SUPREME COURT OF QUEENSLAND

CITATION:	*Stacks Managed Investments Ltd v Tolteca Pty Ltd* [2015] QSC 234
PARTIES:	**STACKS MANAGED INVESTMENTS LTD** (applicant) **v** **TOLTECA PTY LTD** (respondent)
FILE NO/S:	1001 of 2014
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	17 July 2015
DELIVERED AT:	Brisbane
HEARING DATE:	17 July 2015
JUDGE:	Bond J
ORDER:	**Judgment delivered ex tempore on 17 July 2015:** **The order of the court is that:** **1. the application be dismissed;** **2. Tolteca pay Stacks' costs of the application to be assessed on the standard basis.** **3. Tolteca pay the costs of the Receivers over and above any costs that were jointly incurred with Stacks of and incidental to the application.**
CATCHWORDS:	EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – MANDATORY INTERLOCUTORY INJUNCTIONS – RELEVANT CONSIDERATIONS – BALANCE OF CONVENIENCE GENERALLY – whether serious question to be tried – prejudice to the respondent caused by granting the injunction – whether the effect of the injunction is to finally determine the parties' legal rights CONTRACTS – FINANCIAL SERVICES – prohibition of unconscionable conduct in supply of financial services – loan agreement – where the applicant defaulted under a loan agreement – claim for relief of obligations under that agreement – whether unconscionable for the respondent to have provided loan in the circumstances

Australian Securities and Investments Commission Act 2001 (Cth), ss 12CB, 12GD, 12GF, 12GM

Active Leisure (Sports) Pty Ltd v Sportsman's Australia Limited [1991] 1 Qd R 301, cited
American Cyanamid Co v Ethicon Ltd [1975] AC 396, cited
Australian Broadcasting Commission v O'Neill (2006) 227 CLR 57, cited
Beecham Group Ltd v Bristol Laboratories Pty Ltd (1968) 118 CLR 618, cited
Bowen Central Coal Pty Ltd v Aquila Coal Pty Ltd & Anor [2011] QCA 334, cited
Bradto Proprietary Limited v State of Victoria [2006] VSCA 89, cited
Kellogg Brown & Root Pty Ltd v Australian Aerospace Ltd [2007] VSC 200, considered
Live Earth Resource Management Pty Ltd v Live Earth LLC (2007) FCA 1034, cited
Perpetual Trustee Co Ltd v Khoshaba [2006] NSWCA 41, considered
Samsung C & T Corporation v Laing O'Rourke Australia Construction Pty Ltd [2015] WASC 83, cited
Stacks Management Investments Ltd v Tolteca Pty Ltd [2015] QSC 80, cited

Walter Sofronoff, "Interlocutory Injunctions Having Final Effect" (1987) 61 ALJ 341

COUNSEL: N H Ferrett for the applicant

D B O'Sullivan with D J Ananian-Cooper for the respondent

SOLICITORS: Turner Freeman Lawyers for the applicant

McCullough Robertson for the respondent

HIS HONOUR: The relationship between the parties before me is sufficiently articulated in my decision in *Stacks Management Investments Ltd v Tolteca Pty Ltd* [2015] QSC 80 at [4].

In proceeding 1001 of 2014 (the "Stacks proceeding"), Stacks sued Tolteca seeking an order for recovering possession of land at 9847 Mt Lindsay Highway. Stacks had lent the moneys which Tolteca used for the joint venture land development transaction. Tolteca was in default and the land at 9847 Mt Lindsay Highway was security for that loan. Tolteca had counter-claimed for relief founded on unconscionable conduct by Stacks in the giving of the loan in breach of s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth).

To that summary needs only be added the observation that in exercise of power granted to it under the relevant security instrument, Stacks appointed receivers over the property the recovery of which seeks and also some other property. I will refer to the former property as "the subject property".

The trial of issues which arise in the Stacks proceeding is to take place over four days next week.

The relevant events were as follows:

(a) On 16 May 2015, Tolteca purported to enter into an agreement to sell the subject property by private treaty.

(b) On 18 May 2015, Tolteca advised Stacks that it intended to sell the subject property by auction on 21 June 2015 and proposed that the proceeds of any sale be paid into Court.

