercised his discretion in refusing any application for an adjournment

APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OF COURT BELOW – OTHER MATTERS – where the appellants held a number of finance facilities with a bank – where the bank appointed receivers purportedly on the basis of non-payment of interest and deregistration of the guarantor company – where the respondent receivers applied for the appellants to deliver up possession of properties and stock pursuant to the relevant financial documentation – where the appellants applied for an interim injunction of the respondents' application pending the determination of a separate, related action brought by the appellants and for consolidation of the proceedings – where the appellants argue that interest payments on a number of financial facilities occurred through the debiting of an overdraft facility – where the appellants argue that deregistration of the guarantor company was not an act of default, was not relied on by the bank to appoint receivers, was not relied on by the trial judge and was capable of remedy through an application for reinstatement and therefore the default could be remedied – whether the trial judge erred in dismissing the appellants' application and ordering the appellants deliver up possession of the properties and stock

BANKING AND FINANCE – BANKS – BANK ACCOUNTS – INTEREST, OVERDRAFTS AND ADVANCES – where the appellants held a number of finance facilities with a bank – where the bank appointed receivers purportedly on the basis of non-payment of interest and deregistration of the guarantor company – where the respondent receivers applied for the appellants to deliver up possession of properties and stock pursuant to the relevant financial documentation – where the appellants argue that interest payments on a number of financial facilities occurred through the debiting of an overdraft facility – whether the debiting of an available credit facility constitutes the "payment" of interest – whether, in the circumstances, the overdraft facility was an available credit facility for the debiting of interest

MORTGAGES – RECEIVERS – APPOINTMENT – GENERALLY – where the appellants held a number of finance facilities with a bank – where the bank appointed receivers purportedly on the basis of non-payment of interest and deregistration of the guarantor company – where the respondent receivers applied for the appellants to deliver up possession of properties and stock pursuant to the relevant financial documentation – where the appellants argue that interest payments on a number of financial facilities occurred through the debiting of an overdraft facility – where the appellants argue that deregistration of the guarantor company was not an act of default, was not relied on by the bank to appoint receivers, was not relied on by the trial judge and was capable of remedy through an application for reinstatement and therefore the default could be remedied – whether the receivers were validly appointed pursuant to the relevant financial documentation – whether relief against forfeiture would be available in circumstances where a guarantor company has been deregistered

Property Law Act 1974 (Qld), s 95(3)
Uniform Civil Procedure Rules 1999 (Qld), r 757(3)

Coulton v Holcombe (1986) 162 CLR 1; [1986] HCA 33, considered
Dick v University of Queensland [2000] 2 Qd R 476; [1999] QCA 474, considered
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
Minion v Graystone Pty Ltd [1990] 1 Qd R 157, applied
Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd (1978) 139 CLR 231; [1978] HCA 8, considered
University of Wollongong v Metwally (No 2) (1985) 59 ALRJ 481; (1985) 60 ALR 68; [1985] HCA 28, considered
Zheng v Cai (2009) 239 CLR 446; [2009] HCA 52, cited

COUNSEL: P Braham SC, with D Keane, for the appellants
D Clothier QC, with P Ahern, for the respondents

SOLICITORS: Stacks Law Firm for the appellants
Gadens Lawyers for the respondents

[1] **MARGARET McMURDO P:** I agree with Flanagan J's reasons for dismissing this appeal with costs.

[2] **GOTTERSON JA:** I agree with the orders proposed by Flanagan J and with the reasons given by his Honour.

[3] **FLANAGAN J: Introduction** The appellants are cattle farmers and trade under a partnership known as "John and Sally Witherspoon". They are the registered proprietors, as joint tenants, of a cattle property known as the Essex Downs Station and the lessees of two other cattle properties known as Balcomo Station and York Downs Station ("**the properties**").

[4] Until about June 2013 they were also the registered proprietors of a property known as Baroona Station and other land forming part of Essex Downs Station.[1] They are also the owners of the stock (primarily cattle) on the properties and other properties.

[5] To finance their cattle operations the appellants held a number of secured financial facilities, initially with Suncorp Metway Limited and subsequently with the Commonwealth Bank of Australia Limited ("**the Bank**").[2]

[6] The cross collateralised securities for each of the financial facilities were:[3]

1. registered mortgages over the Essex Downs Station, the appellants' leasehold interest in the Balcomo Station and the appellants' leasehold interest in the York Downs Station;
2. a bill of sale dated 20 October 2008 over (inter alia) stock; and
3. a guarantee and indemnity from JC & SA Pty Ltd as trustee for the Spoon Family Trust together with a fixed and floating charge from that company as guarantor.

[7] The amount advanced to the appellants under these facilities was in excess of $11 million.

[8] The respondents are receivers and managers appointed by the Bank on 2 October 2014 to the properties and the stock the subject of the Bank's securities.[4]

[9] On 29 October 2014 the learned primary judge heard and determined two applications.

[10] The first was the respondents' originating application which relevantly sought orders that the appellants deliver up possession of the properties and any stock of the appellants to the respondents. The second application was filed by the appellants. It sought an interim injunction pending the determination of an action brought by the appellants against the respondents and the Bank restraining them from taking or proceeding with any enforcement action in respect of any of the financial facilities. The application also sought consolidation of both proceedings and directions.

[11] The learned primary judge granted the respondents' application and ordered that the appellants deliver up possession of the properties and stock to the respondents within 14 days. The appellants' application for an interim injunction was dismissed.

[12] The appellants seek to challenge the orders for delivery up of possession on the grounds that the learned primary judge erred in:

(a) finding that the appellants were in default of payment of interest since about June 2013;

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1 Affidavit of Sally-Anne Witherspoon affirmed 27 October 2014, [3], [4]; appeal record book, 339-340.

2 Affidavit of John Clive Witherspoon affirmed 27 October 2014, [17]-[20]; appeal record book, 1361-1362. Following the transfer from Suncorp Metway Limited, the appellants secured financial facilities were initially with the Bank of Western Australia Limited trading as Bankwest and subsequently the Commonwealth Bank of Australia Limited trading as Bankwest. Bankwest's business was then transferred to the Commonwealth Bank, effective 1 October 2012. Practice direction 29 of 2012 provides that the Commonwealth Bank is substituted for Bankwest, and has the same rights in the proceeding as Bankwest had, pursuant to s 22(3) of the *Financial Sector (Business Transfer and Group Restructure) Act* 1999 (Cth): applicants' outline dated 29 October 2014, 2, footnote 4; appeal record book, 1505.

3 Exhibits TC-1 and TC-6 to the affidavit of Timothy John Collins sworn 3 October 2014; appeal record book, 75-86; 136-184.

4 Deed of appointment of receivers and managers dated 2 October 2014; appeal record book, 952-962.

(b) finding that the appellants had not demonstrated that there was an arguable basis for impugning the appointment of the receivers; and

(c) refusing the appellants' request to adjourn the originating application.

[13] The appellants in effect submit that his Honour should have appreciated that there was likely to be a relevant dispute of fact as to whether default had occurred under the financial facilities which permitted the Bank to appoint the respondents as receivers and managers. His Honour therefore, it is submitted, should not have granted the relief sought in the originating application but should have adjourned the application and made appropriate directions for the consolidation of the proceedings and pleadings. Such directions would have permitted all issues raised in the proposed statement of claim and the originating application to go to trial.