(c) On 29 May 2015, Stacks responded that it did not agree to that proposal, that it reserved all of its rights in relation to the proposed sale and further, as follows:

> 3. A discharge of the Mortgage will be provided following a tender to our client of all money owing under the Mortgage, in accordance with our client's ordinary rights as mortgagee.
>
> 4. The money owing under the Mortgage includes principal, interest and costs incurred to the date of settlement, together with our client's subsequent costs incurred in the current proceedings, and any other costs secured by the mortgage and not yet incurred at the date of settlement.
>
> 5. The payout figure for our client's mortgage will therefore include an estimate of our client's future costs secured by the mortgage.

(I interpolate that the security upon which Stacks relied conferred on it the legal right to insist on full payment before it was obliged to grant a discharge to Tolteca.)

(d) On Sunday 21 June 2015, Tolteca conducted an auction of the subject property, at which time the property was passed in at $1.1 million, but following which a contract was privately negotiated for a contract price of $1.2 million. The

contract was subject to obtaining the consent of the receivers which had been appointed by Stacks.

(e) On Tuesday 23 June 2015, Stacks wrote to Tolteca noting that it had been advised that an auction had been held on 21 June 2015 and that a sale had occurred, requesting a complete copy of any contract of sale and asking for Tolteca's authority for the proposition that it was empowered to sell property to which receivers had been appointed.

(f) On 23 June 2015, Tolteca wrote to Stacks indicating that they accepted that Tolteca was not in a position to sell the property other than with the receivers' consent and for that reason had only sold the property conditional on the receivers' consent being provided and inquiring of Stacks whether Stacks would urgently seek instructions as to whether Stacks would direct the receivers to consent to the sale. Obviously the proceeds would be paid into Court or held in a trust account pending resolution of the current litigation.

(g) On 25 June 2015, Stacks wrote to Tolteca re-iterating that it would provide discharges of its securities and retire the receivers if the entire proceeds of sale were paid to Stacks at settlement on account of its debt currently owing under the mortgage and further costs to be incurred by Stacks in the litigation as secured under the terms of the mortgage.

(h) On 7 July 2015 and again on 10 July 2015, Tolteca repeated its proposal that the proceeds of sale be paid into Court.

Stacks' position before me is that it objects to the proposal that the sale proceed, other than in circumstances in which its entire debt was paid to it. The sale is scheduled for completion on 7 August 2015.

Against that background, Tolteca seeks orders, the effect of which would be to require Stacks to take such steps as would be necessary to allow the sale to proceed. Stacks submitted to me that the appropriate orders would be:

(a) an order compelling Stacks to terminate the appointment of the receivers, as receivers of the subject property;

(b) an order compelling Stacks to discharge the mortgage; and

(c) an order compelling Tolteca to pay the proceeds of sale into Court.

As I've mentioned, Stacks and the receivers opposed the making of any such orders. It became clear during the hearing that no relief was being pursued against the receivers.

On the evidence before me, the amount available after sale of the subject property would not be sufficient to accord to Stacks the full measure of its legal rights under the security. The evidence was that the payout figure under the mortgage as at 15 July was $1,248,840.47, but that if – and Stacks contended that this should occur –

the payout took into account the estimated legal fees which Stacks was entitled to regard as part of the secured amount, the payout figure would amount to $1,306,009. Stacks insists on its legal rights under the security that it cannot be obliged to discharge its mortgage for anything less than full payment.

For its part, Tolteca says that it is seeking a remedy in the trial next week that the security on which Stacks relies should be set aside. In other words, that it has an argument that Stacks should not be afforded the legal rights which it seeks to exercise by reference to its security.

It seems to me that the appropriate analytical framework to be applied is that which is applicable to an interlocutory mandatory injunction having final affect. I think that is so because the granting of the injunction would effectively finally resolve against Stacks the question of whether it had the right to refuse to discharge the mortgage except upon final payment and effectively to stymie the sale.

The law in Australia has long regarded it to be necessary to make two main inquiries:

(a) whether the applicant has shown that it has a prima facie case; and

(b) whether the applicant has shown that the balance of convenience favours the granting of the relief claimed.