[14] The primary issue on appeal is therefore whether his Honour erred in failing to identify that there was a proper basis upon which the appellants could challenge the appointment of the respondents as receivers and managers. The appellants accepted that his Honour identified the correct test to be applied in respect of the Bank's application:[5]

> "… the Witherspoons [sic] threshold on the bank's application which is in effect for final relief on a claim in ejectment is lower, in my view. It is whether there's any question which makes it appropriate for that proceeding to be dealt with as if started by claim on a trial."

[15] His Honour therefore (correctly with respect) identified the primary issue as follows:[6]

> "… the appropriate questions resolve to whether there is any prospect in reality of the Witherspoons' claim leading to an order which will invalidate the appointment of the receivers ab initio."

[16] The respondents, either by way of notice of contention or as a finding made by his Honour, seek to support the orders on two bases, namely that steps taken by the appellants to deregister JC & SA Pty Ltd and the actual deregistration of the company constituted an independent event of default permitting the appointment of the respondents as receivers and managers, as well as the failure to pay interest.

The relevant history of dealings between the appellants and the Bank

[17] On 29 September 2008 the Bank offered two financial facilities to the appellants. The first was entitled a Flexi-Protect Facility. The facility limit was $10,250,000.00 increasing to $10,950,000.00 on 31 October 2009. The facility expiry date was 180 months from the initial drawdown date. The facility was therefore to expire in or about 2023. According to the facility terms, all payments of interest and fees would be debited to the appellants' nominated Bankwest cheque account or other Bankwest account acceptable to the Bank.[7]

[18] The second facility was an overdraft facility entitled an AgriOne Overdraft Facility. The purpose of this facility was for working capital and general business purposes.

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5 Reasons, 4; appeal record book, 1552. The concession was made by senior counsel for the appellants in the appeal transcript of proceedings, 30 April 2015, 1-41, lines 13-16. See also: *Uniform Civil Procedure Rules* 1999 (Qld) rr 11, 14.

6 Reasons, 5; appeal record book, 1553.

7 Exhibit SAW-1 to the affidavit of Sally-Anne Witherspoon affirmed 27 October 2014, 462; appeal record book, 840.

The facility's limit was $1,500,000.00 reducing to $1,000,000.00 on 30 April 2009. Interest was payable monthly in arrears on the last business day of each calendar month. The outstanding amount of the overdraft was repayable on demand.[8]

[19] On 2 January 2009 there was a variation to these facilities.[9] The Flexi-Protect Facility (which was referred to by the parties as the "big loan") was not varied. The overdraft was increased to $2,500,000.00 and remained repayable on demand. A special condition of the overdraft facility was that the account could be converted into another type of account if the requirements for the account were not maintained.[10]

[20] On 22 November 2010 the Bank offered the appellants new facility terms. As to the big loan, the facility limit was set at $9,550,000.00 with an expiry date of 31 October 2011 rather than in 2023.[11] It is the Bank's conduct in relation to the change of the expiry date of the big loan which constitutes part of the appellants' pleaded case against the Bank and the receivers in the appellants' claim and statement of claim filed 28 October 2014.[12] It remained a term of the big loan facility that all payments of principal, interest and fees would be debited to the appellants' nominated cheque account.

[21] The overdraft facility was reduced from $2,500,000.00 to $1,500,000.00 and remained repayable on demand. Interest also remained payable monthly in arrears on the last business day of each calendar month. As at 22 November 2010 the balance of the overdraft account was approximately $2,691,869.79.[13] $1,000,000.00 of the overdraft was converted to a commercial advance facility. The purpose of this conversion was to transfer portion of the overdraft debt to term lending.[14] The facility expiry date for the commercial advance facility of $1,000,000.00 was 31 October 2011. The letter of 22 November 2010 also refers to an existing commercial advance facility of a further $1,000,000.00. This was the continuation of an existing facility originally approved to purchase cattle, provide development funding and working capital. A further facility was provided called a Business Edge loan of $1,000,000.00 (Account No 123-049118-6). The facility expiry date for the Business Edge loan was 12 months from the initial drawdown date. Like the big loan, all payments of principal, interest and fees for the Business Edge loan were also able to be debited to the appellants' nominated Bankwest cheque account.[15]

[22] Item 6.1 of the Facility Terms of 22 November 2010 identified non-financial undertakings. These included a special undertaking that should cash flow forecasts and any agreed strategy not be achieved and/or commitments were unable to be met, the appellants were required to reduce the debt from the sale of assets.[16]

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8 Exhibit SAW-1 to the affidavit of Sally-Anne Witherspoon affirmed 27 October 2014, 465; appeal record book, 843.

9 Exhibit SAW-1 to the affidavit of Sally-Anne Witherspoon affirmed 27 October 2014, 470; appeal record book, 848.

10 Exhibit SAW-1 to the affidavit of Sally-Anne Witherspoon affirmed 27 October 2014, 474; appeal record book, 852.

11 Exhibit SAW-1 to the affidavit of Sally-Anne Witherspoon affirmed 27 October 2014, 487; appeal record book, 865.

12 Claim and statement of claim filed 28 October 2014; appeal record book, 1523-1536.

13 Exhibit SAW-1 to the affidavit of Sally-Anne Witherspoon affirmed 27 October 2014, 413; appeal record book, 789.

14 Exhibit SAW-1 to the affidavit of Sally-Anne Witherspoon affirmed 27 October 2014, 488; appeal record book, 866.

15 Exhibit SAW-1 to the affidavit of Sally-Anne Witherspoon affirmed 27 October 2014, 489; appeal record book, 867.

16 Exhibit SAW-1 to the affidavit of Sally-Anne Witherspoon affirmed 27 October 2014, 490-491; appeal record book, 868-869.

[23] By letter dated 28 October 2011 the financial facilities were further varied. The limit on the overdraft account was increased from $1,500,000.00 by an additional $500,000.00 to $2,000,000.00. The additional $500,000.00 was only available until 30 June 2012.[17] The facility expiry date for the Business Edge loan was identified as 31 October 2012.[18] The facility limit for the big loan remained at $9,550,000.00 with an expiry date of 31 October 2012.[19]

[24] The letter of 28 October 2011 also stated that the terms and conditions for all the facilities were set out in the Bank's General Terms for Business Lending dated April 2011. I will return to these General Terms for Business Lending.

[25] At the time the overdraft was increased by $500,000, namely 28 October 2011, the overdraft had a balance of $1,469,420.64.[20] On 31 October 2011 the overdraft was debited with the interest on the big loan (Account No 123-044672-5) in the amount of $357,143.83. An examination of the bank statements to the overdraft account[21] shows that at all material times the interest for the big loan and the Business Edge loan as well as the interest payable on the overdraft were always debited to the overdraft account. It is also clear from an examination of the bank statements of the overdraft account that at or about 28 October 2011 it was operating as a business overdraft account with numerous debited payments (presumably in relation to the operation of the cattle business) and credited receipts being recorded.

[26] The financial statements of the partnership reveal that for the years ending 30 June 2010, 2011 and 2012 the appellants sustained significant net losses. They also had a substantial surplus of liabilities over assets and their interest expenses alone exceeded the partnership's total income.[22]

[27] On or about 8 October 2012 the Bank notified the appellants that the commercial advance facilities including the big loan would not be renewed.[23] By their express terms the commercial advance facilities expired on 31 October 2012. The Bank did not however, at this time, take any enforcement steps.

[28] The appellants appointed an independent financial advisor, Mr Michael Lyons, to assist them.

[29] By email dated 22 November 2012 the Bank informed Mr Lyons as follows:[24]

> "With regard to charging interest to the accounts, at the meeting it was advised that the interest would be charged to the account noting the breach of limit. As discussed, the bank would support the

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17 Exhibit SAW-1 to the affidavit of Sally-Anne Witherspoon affirmed 27 October 2014, 505; appeal record book, 883.