As to the requirement that a prima facie case be established, in *Live Earth Resource Management Pty Ltd v Live Earth LLC* (2007) FCA 1034 at [11] - [13], Stone J explained and summarised the position as follows:

> [11] In *Australian Broadcasting Commission v O'Neill* (2006) 227 CLR 57, the High Court has recently affirmed that in Australia, the principles relevant to the grant of an interlocutory injunction are those laid down in *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 at 662-3 where the Court said that in dealing with applications for interlocutory injunctions it addresses itself to two main inquiries:
>
> > The first is whether the plaintiff has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be entitled to relief… The second inquiry is… whether the inconvenience or injury which the plaintiff would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the defendant would suffer if an injunction were granted.
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> [12] In *O'Neill* Gummow and Hayne JJ (with whom Gleeson CJ and Brennan J, in their separate joint judgment agreed) quoted this comment and, at 478, added the following explanation:
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> > By using the phrase "prima facie case", their Honours did not mean that the plaintiff must show that it is more probable than not that at the trial the plaintiff will succeed; it is sufficient that the plaintiff show a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial.
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> [13] Their Honours also referred to the additional comment in *Beecham* to the effect that the strength of the prima facie case required depends on the nature of the nature of the rights asserted by the applicant for relief and the practical consequences likely to flow from the order the applicant seeks. This latter comment illustrates that the two inquiries referred to by the

> Court in *Beecham* are interlinked so that the weight of considerations in regard to one may well affect the other.

I observe parenthetically that I will return to the significance of the strength of the case that Tolteca must demonstrate before me.

As to the balance of convenience, the considerations which the Court brings to bear in the assessment of the balance of convenience are many and varied. The position was recently and authoritatively re-stated in *Bowen Central Coal Pty Ltd v Aquila Coal Pty Ltd & Anor* [2011] QCA 334, where Fraser JA, with whom White JA and Margaret Wilson AJA agreed:

(a) approved (at [36]) the seminal description of the object of an interlocutory injunction in cases of this kind made by Lord Diplock, (with whose reasons Viscount Dilhorne and Lords Cross, Salmon and Edmund–Davies agreed) in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (at 406):

> The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial.

(b) gave qualified approval (at [38] – [39]) to Lord Diplock's further statement (at 408) of the manner in which a Court should consider whether the balance of convenience favoured the grant or refusal of the relief:

> As to that, the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.

> It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

(I interpolate that the qualification was that Fraser JA noted that it had been held in *Active Leisure (Sports) Pty Ltd v Sportsman's Australia Limited* [1991] 1 Qd R 301 that the adequacy of an award of damages and the availability or sufficiency of an undertaking on the part of the plaintiff must be considered "as part of the totality of determining the balance of convenience and not as a step anterior thereto".)

(c) concluded (at [38]) that the statement by Gummow and Hayne JJ in *Australian Broadcasting Corporation v O'Neill*, that the balance of convenience inquiry involved an inquiry into whether the inconvenience for injury which the plaintiff would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the defendant would suffer if an injunction were granted was consistent with that of Lord Diplock and was not intended to suggest a different manner of proceeding.

It remains to make two further observations as to the law.

First, the progression of the two main inquiries is not a mechanical exercise. In considering whether or not to grant an interlocutory injunction pending a final hearing, the Court must weigh up all the relevant factors in order to take the course which appears to carry the lower risk of injustice. This was emphasised by Hansen J in *Kellogg Brown & Root Pty Ltd v Australian Aerospace Ltd* [2007] VSC 200 at [45] – [48], where his Honour referred with approval to observations made in the Victorian Court of Appeal in the decision of *Bradto Pty Limited v State of Victoria* [2006] VSCA 89 at [35] that:

> … whether the relief sought is prohibitory or mandatory, the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' in the sense of granting an injunction to a party who fails to establish his right at the trial, or in failing to grant an injunction to a party who succeeds at trial.

Hansen J went on to say further that it was also well established that in considering where the lower risk of injustice lies, all relevant factors were to be considered overall. That meant that matters pertaining to the strength of the case to be tried and the balance of convenience were to be weighed in the balance and that was because the several elements related to each other.

Second, in the circumstances of this case, given that the effect of granting the injunction would be to alter the status quo and effectively finally to determine Stacks' legal rights against Stacks and in advance of next week's trial, I would be minded to require a high degree of assurance as to Tolteca's case that Stacks should not be afforded its legal rights to insist on full payment in the amount sought before

agreeing to discharge its mortgage.

In this regard I note that in the recent decision of *Samsung C & T Corporation v Laing O'Rourke Australia Construction Pty Ltd* [2015] WASC 83, Edelman J observed, at [68], that the fact that:

> …the grant of a mandatory injunction has the effect of determining an issue without a full hearing is a relevant, and sometimes very significant, consideration which can militate against the award of a mandatory injunction.

His Honour cited observations by Gummow and Hayne JJ in *Australian Broadcasting Corporation v O'Neill* at [72] and the article by Mr Sofronoff, entitled "Interlocutory Injunctions Having Final Effect" (1987) 61 ALJ 341 at 349.

In his article, Mr Sofronoff observed in the last few paragraphs of his articulation of the relevant principle as follows:

> (7) Where, however the realities of the case are such that the grant or withholding of relief will have the practical effect of putting an end to the action by granting a successful party all he seeks, or because the harm caused to the losing party will be complete and for which money cannot constitute any worthwhile recompense, then it is necessary to consider the likelihood that the plaintiff will succeed.
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> (8) In such a case, generally an injunction ought not be granted if the consequence is to deny a defendant an effective right to a trial, if the defendant has put forward a fully arguable case raising a triable issue and if the plaintiff's case is not overwhelming.

Proposition (7) is not entirely apposite in the circumstances of this case. However, because, as I have indicated, the effect of granting the injunction sought by Tolteca would be finally to determine an aspect of Stacks' legal rights against it, it does seem to me that I ought regard it as important for Tolteca to demonstrate to me the appropriate high degree of assurance as to the strength of its case.

I turn to consider the two major inquiries.

First, the prima facie case inquiry.

Tolteca's argument relied on its pleaded case at next week's trial where its counterclaim seeks the following relief:

(a) an order pursuant to s 12GM of the *Australian Securities and Investments Commission Act 2001* (Cth) ("the Act") setting aside the mortgage;

(b) in the alternative to (a), pursuant to s 12GD of the Act, an injunction permanently restraining the plaintiff from enforcing the mortgage;

(c) an order pursuant to s 12GM of the Act setting aside the loan agreement; and

(d) further or alternatively, damages pursuant to s 12GF of the Act in such matters would otherwise be necessary to pay out the loan.

The basis for the relief is that by granting the loan and accepting the mortgage in circumstances pleaded earlier in the counterclaim, Stacks had engaged in unconscionable conduct in contravention of s 12CB of the Act.

The relevant circumstances alleged to ground the conclusion that the conduct was unconscionable were set out in paragraphs 20 to 21 of the counterclaim, the text of which forms annexure A to these reasons for judgment.

I observe that much of what is pleaded in those paragraphs is in issue in the trial and this appears by reference to paragraphs 24 to 30 of the reply and answer, the text of which forms annexure B to these reasons for judgment.

Stacks points out that there is no evidence other than the pleading supporting the case today. It submits that a person in Tolteca's position seeking a remedy of the nature which it seeks could have come before this Court with evidence supporting the alleged case, but has not. I observe that given there is a trial next week, one would have expected that the evidence would have been easily available. Faced with this argument, Tolteca pointed to paragraph 2(g) of the reply which admitted an allegation concerning Stacks' policy in determining whether or not to lend on the strength of mortgage over real property, the admission being:

> Our compliance plan identifies the need to consider a borrower's income in approving a loan. Given our low LVR requirements, we do not usually given extensive consideration to a borrower's income on the basis that there is sufficient equity in the mortgaged property to secure the loan.

Tolteca also drew my attention to observations by Basten JA in *Perpetual Trustee Co Ltd v Khoshaba* [2006] NSWCA 41 at [128].

Having regard to all those matters, I am not minded to regard the case of Tolteca as anything other than an arguable case that some degree or other of unconscionable conduct might be established at trial.

Bearing in mind the absence of evidence addressing the matters in issue, I do not think that I can presently reach the view that there is a high degree of assurance that Stacks should not be afforded its legal right to insist on full payment of the amount sought before agreeing to discharge its mortgage.

I turn to consider the second element of inquiry, namely balance of convenience.