18 Exhibit SAW-1 to the affidavit of Sally-Anne Witherspoon affirmed 27 October 2014, 506; appeal record book, 884.

19 Exhibit SAW-1 to the affidavit of Sally-Anne Witherspoon affirmed 27 October 2014, 507; appeal record book, 885.

20 Exhibit SAW-1 to the affidavit of Sally-Anne Witherspoon affirmed 27 October 2014, 365; appeal record book, 741.

21 Exhibit SAW-1 to the affidavit of Sally-Anne Witherspoon affirmed 27 October 2014, 314-372, 391-455; appeal record book, 690-748, 767-831.

22 Exhibit SAW-1 to the affidavit of Sally-Anne Witherspoon affirmed 27 October 2014, 4-201; appeal record book, 380-577; respondents' outline of submissions dated 5 January 2015, [9].

23 Affidavit of Sally-Anne Witherspoon affirmed 27 October 2014, [99]; appeal record book, 362.

24 Exhibit SAW-1 to the affidavit of Sally-Anne Witherspoon affirmed 27 October 2014, 731; appeal record book, 1109.

> temporary increase to allow the business to continue to trade whilst a strategy was developed.
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> Upon agreeing a suitable strategy going forward, the bank will refund any honour fees charged to the overdraft account."

[30] Mr Lyons advised the appellants to sell Baroona Station and part of Essex Downs Station.[25]

[31] By email dated 18 January 2013 the Bank informed Mr Lyons as follows:[26]

> "1. We confirm that the revised asset sell down is acceptable as part of the initial plan leading up to 30 June 2013.
>
> 2. We confirm the cheque for the advertising budget will be honoured when presented.
>
> 3. We confirm that interest will continue to capitalise and will be dealt with out of any sale proceeds.
>
> 4. Nathan and I will work out an internal strategy that will allow the Witherspoons access to an account to meet their monthly trading costs. The limit of this account is to be determined and the account will be cleared on a monthly basis.
>
> 5. As per point 4, the account will need to be cleared monthly from cattle proceeds and interest from other accounts will not be charged to this account."

[32] As foreshadowed by the email of 18 January 2013, the Bank put in place an additional overdraft of $125,000.00 in or about March 2013.[27] According to Mrs Witherspoon this additional overdraft was paid in full from cattle sales and other income by the end of each month over the period from March 2013 until approximately September 2013. The $125,000.00 overdraft was unable to be repaid at the end of September 2013.[28] When the additional overdraft of $125,000.00 was put in place in March 2013 the balance of the overdraft account was approximately $2,000,000.00.[29]

[33] In April and June 2013 Baroona Station and part of Essex Downs Station were sold. Settlement funds of $1,775,968.97 were paid into the overdraft account on 17 April 2013. A further amount of $1,826,315.67 was paid into the overdraft account on 28 June 2013.[30] At the time the $1,775.968.97 was paid into the overdraft account it had a balance of $2,210,097.54; well over the $1,500,000.00 limit.

[34] From an examination of the bank statements for the overdraft account, it would appear that the additional settlement funds of $1,826,315.67 were used as follows:

(a) to cover the interest that was debited to the overdraft account in May and June 2013;

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25 Affidavit of John Clive Witherspoon affirmed 27 October 2014, [42]-[44]; appeal record book, 1366.

26 Exhibit SAW-1 to the affidavit of Sally-Anne Witherspoon affirmed 27 October 2014, 738; appeal record book, 1116.

27 Affidavit of Sally-Anne Witherspoon affirmed 27 October 2014, [124]; appeal record book, 367.

28 Affidavit of Sally-Anne Witherspoon affirmed 27 October 2014, [124]-[125]; appeal record book, 367-368.

29 Exhibit SAW-1 to the affidavit of Sally-Anne Witherspoon affirmed 27 October 2014, 332; appeal record book, 708.

30 Exhibit SAW-1 to the affidavit of Sally-Anne Witherspoon affirmed 27 October 2014, 329, 331; appeal record book, 705, 707.

(b) to close account number 123-044-6767 by the transfer of $1 million; and

(c) $392,187.67 was transferred to account number 123-049118-6 (the Business Edge Facility).

This left the overdraft account with a balance as at 28 June 2013 of $159,794.57.[31] The additional overdraft of $125,000.00 remained in place.

[35] The overdraft bank statements also reveal that from about October 2012 the Bank charged honour fees (in the amount of $38.00) for the honouring of debits to the overdraft account.[32] After the payment to the overdraft account of the settlement amounts the account appears to have ceased to operate as a business overdraft account in that the only debits into the account were for the interest payable on the big loan, the Business Edge loan and the overdraft. After the crediting of the settlement amounts to the overdraft account, the only further amounts credited were an amount of $605.00 on 1 July 2013, an amount of $30,000.00 on 22 August 2013 and a further amount of $605.00 on 30 June 2014. A credit for an amount of $54,979.80 entered on 9 August 2013 was reversed on 12 August 2013. It is therefore apparent that the overdraft account from about 28 June 2013 ceased to be operated as a business overdraft and was merely used to record the interest debited to the big loan, the Business Edge facility and the overdraft.

[36] This is consistent with the Bank providing to the appellants an additional overdraft of $125,000.00 which was required to be cleared monthly from cattle proceeds. As was stated in the email of 18 January 2013 from the Bank to Mr Lyons, interest from other accounts would not be charged to the $125,000.00 overdraft facility.[33]

[37] The Witherspoons were unable to clear the additional overdraft of $125,000.00 in September 2013. The Bank therefore wrote to the Witherspoons on 25 November 2013 in the following terms:[34]

> "In consideration of your cooperation and your efforts in selling the above properties the Bank agreed in March 2013 to provide you with an additional Overdraft limit of $125,000.00, subject to monthly reviews including the debit balance of the account being cleared each month.
>
> I understand from my discussions with Mr Lyons that the Overdraft Limit of $125,000 is unable to be cleared and that the monthly interest charges on your various loan facilities will be unable to be met when due. I also note that notwithstanding sale proceeds totalling $4,642,472 were received between April 2013 and June 2013, the balance of your loan facilities is currently $10,731,009 due to interest charges and other payments that were unable to be met from your farming and other income.
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> The Bank is of the view that the income able to be generated by your farming normal operations will remain insufficient to repay your loan facilities over a commercially acceptable term. In the circumstances, the

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31 Exhibit SAW-1 to the affidavit of Sally-Anne Witherspoon affirmed 27 October 2014, 329-331; appeal record book, 707-707.

32 Exhibit SAW-1 to the affidavit of Sally-Anne Witherspoon affirmed 27 October 2014, 332-337; appeal record book, 708-713.

33 Exhibit SAW-1 to the affidavit of Sally-Anne Witherspoon affirmed 27 October 2014, 738; appeal record book, 1116.

34 Exhibit TC-9 to the affidavit of Timothy John Collins sworn 3 October 2014; appeal record book, 242.

> Bank is unable to provide further borrowings or to allow the balance of your existing loan facilities to continue to increase due to unpaid interest charges. As a consequence, the Bank is not prepared to continue to provide loan facilities to you."