Although a number of factors were suggested, it seemed to me that the prejudice which Stacks would suffer if the injunction was granted to Tolteca, but Tolteca failed at trial, was essentially –

(a) the denial of its legal rights in the manner I have indicated; and

(b) the possibility that the sale which Tolteca effectively seeks to impose on Stacks is in fact a sale at less than the value which might ultimately be obtained.

I should observe that these two matters are related, but, it seems to me, distinct. In other words, I think there is a distinct value in the existence of legal rights which give a mortgagee the power to control the manner in which secured property is sold.

On the other hand, the prejudice which Tolteca would suffer if the injunction was refused and Stacks should fail at the trial, was essentially the possibility that the current sale would be lost, the contract never having become unconditional, and the subject property might not be sold for that price again. In other words, Tolteca might have lost some part of the value of the sale.

In relation to the question of value of the subject property, with one exception the parties were agreed that the evidence addressing value was adequately summarised in my previous judgment at [26](a) and [26](d). I quote:

> (a) Stacks adduced evidence as to the value of the property at 9847 Mount Lindsay Highway. A market appraisal by a real estate agent valued the property at $920,000 to $970,000. An indicative assessment of market value from a valuer initially valued the property at $925,000 to $975,000. However, upon considering the evidence adduced by Tolteca and carrying out further investigations, the valuer revised the figure upwards to $1.2 million to $1.3 million, subject to a discount of as much as 10 per cent for sale by a mortgagee in possession.
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> …
>
> (d) For its part, Tolteca adduced evidence on information and belief concerning a different real estate agent's opinion of the fair value of the property. That real estate agent thought that a figure of $1.4 million to $1.5 million would represent fair value in the current market. …

I mentioned that that concession was subject to an exception. That exception concerned such inferences as could be gleaned from the fact of the proposed sale and the evidence concerning the manner in which the proposed sale was obtained. That evidence was contained in an affidavit by a real estate agent relied upon by Tolteca. The real estate agent:

(a) deposed to the retainer of the real estate agent;

(b) deposed to advertising in six identified papers on various dates of the sale by auction;

(c) identified a number of other actions that the real estate agent took in terms of distributing brochures and other steps taken to advertise the property.

(d) deposed to the sale taking place by way of auction on 21 June 2015 with a reserve price set at $1.3 million, the outcome of which was that although there were a lot of persons present at the auction and the agent regarded it to be a great turn out, the highest offer made was $1.1 million and the property was passed in.

Following the auction, as I have already mentioned, a sale price was negotiated privately with the bidder who made the offer at $1.1 million to an increased price of

$1.2 million.

For its part, Stacks pointed to the fact that although Tolteca offered the usual undertaking as to damages, there was no evidence that Tolteca was actually a company of substantial value because there was no evidence that it had any capacity to pay. Such evidence that there was, was contained in the pleading, which revealed that Tolteca could not pay what it was obliged to pay Stacks under the security.

By way of conclusion, I have to carry out a balancing exercise. Where then does the lower risk of injustice lie in the all the circumstances of this case, bearing in mind the law as I have identified it and the various contended prejudices that I've discussed under the heading balance of convenience?

Bearing in mind the considerations to which I have adverted, it seemed to me that there is no compelling case that granting the injunction would give rise to the lower risk of injustice. Given the fact that Tolteca, as applicant, bore the onus of proof, I consider that it has failed to persuade me that I should grant the relief it sought.

Accordingly, I dismiss the application.

…

HIS HONOUR: I order that the applicant, Tolteca, pay Stacks' costs of the application, to be assessed on the standard basis.

...

HIS HONOUR: From the outset the receivers were represented by the same counsel and the same solicitors as had been retained by Stacks. After I recorded the order made in favour of Stacks for costs, counsel for Stacks and the receivers applied for an order that Tolteca pay the costs of the receivers of and incidental to this application. I agree that the receivers are entitled to their costs. I am concerned, however, that there be no double recovery.

In other words, to the extent that there were costs jointly incurred by both Stacks and the receivers the effect of the orders I make should be only that those costs be paid once by Tolteca.

MR O'SULLIVAN: The costs over and above, which are separate and attributable only to the receivers should be recoverable, your Honour.