[38] By the same letter the Bank invited the appellants to engage in a mediation pursuant to the Queensland Farm Finance Strategy. This mediation was arranged to take place on Monday, 2 June 2014. By email dated Friday, 30 May 2014, the appellants' then solicitors stated that the appellants wished to cancel the mediation.[35] The Mediator's Statement records that the Bank attended and was prepared to participate in the mediation in good faith but the appellants had unilaterally purported to cancel the mediation and failed to attend.[36]

[39] Under cover of a letter dated 3 September 2014 the Bank served the appellants with a notice of demand. By this notice of demand the Bank elected to declare that the total outstanding amount under all three facilities was payable on demand and demanded payment within 28 days of all principal, interest, fees and charges outstanding to the Bank.[37]

[40] On 2 October 2014 the respondents were appointed as receivers and managers.[38] On the day prior to the respondents' appointment as receivers and managers, JC and SA Pty Ltd, the corporate trustee of the Spoon Family Trust, was deregistered.[39]

Finding that the appellants were in default of payment of interest since about June 2013.

[41] By their statement of claim the appellants sought (as well as other relief) to challenge the validity of the respondents' appointment as receivers and managers. The primary basis of this challenge was that in respect of the big loan the Bank had acted unconscionably (pursuant to s 12CB of the *Australian Securities and Investments Commission Act* 2001 (Cth)) in reducing the term of this facility from 180 months to expire on 31 October 2012. As to the overdraft facility, the appellants allege that it was never the intention of the appellants and the Bank that the overdraft would be repayable on demand, but would be repayable at a reasonable time.[40]

[42] His Honour accepted that the matters pleaded in the statement of claim were matters that had to be resolved at trial.[41] The appeal also proceeded on the basis that the matters alleged in the statement of claim raised arguable grounds to challenge the appointment of the respondents.[42]

[43] His Honour, however, identified two independent events of default which permitted the respondents' appointment, namely the non-payment of interest on the relevant facilities since June 2013 and the deregistration of JC & SA Pty Ltd.

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35 Exhibit TC-10 to the affidavit of Timothy John Collins sworn 3 October 2014; appeal record book, 245.
36 Exhibit TC-11 to the affidavit of Timothy John Collins sworn 3 October 2014; appeal record book, 246.
37 Exhibit TC-8 to the affidavit of Timothy John Collins sworn 3 October 2014; appeal record book, 234-237.
38 Exhibit DP-1 to the affidavit of Danny Francis Pennicott sworn 3 October 2014; appeal record book 262.
39 Affidavit of Sally-Anne Witherspoon affirmed 27 October 2014, [16]; appeal record book, 342.
40 Claim and statement of claim filed 28 October 2014, [12.1], [12.3], [13.1], [13.5]; appeal record book, 1532-1534.
41 Reasons, 3, lines 32-41; appeal record book, 1551.
42 Appeal transcript of proceedings, 30 April 2015, 1-12, lines 16-30.

[44] Given the evidence before his Honour and the conduct of the case at first instance, the finding that the appellants had failed to pay interest since June 2013 is unremarkable. The respondents' principal affidavit by Timothy John Collins swore, on 3 October 2014, to the fact that "there remains substantial unpaid interest as at the date of this affidavit".[43] This affidavit also exhibited as "TC-9" the Bank's letter of 25 November 2013 which specifically referred to the balance of the appellants' existing loan facilities continuing to increase due to unpaid interest charges. Ms Adamson's affidavit quantified the unpaid interest on the three relevant facilities from 28 June 2013 to 1 October 2014. This was an amount of approximately $942,000.00.[44]

[45] The respondents at first instance submitted:[45]

> "MR SAVAGE: … Now, the uncontroversial facts are the amount owing [indistinct] the facility is $11.9 million and interest flows at $2,000 a day and that the bank expects a deficiency on realisations of about $5 million. … Now, the interest hasn't been paid since 2013, and it was only paid up to 2013 because some of the properties were sold.
>
> HIS HONOUR: When do you say that? Why do you say that?
>
> MR SAVAGE: Well, its common ground that there hasn't been a payment of interest since 2013.
>
> HIS HONOUR: Yes. Your case is June 2013, which followed, as I understand it, the sale of two of the properties in April.
>
> MR SAVAGE: Yes."

[46] This submission was not challenged by senior counsel who appeared for the appellants below. His Honour was therefore dealing with this issue on the basis that it was common ground that the appellants had failed to pay interest on the relevant facilities since June 2013.

[47] There was no contrary evidence from the appellants. Mrs Witherspoon is the person in the partnership who attends to the paperwork and runs the business side of the partnership.[46] She was therefore uniquely positioned to refute the evidence that the appellants were in default of payment of interest on the facilities.

[48] The respondents' submissions below squarely raised the failure to pay interest since June 2013 as constituting an event of default under clause 16.1(a) of the General Terms for Business Lending. It must therefore be accepted that the appellants made no submission before his Honour contrary to the undisputed evidence that they had failed to pay interest on the relevant facilities since June 2013.

[49] The failure to pay interest was not only not disputed, it also constituted the basis for a submission by senior counsel for the appellants below that such a failure to pay interest was causally connected to the Bank's conduct alleged in the statement of claim:[47]

> "HIS HONOUR: How does the bank's breach – I don't pretend to be on top of all of this, but I – it's helpful if I think I understand what the links are. How does the bank's breach go to whether or not the interest hasn't been paid since 2013?

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43 Affidavit of Timothy John Collins sworn 3 October 2014, [10]; appeal record book, 71.
44 Affidavit of Nicola Jane Adamson sworn 28 October 2014, [6]; appeal record book, 1420.
45 Transcript of proceedings, 29 October 2014, 1-36, lines 9-27; appeal record book, 36.
46 Affidavit of John Clive Witherspoon affirmed 27 October 2014, [14]; appeal record book, 1360-1361.
47 Transcript of proceedings, 29 October 2014, 1-9, lines 15-37; 1-10, lines 15-16; appeal record book, 9, 10.

> MR JACOBS: We say that the bank's conduct – it's on a number of different levels. The bank's conduct was a breach of the Code. But for that breach, none of this would have happened.
>
> …
>
> HIS HONOUR: But all of those would've required paying interest and the failure to pay interest would've been a breach under any of them, even if you still had a loan to 2023. So I don't understand how the default which is the basis of, presumably, an acceleration notice, depends on the conduct you complained.
>
> MR JACOBS: Well, your Honour had the bank not put pressure on the Witherspoons to dispose of the farm – to pay up. I withdraw the submission to sell the farms. Had they not put pressure on the Witherspoons on the 28th of October of 2013 to pay up …
>
> MR JACOBS: … And they sell the two lucrative farms that were central to the production of money."

[50] The respondents correctly submit that senior counsel's articulation of the case before his Honour implicitly involves a recognition that interest had not been paid.[48]

[51] The appellants on appeal now seek to raise for the first time that there is a relevant factual dispute as to whether there had been a failure to pay interest since June 2013. This factual dispute is sought to be demonstrated by reference to the terms of the finance facilities and the bank statements. The appellants submit that this evidence suggests that they made interest payments from available credit facilities (namely the overdraft facility) until the end of September 2014.[49]

[52] The appellants should not be permitted on appeal to seek to dispute a matter that was in effect conceded at first instance. In *Coulton v Holcombe*,[50] Gibbs CJ, Wilson, Brennan and Dawson JJ stated:

> "In a case where, had the issue been raised in the court below, evidence could have been given which by any possibility could have prevented the point from succeeding, this Court has firmly maintained the principle that the point cannot be taken afterwards."

[53] Similarly, in *University of Wollongong v Metwally (No 2)*[51] the court stated:

> "It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so."

[54] Barwick CJ in *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd*[52] observed:

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48 Appeal transcript of proceedings, 30 April 2015, 1-59, lines 6-10.

49 Appellants' outline of argument dated 8 December 2014, [12].

50 (1986) 162 CLR 1, 7.

51 (1985) 60 ALR 68, 71 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ). See also *Zheng v Cai* (2009) 239 CLR 446, 453 [16] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

52 (1978) 139 CLR 231, 241.

> "Suffice it to say it should only be in the clearest case and for the most cogent reasons that a party who has conceded matter at trial should be allowed to make the validity of what has been conceded the basis for overturning the result of the trial."

[55] In the present appeal whilst there was no formal concession by senior counsel for the appellants at first instance, the non-payment of interest was not in dispute and formed the basis of an alternative submission. In this sense the default in payment of interest was effectively conceded.

[56] A distinction however, should be drawn to the applicability of the principles identified above to an effective concession made at trial as opposed to the present case which is more in the nature of summary judgment on the originating application. Thomas JA in *Dick v University of Queensland*[53] identified this distinction:

> "It has been recognised for example in the case of an appeal against a summary judgment that it may be appropriate for an appeal court to exercise its discretion so as to permit the right point to be re-litigated. In *Doherty v Murphy*[54] the Appeal Division of the Supreme Court of Victoria regarded both the nature of the proceeding and the circumstances of incompetence on the part of the appellant's solicitor as providing good reason for allowing the matter to be re-litigated. In other decisions by intermediate courts of appeal the discretionary powers of the court in question conferred by legislation or rules of court have sometimes been thought relevant to the question of whether a new point may be taken on appeal. … This in my view to some extent supports the view that the general rule against raising new points on appeal may not necessarily apply with the same rigidity to an application of this kind as it does to a decision reached after the a full trial based upon clearly defined issues."

[57] Even allowing for this distinction there are in my opinion two primary reasons why the appellants should not be permitted to raise this issue on appeal. The first is the prejudice occasioned to the respondents by the appellants' failure to dispute the issues at first instance. Had the appellants, through Mrs Witherspoon, put on evidence that the interest on the relevant facilities had been paid because of available credit in the overdraft (allegedly up to a limit of $1.5 million) that evidence could have been the subject of a factual response. The respondents, however, were deprived at first instance of putting on such evidence in response. As an example of the type of evidence the respondents may have put on, the appeal record contains an affidavit of Timothy John Collins sworn 7 November 2014.[55] Exhibited to this affidavit is a letter from the Bank to the appellants dated 18 April 2013. It deals with the disbursement of the settlement funds from the sale of Baroona Station. The letter relevantly states:

> "Kindly be advised that as per our discussions the limit on the Agrione account [the overdraft account] has now been reduced from $1,500,000.00 to nil. The interest rates for arrears on this account is 13.90%."

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53 [2000] 2 Qd R 476, 489-490 [41].

54 [1996] 2 VR 553.

55 Affidavit of Timothy John Collins sworn 7 November 2014; appeal record book 1566-1569.

[58] Mr Collins' affidavit of 7 November 2014 and the letter of 18 April 2013 were not before his Honour. The respondents do not seek to place this evidence before this Court as fresh evidence but rather as an example of the type of evidence the respondents may have sought to lead below had the payment of interest been disputed.[56] Senior counsel for the appellants submitted that if leave had been sought to adduce this evidence it would have "caused an evidentiary contest on appeal".[57] The evidence was not led by the respondents for this purpose. The evidence is only relevant to identify the type of prejudice referred to in cases such as *Coulton v Holcombe*.

[59] Secondly, the appellants did not seek leave to adduce fresh evidence, for example from Mrs Witherspoon that there was no default of interest because the overdraft had sufficient credit to cover the payment of interest on all relevant facilities. Rather, senior counsel for the appellants sought to establish a relevant factual dispute only by reference to the terms and conditions of the facilities and the bank statements. These documents were in evidence before his Honour. For the appellants' submission to be accepted that there was no default in the payment of interest it is necessary to construe these documents as giving rise to a factual dispute. In my opinion, a proper examination of these documents does not give rise to any relevant factual dispute. Any evidentiary inference that arises from an examination of these documents is entirely equivocal.

[60] It may be accepted that as at 28 October 2011 the overdraft had a combined facility of $2 million with $500,000.00 of that facility being available until 30 June 2012. It may also be accepted that the payments of interest for the big loan and the Business Edge loan could be debited to the overdraft account and that the interest on the overdraft facility was always debited to the overdraft. What is central, however, to the appellants' submission, is that from 28 June 2013 to the appointment of the respondents as receivers and managers on 2 October 2014, the overdraft facility still had a facility limit of $1,500,000.00. That is, the overdraft facility limit of $1,500,000.00 was not at any time altered.

[61] An overdraft facility is a current account on which the banker has approved arrangements which allow drawings to a certain limit which will leave the account in debit. The mere fact that the present overdraft facility required interest to be paid monthly in arrears on the last business day of each calendar month does not mean that such payment could not be made by way of debit to the account if the account was within limit. If however the limit to the overdraft facility had been reduced and the reduced level been exhausted between 28 October 2011 and 28 June 2013, the mere debiting of the interest from each facility to the overdraft account could not constitute payment of interest.

[62] It is not possible from an examination of the terms and conditions of the overdraft facility and the bank statements to determine whether the overdraft facility limit has or has not been altered.

[63] These documents only constitute part of the history of dealings between the Bank and the appellants. The overdraft facility was subject to the Bank's Business General Terms for Business Lending. By clause 1.2(a)(iii) the Bank had the right to review the overdraft facility and the conditions of the facility at such times as the

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56 Appeal transcript of proceedings, 30 April 2015, 1-61, lines 16-19.

57 Appeal transcript of proceedings, 30 April 2015, 1-72, lines 28-30.

Bank determined.[58] By clause 1.2(b)(i) if, following a facility review, the Bank determined in their absolute discretion that there had been an adverse change in the total outstanding amount or the appellants' creditworthiness, financial position or business position, the Bank was able to give written notice informing the appellants of the revised conditions which applied to the overdraft facility.[59]

[64] A consideration of the material before his Honour suggests that the limit to the overdraft facility of $1,500,000.00 was the subject both of review and alteration. For example, the facility documents that the Court was taken to did not include any documents concerning the additional overdraft provided by the Bank in March 2013 of $125,000.00. According to the letter of 18 January 2013 the Bank required this account to be cleared monthly from cattle proceeds.[60] The debiting of interest from June 2013 to 1 September 2014 took the balance of the overdraft from $159,794.57 to $1,007,524.15.[61] If, as the appellants submit, the overdraft had a limit of $1,500,000.00 during this period, it is difficult to understand why there was any need for the appellants to have sought in March 2013 an additional overdraft of $125,000.00 which was repayable in full each month. The overdraft's balance figure of $1,007,524.15 as at 1 September 2014 is the same figure shown in the notice of demand issued on 3 September 2014.[62]

[65] Mr Collins, in his affidavit of 3 October 2014, refers to this notice of demand and the fact that as at 3 October 2014 there remained substantial unpaid interest. The notice of demand identifies accrued interest as at 3 September 2014 on the relevant facilities as $3,239.15, $206.15 and $1,790.61. The appellants submit that those figures suggest that the outstanding interest was miniscule and in no way corroborates the statement made by senior counsel for the respondents at first instance that interest had not been paid since 2013.[63] The appellants' submission misconstrues the notice of demand. The balance shown for the overdraft facility of $1,007,524.15 is the balance as at 1 September 2014. The accrued interest amount of $1,790.61 is the interest calculation for the two day period 1 September 2014 to 3 September 2014. The substantial unpaid interest referred to by Mr Collins must be read as a reference to the balance of the overdraft given that it was this account which was used for debiting interest on all facilities from 28 June 2013 to 1 September 2014.