HIS HONOUR: Yes. So the order that I will make, accepting the observation which the transcript will record as just made by counsel for Stacks and the receivers, is that Tolteca pay the costs of the receivers over and above any costs that were jointly incurred with Stacks of and incidental to the application.

ANNEXURE A

20. At the time that the Plaintiff granted the loan and accepted the mortgage:

    (a) the Plaintiff was aware, or ought to have been aware:

        (i) by reason of its having obtained a report on 13 October 2009 from Veda Advantage, that Ms Pettett was the controlling mind of the Defendant;

        (ii) by reason of the matters pleaded at paragraphs 10(d), 13 and 14 above, that Mr Loel was involved in the Project, as well as acting for the Defendant and Ms Pettett and that, for that reason, was not acting merely as a disinterested advisor;

        (iii) by reason of the matters pleaded at paragraphs 10(c), 10(d), 12 and 13 above, that Ms Pettett did not appreciate the detail of the Project and thus was unlikely to be able to assess the capacity of the Defendant to repay the loan;

(iv) by reason of those same matters, that Ms Pettett relied heavily on Mr Loel's advice;

(v) by reason of the matters pleaded at paragraphs 5(d)(vi), 10(a)(ii), and 13(b) above, that significantly conflicting statements had been made as to Ms Pettett's personal net worth;

(vi) by reason of the matters pleaded at paragraphs 5(e), 10(a)(iii), and 13, that significantly conflicting statements had been made as to Ms Pettett's personal income; and

(vii) by reason of the matters pleaded at paragraphs 5(d)(ii), 10(d), 16 - 17, and 18(a), that significantly conflicting statements had been made as to the Defendant's income and whether that income was current or projected.

Particulars

The Plaintiff:

(A) by Ms Elford, was aware of the matters alleged in paragraph 13(a) to 13(c);

(B) By Ms Elford and Mr Ray Stack, was aware of the matters alleged in paragraphs 13(d) and 13(e);

(C) By Mr Newman, was aware of the matters alleged in paragraph 12;

(D) By Mr Ray Stack, was aware of the matters alleged in paragraph 14;

(E) By Mr Ray Stack and or Mr Newman, was aware of the matters alleged in paragraphs 5(d)(ii), 5(d)(vi), 5(e), 10(a)(ii), 10(a)(iii), 10(c) and 10(d) by Mr Paul Stack, was aware of the matters alleged in paragraph 16,17 and 19(a).

(b) the Plaintiff was, or should have been aware, given its knowledge of Ms Pettett's state of knowledge, dependence on Mr Loel, and vulnerability as set out immediately above, as well as Mr Loel's separate involvement in the Project, that Ms Pettett and the Defendant were at real risk of entering into the transaction without receiving any

independent advice as to the rationality of such a course and without having the skill competently to judge the advisability of such a course;

(c) given the matter pleaded at paragraph 2 above, it was not the Plaintiff's policy seriously to investigate an applicant's capacity to service a loan so long as the Plaintiff could be assured of recovering amounts advanced (including interest and other charges) by enforcing security;

(d) (it is therefore to be inferred) the Plaintiff:

(i) had given no proper consideration to the Defendant's capacity to service the loan; and

Particulars

The Plaintiff did not consider the income earned by the Defendant in the previous three financial years, the income presently being earned by the Defendant and whether the income earned by the Defendant was sufficient to meet interest payments to the Plaintiff under the mortgage and other fees payable to the Plaintiff under the mortgage, in addition to other expenses paid by the Defendant connected to the land such as rates and insurance and maintenance or improvement on the property.

(ii) held no real concern as to whether the Defendant could service the loan, being happy to resort to the mortgage if need be.

Particulars

The persons taking that position on behalf of the Plaintiff were the following persons involved in the loan application and the approval of the loan:

(A) Ray Stack, a director of the Plaintiff;

(B) Paul Stack, a director of the Plaintiff;

(C) Yvonne May, a loans officer employed by the Plaintiff;

(D) Mark Newman, a credit application manager employed by the Plaintiff;

(E) Leanne Elford, an employee of the Plaintiff.