[66] It is also clear from the overdraft bank statements that from about April 2013 it ceased to operate as a true business overdraft. The only debits to the account were of interest in relation to the various facilities including the overdraft. Simply because the letter of 28 October 2011 records the existing overdraft facility as having a facility limit of $1,500,000.00 does not mean that limit was in place as at 28 June 2013. The bank statements are merely evidence that interest was debited to the overdraft account.

[67] The appellants' analysis of the facilities and the bank statements is, without more, insufficient to give rise to a relevant dispute of fact. No error has therefore been demonstrated.

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58 Exhibit TC-2 to the affidavit of Timothy John Collins sworn 3 October 2014; appeal record book, 91.

59 Exhibit TC-2 to the affidavit of Timothy John Collins sworn 3 October 2014; appeal record book, 91.

60 Exhibit SAW-1 to the affidavit of Sally-Anne Witherspoon affirmed 27 October 2014, 738; appeal record book, 1116.

61 Exhibit SAW-1 to the affidavit of Sally-Anne Witherspoon affirmed 27 October 2014, 314, 329; appeal record book, 690, 705.

62 Exhibit TC-8 to the affidavit of Timothy John Collins sworn 3 October 2014; appeal record book, 236.

63 Appellants' reply submissions dated 13 February 2015, [3].

Finding that the appellants had not demonstrated that there was an arguable basis for impugning the appointment of the receivers

[68] The appellants submitted both at first instance and on appeal that his Honour should not have granted final relief to the respondents even if there was a default in the payment of interest. This submission was premised on the assumption that the sale of Baroona Station and part of Essex Downs Station damaged the appellants' capacity to meet ongoing interest payments.[64]

[69] This alleged connection between the sale of the two properties and the appellants' inability to meet the interest payments since June 2013 is not pleaded in the statement of claim. What the statement of claim pleads in [15] is:[65]

> "Acting in the belief that Bankwest had the right to call up all the facilities aforesaid by the end of October 2012, and that the Plaintiffs had no alternative but to comply with the Bank's demand, the Plaintiffs sold Baroona Station and part of Essex Downs Station for the sum of $2.9m and $1,913,780, and paid the net proceeds of the sales to Bankwest in reduction of the amounts owing under the said facilities."

[70] Mrs Witherspoon's affidavit goes somewhat further than the pleading. She alleges that the two properties were sold at undervalue and their sale delayed cattle being ready for sale.[66]

[71] The appellants did not establish before his Honour that there was any pleaded or evidentiary basis demonstrating a causal connection between the conduct alleged against the Bank and the default in the payment of interest. Even though the alleged causal connection was not pleaded or supported by evidence his Honour nevertheless dealt with the submission:[67]

> "… the claim made by the Witherspoons includes a claim for damages but there are two hurdles which, in my view, would have to be faced before that claim could invalidate the appointment of the receivers based on the ground that there was default in the payment of interest or in the payment of the facilities. Either they would have to answer the failure to pay the interest by their cross-claim for damages, being the amount that was due on the outstanding balances, or they would have to overtop that amount and any amount due on account of principal as well."

[72] His Honour noted that there was no evidence at that stage that damages would overtop those amounts.[68] There was no evidence, for example, from Mrs Witherspoon that had the two properties not been sold and operations continued with the two properties within the partnership this would have enabled sufficient income to be received to meet interest payments. In light of what the financial statements revealed it is not surprising that Mrs Witherspoon did not give such evidence. Even prior to the sale of the two properties the partnership was sustaining significant net losses and interest expenses alone exceeded the partnership's total income.[69]

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64 Appellants' outline of argument dated 8 December 2014, [15].
65 Claim and statement of claim filed 28 October 2014, [15]; appeal record book, 1534.
66 Affidavit of Sally-Anne Witherspoon affirmed 27 October 2014, [126]-[131]; appeal record book, 368-369.
67 Reasons, 4, lines 35 to 41; appeal record book, 1152.
68 Reasons, 4, line 43; appeal record book, 1552.
69 Respondents' outline of submissions dated 5 January 2015, [9].

[73] The appellants have not demonstrated that his Honour erred in rejecting the appellants' submission below of a causal connection between the Bank's alleged conduct as pleaded and the appellants' default in the payment of interest.

Refusing the appellants' request to adjourn the originating application

[74] In order to deal with the appellants' submission that his Honour should have granted their adjournment application it is necessary to detail some procedural history.

[75] The respondents' proceedings seeking possession were commenced by originating application filed 3 October 2014. This application was supported by the affidavit of Mr Collins in which he swore that since 21 December 2012 the Bank had received $31,200.00 toward amounts owing under the facilities and that there remained substantial unpaid interest as at the date of the affidavit.[70]

[76] The originating application was originally listed for hearing on 16 October 2014.

[77] On 9 October 2014 the appellants filed an interlocutory application seeking orders vacating the hearing date of the respondents' application and requiring the parties file and serve pleadings and evidence to prepare the matter for hearing.

[78] On 10 October 2014 the respondents' application was adjourned by consent to 29 October 2014 and the appellants were ordered to deliver any affidavit material in respect of either application by 4.00 pm on Friday, 24 October 2014. The appellants were late in serving their affidavit material. Extensive affidavit material was not served until Monday, 27 October 2014. On the same day the appellants served an application seeking an interim injunction pending the determination of the action referred to in the statement of claim. This application sought further orders including the consolidation of the proceedings and that both matters proceed on pleadings.

[79] On Tuesday, 28 October 2014 the appellants served a claim and statement of claim in the separate proceedings (BS10192/14).

[80] The respondents' reply affidavits in proceeding BS9450/14 were served at 6.25 pm on Tuesday, 28 October 2014. This included the affidavit of Ms Adamson.

[81] On the morning of the hearing on Wednesday, 29 October 2014, the appellants served two affidavits in reply to the respondents' reply affidavits. The appellants' reply affidavits, as already observed, did not contest the proposition that the appellants had failed to pay interest since June 2013. At the hearing before his Honour, senior counsel for the appellants handed up a draft order.[71] This draft order sought that the respondents' originating application BS9450/14 be consolidated with the claim filed by the appellants in proceeding BS10192/14. The draft order also sought that evidence in one proceeding be evidence in the other and that the consolidated proceedings proceed by way of pleadings and directions.

[82] The appellants submit that his Honour's discretion miscarried (in the sense conveyed by *House v The King*[72]) in refusing the appellants' application for an adjournment and in not permitting cross-examination of the respondents' witnesses. The appellants relied on four passages from the transcript of proceedings before his Honour to support this submission. The first is as follows:[73]

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70 Affidavit of Timothy John Collins sworn 3 October 2014, [10]; appeal record book, 71.

71 Draft order dated 29 October 2014; appeal record book, 1545.

72 (1936) 55 CLR 499, 504-505.

73 Transcript of proceedings, 29 October 2014, 1-8, lines 7-21; appeal record book, 8.

> "HIS HONOUR: So the question is are you ready to proceed on the final hearing of the application today? I think you're saying to me you're not.
>
> MR JACOBS: No. No. I'm not, your Honour.
>
> HIS HONOUR: So the question becomes then, what's to be done in the middle?
>
> MR JACOBS: We need further evidence – this is outlined in our affidavits. We've got to get further evidence from Mr Adam Gilberti. A lot of the records of my clients are up at Cape York and they've been Sydney – our instructing solicitors – and Mr Gilberti has said that he needs more records and it's been impossible to manoeuvre this in the time concerned.
>
> There's also a financial advisor, Mr Lyons, who figures somewhat prominently in these proceedings."