21. A prudent lender, interested to ensure repayment rather than merely resting on the protection afforded by the security it would obtain, upon becoming aware of any of the matters pleaded in paragraphs 20(a) and 20(b) above, would have:

(a) investigated to establish the true capacity of the Defendant to service the loan sought by the application;

Particulars

A prudent lender would have investigated the income earned by the Defendant in the previous three financial years and the income presently being earned by the Defendant by having regard to information including, without being limited to, income tax returns, income tax assessment notices, business activity statements and the financial statements prepared by the Defendant's accountants and, given the purpose of the loan, would have investigated whether the Defendant or Mrs Pettett has previously undertaken any property developments and, if so, whether the previous property development or developments had been profitable.

(b) concluded from those investigations that:

(i) The Defendant did not earn sufficient income to service interest on a loan of $1,000,000.00 at the interest rate specified in the mortgage of a lower rate of 10.25% or a higher rate of 14.25%, either of which exceeded the upper limit of the income range of the Defendant which Mrs Pettett notified to Ms Elford on 9 February 2010 referred to in paragraph 13.

(ii) the Defendant did not have the necessary expertise to undertake a property development such as that contemplated by the Project and the application;

Particulars

The Plaintiff should have formed this conclusion from the investigations referred to in sub-paragraph (a) which, had they been undertaken, would have revealed that:

(a) neither the Defendant nor Mrs Pettett had previously undertaken any property developments or had been involved in or had any experience in property developments;

(b) undertaking property developments was inconsistent with the farming business undertaken on the Defendant's Property.

(iii) given that such a lender would have established from such investigations that Mr Loel acted for both parties to the Project, being the Defendant and John Anderson, the Defendant was not assisted by independent and disinterested legal advice in relation to the Project or the proposed transaction between the Plaintiff and Defendant; and

Particulars

The Plaintiff should have formed this conclusion from the investigations referred to in sub-paragraph (a) which had they been undertaken would have revealed that:

(a) Mr Anderson was bankrupt;

(b) Mr Anderson had previously been involved in the project;

(c) Mr Anderson was assuming no risk in the Project;

(d) Mr Loel acted for Mr Anderson and the Defendant;

(e) Mr Anderson was obtaining a benefit from the Project.

(iv) for those reasons, the Defendant was at real risk of not obtaining the profit forecast in the application and therefore was unlikely to meet its obligations under the loan and mortgage; and

(c) in those circumstances, would have refused the loan, and not accepted the mortgage.

ANNEXURE B

The plaintiff's awareness of relevant circumstances

24. In relation to paragraph 20(a) of the Counterclaim, the plaintiff:

(a) ***(The controlling mind of the defendant)*** in relation to sub-paragraph (i) thereof:

(i) admits that when it granted the loan and accepted the mortgage it believed that Mrs Pettett was in control of the defendant;

(ii) denies that it believed that fact because of the Veda Advantage report which it obtained on 13 October 2009, because it believed that Mrs Pettett was in control of the defendant because of Mrs Pettett's conduct in relation to the loan and mortgage, as pleaded in paragraphs 10 to 22 herein; and

(iii) otherwise does not admit the allegation that Mrs Pettett was in fact the controlling mind of the defendant. The plaintiff has made reasonable

enquiries and remains uncertain of the truth or otherwise of that allegation;

(b) ***(Mr Loel "involved in" the Project)*** denies sub-paragraph (ii) thereof because:

(i) the plaintiff was not aware and ought not to have been aware that Mr Loel was involved in the Project, or that he was not acting merely as a disinterested advisor; and

(ii) the matters pleaded in paragraphs 10(d), 13 and 14, insofar as those matters are admitted herein, did not cause the plaintiff to be aware of the matters alleged, and ought not to have caused the plaintiff to be so aware; and

(c) says further to sub-paragraph (ii) that the plaintiff does not admit that Mr Loel was in fact "involved in the Project", and was "not acting merely as a disinterested advisor". The plaintiff has made reasonable enquiries and remains uncertain of the truth or otherwise of the allegations therein;

(d) ***(Mrs Pettett's lack of knowledge of the Project)*** denies sub-paragraph (iii) thereof because the plaintiff believed when it granted the loan (and continues to believe) that Mrs Pettett appreciated the detail of the Project and was able to assess the defendant's capacity to repay the loan, because:

(i) by reason of their respective interviews with Mrs Pettett on 9 February 2010 set out in paragraphs 16 and 17 hereof, Mr Ray Stack and Ms Elford both formed the view that Mrs Pettett had a good grasp of the development and had the ability to bring it to fruition; and