[83] The second passage is the same passage set out in paragraph [47] above.

[84] The third passage relied on is as follows:[74]

> "MR JACOBS: Well, your Honour, these are matters that we need more time to deal with. We haven't had that time. I need Mr Gilberti to take me to the bank statements to show what payments were made and what the position was at any particular time. And I need Mr Lyons. …
>
> HIS HONOUR: So the default is just said to be defaults. It's not specified what the defaults were.
>
> MR JACOBS: Yes. Your Honour, we say that by the bank telling us that we had to pay up by the end of the month, that killed the goose that was laying the golden egg. They stopped the flow of money. We then were in damage control and Mrs Witherspoon says this to her in her affidavit. And part of the damage control on the advice of Mr Lyons, was to sell two of the farms that were vital in the production of the money. …"

[85] The "matters" that senior counsel for the appellants was referring to in that passage were identified by his Honour as being the default in the payment of interest and the deregistration of JC & SA Pty Ltd.

[86] The fourth passage reads:[75]

> "MR JACOBS: And there is that danger over here, your Honour. We are anxious to bring this matter to trial. We – anxious to cross-examine some of our learned friend's witnesses. I – I – I couldn't possibly prepare that overnight when I got some of these affidavits pretty late last night. The orders that my learned friend seeks – I don't know whether your Honour has seen that."

[87] Nowhere in these passages nor indeed anywhere in the transcript of proceedings before his Honour is there recorded an application by the appellants for an

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74 Transcript of proceedings, 29 October 2014, 1-22, lines 1-29; appeal record book, 22.

75 Transcript of proceedings, 29 October 2014, 1-26, lines 13-17; appeal record book, 26.

adjournment of the respondents' originating application. There is certainly no recording of an application by the appellants to adjourn their own application for the proceedings to be consolidated and proceed by way of pleading. The appellants' application required his Honour to consider whether it was appropriate for the respondents' proceedings to have been started by way of originating application. By r 11(a) of the *Uniform Civil Procedure Rules* 1999 (Qld), a proceeding may be started by application if the only or main issue in the proceeding is an issue of law and a substantial dispute of fact is unlikely. There was no dispute of fact before his Honour as to the appellants being in default of the payment of interest since June 2013 and that JC & SA Pty Ltd had been deregistered. There was no question of any causal connection between the Bank's conduct as alleged in the statement of claim and the deregistration of JC & SA Pty Ltd. What his Honour examined was whether there was any evidence of a causal connection between the Bank's alleged conduct and the appellants' default in payment of interest. The four passages referred to by the appellants above are more consistent with their wish to obtain evidence for, and cross-examination of witnesses at, a trial.[76]

[88] The hearing of the respondents' originating application had already been adjourned from 16 October 2014 to 29 October 2014. The lateness of the respondents' affidavit material in reply was caused by the late service of the appellants' material. The appellants did, however, respond to the respondents' material served the night before the hearing of the application. The transcript of the proceedings before his Honour does not reveal that the appellants wish to adduce further evidence or cross-examine any witness such as Ms Adamson concerning the default in payment of interest.

[89] I accept the respondents' submission that even if the appellants are to be taken as having applied for an adjournment to obtain more evidence to defend the respondents' application, no error in the exercise of his Honour's discretion is identified.[77] The originating application having been adjourned once, it was incumbent on the appellants to present evidence in support of any submission that there was a causal connection between the Bank's conduct and the default in payment of interest. As already discussed above, his Honour correctly found that there was no reasonable factual basis for such a causal connection.

Deregistration of JC & SA Pty Ltd

[90] There was uncontested evidence before his Honour that JC & SA Pty Ltd was deregistered on 1 October 2014, one day before the appointment of the respondents.[78] Neither the notice of demand,[79] nor the covering letter dated 3 September 2015[80] nor the Deed of Appointment of Receivers and Managers dated 2 October 2014[81] identified either the deregistration of JC & SA Pty Ltd or the default in the payment of interest as a specific event of default. These documents in fact did not identify any specific event of default. The language used was general, for example, "the borrower is in default of the facilities" or "by reason of events which have happened, and by virtue of the powers contained in the security, the Bank is entitled to appoint receivers and/or managers of the property …".

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76 Respondents' outline of submissions dated 5 January 2015, [46].

77 Respondents' outline of submissions dated 5 January 2015, [48].

78 Affidavit of Sally-Anne Witherspoon affirmed 27 October 2014, [16]; appeal record book, 342; exhibit JS-11 to the affidavit of Joseph John Saba Shaw sworn 28 October 2014; appeal record book, 1498.

79 Exhibit TC-8 to the affidavit of Timothy John Collins sworn 3 October 2014; appeal record book, 236-237.

80 Exhibit TC-8 to the affidavit of Timothy John Collins sworn 3 October 2014; appeal record book, 234-235.

81 Exhibit TC-12 to the affidavit of Timothy John Collins sworn 3 October 2014; appeal record book, 247-257.

[91] There was no contractual obligation on the part of the Bank to specify any particular event of default, nor was there any other legal obligation to do so. As observed by McPherson J (as his Honour then was) in *Minion v Graystone Pty Ltd*:[82]

> "… the action taken must be capable of being justified at law, but that the grounds of justification, although they must have existed, need not have been known or relied upon at the time the action was taken."

[92] Applying that principle to the notice of default, it matters not whether the deregistration of the company or the default in payment of interest was specified as an event of default. If these matters constituted a relevant event of default under the securities entitling the Bank to appoint the respondents as receivers and manager, then the existence of such a power is sufficient.

[93] Whilst senior counsel for the appellants faintly submitted, by reference to clause 16.1(k) of the Business General Terms for Business Lending,[83] that the deregistration was not an event of default, an examination of these terms and the security documents show that deregistration is an event of default. Clause 16.1 of the Business General Terms provide, in clause 16.1(v), that an event of default occurs, whether or not it is in the appellants' power to prevent it, if an event specified as an "event of default" in the facility terms or the facility documents occurs.[84] By clause 1.1, "facility documents" comprise, *inter alia*, the security documents. The consequence of such an event of default is that the Bank may exercise its rights under any security.[85]

[94] The Bank's fixed and floating charge over JC & SA Pty Ltd identified as an event of default in clause 17(g):[86]

> "you are or become deregistered, or a *debtor/guarantor* (if it is a corporation) is or becomes deregistered, or steps are taken to deregister you or the *debtor/guarantor*."

[95] Such a default entitled the Bank to appoint a receiver pursuant to clause 18.2(b) of the fixed and floating charge. The deregistration also constituted a default under the mortgages[87] and the bill of sale.[88]

[96] It follows that the taking of any step by the appellants to deregister JC & SA Pty Ltd constituted an event of default entitling the Bank to appoint receivers.

[97] The appellants seek to avoid this consequence on five bases. The first is that the deregistration was not relied on by the Bank for the appointment of the receivers. There was no notice of default or demand relating to the deregistration and it was not a matter relied on in the Deed of Appointment.[89] For the reasons stated in [90] to [92] above this ground must fail.

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82 [1990] 1 Qd R 157, 164.

83 Exhibit TC-2 to the affidavit of Timothy John Collins sworn 3 October 2014; appeal record book, 87-129.

84 Exhibit TC-12 to the affidavit of Timothy John Collins sworn 3 October 2014; appeal record book, 110.

85 Exhibit TC-2 to the affidavit of Timothy John Collins sworn 3 October 2014, 16.2(h); appeal record book, 111.

86 Exhibit NA-2 to the affidavit of Nicola Jane Adamson sworn 28 October 2014; appeal record book, 1445.

87 Exhibit TC-7 to the affidavit of Timothy John Collins sworn 3 October 2014, 12.1(h)(v), 13.1(a)(ii), 14.1(a); appeal record book, 210, 212, 213.

88 Exhibit TC-6 to the affidavit of Timothy John Collins sworn 3 October 2014, 10.1(g)(v); appeal record book, 165.

89 Appellants' reply submissions dated 13 February 2014, [17].

[98] The second basis is that his Honour did not rely on deregistration in granting the respondents' orders. As the respondents' notice of contention is out of time, the respondents cannot, on appeal, rely on this event of default. This submission should also be rejected. An examination of the Reasons reveals that the deregistration of the company was relied on by his Honour in concluding that the respondents were entitled to possession. The fact that the respondents were relying on two events of default, namely default in the payment of interest and deregistration, was identified by his Honour early in the Reasons.[90] His Honour recognised that the parties' submissions focused on both these events of default.[91] His Honour continued:[92]

> "In general terms, the Witherspoons do not challenge the basis of the appointment under the bank's documents, in accordance with the bank's case. The claim is that the appointments are invalid, either because of their claim as set out in the statement of claim or because, in respect to the guarantor, there is a basis on which the company concerned might be re-registered."

[99] His Honour then dealt with the appellants' submissions as to why the deregistration was not an irremediable default. His Honour's Reasons and ultimate disposition of the matter are, in my view, consistent with his Honour relying upon both events of default. It was therefore strictly unnecessary for the respondents to file a notice of contention. The notice of contention was out of time, being filed outside of the 14 day period stipulated in r 757(3) of the *Uniform Civil Procedure Rules* 1999 (Qld). Even if it was thought that a notice of contention was necessary, the appellants did not assert that they had suffered any prejudice and accordingly I would have granted the respondents leave to file the notice of contention out of time.

[100] The third basis submitted by the appellants is that the deregistration was of no material adverse consequence to the Bank because JC & SA Pty Ltd was not trading and did not own any assets as at the date of its deregistration. In terms of whether an event of default occurred under the facility documents, it is irrelevant whether the deregistration adversely affected the Bank. Further, JC & SA Pty Ltd was the corporate trustee of the Spoon Family Trust. Even if one was to accept that the company was not trading and did not own any assets, as the corporate trustee of the Spoon Family Trust it would have had a right of indemnity from trust property. There was no evidence before his Honour as to the value of this right. The Bank had obtained a guarantee and indemnity from JC & SA Pty Ltd as trustee for the Spoon Family Trust together with a fixed and floating charge from that company, as guarantor. The terms of that fixed and floating charge when read in conjunction with clause 16.1(v) of the Business General Terms for Business Lending, gave the Bank the right to appoint receivers if the company was deregistered or steps were taken to deregister the company. That legal consequence is not avoided simply because the company was not trading.

[101] The fourth basis relied on by the appellants is that the default is one capable of remedy. Section 601AH(2) of the *Corporations Act* 2001 (Cth) gives the Court a discretion to make an order that ASIC reinstate the registration of a company if:

> (a) an application for reinstatement is made to the Court by:
>
> (i) a person aggrieved by the deregistration; or

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90 Reasons, 2, lines 23-33; appeal record book, 1550.

91 Reasons, 2, lines 45-46; appeal record book, 1550.

92 Reasons, 3, lines 1-5; appeal record book, 1551.

(ii) a former liquidator of the company; and

(b) the Court is satisfied that it is just that the company's registration be reinstated.

[102] The effect of reinstatement is dealt with by s 601AH(5) which provides that if a company is reinstated, the company is taken to have continued in existence as if it had not been deregistered. The difficulty with this submission is that there was no evidence either before his Honour or this Court that the appellants have made any application for reinstatement pursuant to s 601AH. As observed by his Honour, even if such an application was to be made it is not clear whether it would be successful.[93] An application pursuant to s 601AH would require the appellants to demonstrate that they are persons aggrieved by the deregistration. This is in circumstances where it was the appellants who voluntarily caused the deregistration. Section 601AH also requires the Court to be satisfied that it is just that the company's registration be reinstated. This requires an exercise of discretion by the Court.

[103] The relevant event of default is not merely the deregistration of the company but taking any steps to have the company deregistered. Even if an application pursuant to s 601AH was successful and the effect of s 601AH(5) was to reinstate the company as if it had not been deregistered such an application would not necessarily remedy the event of default constituted by the appellants "taking steps" to deregister the company.

[104] The fifth basis is the appellants' assertion that they could seek relief against forfeiture pursuant to s 95(3) of the *Property Law Act* 1974 (Qld) on the undertaking to remedy the default.[94] Section 95 is entitled "Relief against provision for acceleration of payment". Section 95(3) provides:

> "The mortgagor, in any proceedings brought to enforce the rights of the mortgagee or brought by the mortgagor, may –
>
> (a) upon undertaking to the court to perform any such covenant or obligation; and
>
> (b) upon tender or payment into court of such instalment;
>
> apply to the court for relief from the consequences of such default, and the court may grant or refuse relief (whether by staying proceedings brought by the mortgagee or otherwise) as the court, having regard to the conduct of the parties and to all other circumstances, thinks fit, and in the case of relief may grant it on such terms (if any) as to payment of any reasonable expenses of the mortgagee and as to the cost or otherwise as the court in the circumstances thinks fit."

[105] There was no evidence, either at first instance or on appeal, that the appellants have sought relief against forfeiture pursuant to s 95(3). The primary judge noted that no detailed submissions were addressed to s 95(3).[95]

[106] There are difficulties with the application of s 95(3) to an event of default concerning the deregistration or steps being taken to deregister the company. Section 95(3) speaks of the performance of a "covenant or obligation". The deregistration of the company or steps being taken to deregister the company are more in the nature of an

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93 Reasons, 5, lines 22-24; appeal record book, 1553.

94 Appellants' reply submissions dated 13 February 2015, [18].

95 Reasons, 5, lines 36-41; appeal record book, 1553.

event, rather than the observance of any covenant or obligation. Further, the capacity to remedy any default is a requirement for relief against forfeiture pursuant to s 95(3). The appellants cannot themselves remedy the default. All the appellants may do is to bring an application pursuant to s 601AH of the *Corporations Act* 2001 (Cth) seeking a favourable exercise of discretion by the Court. In any event, the appellants have not sought relief against forfeiture.

[107] It follows that the deregistration of the company was an event of default that entitled the Bank to appoint the respondents as receivers without notice to the appellants.[96] It was also an event of default which had no causal connection with any conduct alleged against the Bank in the appellants' statement of claim. This event of default in itself justified the granting of the respondents' originating application.

Disposition

[108] The appeal should be dismissed and the first and second appellants pay the first, second and third respondents' costs of the appeal.

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[96] Clause 18.1 of the Fixed and Floating Charge contains no requirement for notice: exhibit NA-2 to the affidavit of Nicola Jane Adamson sworn 28 October 2014, 18.1; appeal record book, 1445-1446. Clause 13.1 of the Memorandum of Common Provisions provides that the Bank may exercise its powers (which includes the power to appoint receivers) without notice: exhibit TC-7 to the affidavit of Timothy John Collins sworn 3 October 2014, 13.1; appeal record book, 212.