(ii) Mrs Pettett had access to Mr Pettett's experience and expertise, and Mr Loel had made Mr Ray Stack aware of that as pleaded in paragraph 18 hereof;

(iii) the matters pleaded in paragraphs 10(c), 10(d), 12 and 13 of the Counterclaim, insofar as those matters are admitted, did not cause the plaintiff to be aware of the matters alleged, and ought not to have caused the plaintiff to be so aware;

(e) ***(Mrs Pettett relied heavily on Mr Loel)*** in relation to sub-paragraph (iv) thereof:

(i) admits that it was aware that Mrs Pettett relied on Mr Loel's advice as to legal matters;

(ii) denies that Mrs Pettett relied on Mr Loel's advice as to non-legal matters because Mrs Pettett did not so rely; and

(iii) denies that the plaintiff was or ought to have been aware of Mrs Pettett's alleged heavy reliance on Mr Loel because of the matters pleaded in paragraphs 10(c), 10(d), 12 and 13 of the Counterclaim, because insofar as those matters are admitted, they did not cause the plaintiff to believe that was the case, and ought not to have caused the plaintiff to so believe;

(f) ***(Significantly conflicting statements as to Mrs Pettett's personal "net worth")*** denies sub-paragraph (v) thereof because:

(i) significantly conflicting statements had not been made to the plaintiffs as to the personal net worth of Mrs Pettett;

(ii) the allegation in paragraph 13(b) of the Counterclaim is untrue;

(iii) the documents referred to in paragraphs 5(d)(ii) and 10(d) of the Counterclaim listed particular assets and their approximate value and provided no total;

(iv) while there are some discrepancies in the estimated value of particular assets listed in the documents referred to in paragraphs 5(d)(ii) and 10(d) of the Counterclaim, they are not significantly conflicting save as to the value of Mrs Pettett's furniture;

(v) in the case of the value of Mrs Pettett's furniture, the document referred to in paragraph 5(d)(ii) of the Counterclaim estimated its value as $20,000, the document referred to in paragraph 10(d) of the Counterclaim included in the space for the value of her furniture the statement "Insurance, Maria, 50,000", and Mrs Pettett in the conversation referred to in paragraph 16 hereof clarified that her estimate of the value of her furniture was approximately $20,000; and

(vi) the total value of the assets listed in the documents referred to in paragraphs 5(d)(ii) and 10(d) of the Counterclaim are $55,000 and $70,000, which are not significantly conflicting;

(g) ***(Significantly conflicting statements as to Mrs Pettett's personal income)*** denies sub-paragraph (vi) thereof because:

(i) the allegation in paragraph 5(e) of the Counterclaim is untrue because the loan application dated 7 October 2009 treated the defendant and Mrs Pettett as a single applicant;

(ii) the allegation in paragraph 10(a)(iii) of the Counterclaim is untrue because of the matters set out in paragraph 11(d) hereof; and

(iii) no statement was made to Ms Elford and Mr Ray Stack regarding Mrs Pettett's income as pleaded in paragraph 13 of the Counterclaim, however a statement as to her income was made to Ms Elford only, as pleaded in paragraph 15 and 16 hereof, and was to the effect pleaded in sub-paragraph (i) below;

(h) ***(Significantly conflicting statements as to the defendant's income)*** denies sub-paragraph (vii) thereof because:

(i) the statement referred to in paragraph 5(d)(ii) thereof (insofar as it is admitted in paragraph 5(c) hereof) was made in the context of an earlier loan application which was submitted four months prior to the later statements referred to, and which treated the defendant and Mrs Pettett as a single applicant; and

(ii) the later statements made to the plaintiff regarding Mrs Pettett's and the defendant's income, in context, and as clarified by Mrs Pettett to Ms Elford on 9 February 2010 (as pleaded in paragraph 16 above), were not

significantly conflicting, and were to the effect pleaded in sub-paragraph (i) below;

(i) says further to paragraphs 20(a)(vi) and (vii) of the Counterclaim that the statements made to the plaintiff regarding the defendant's and Mrs Pettett's income were to the following effect:

(i) Mrs Pettett received personally a Centrelink Family Allowance of $400 per fortnight;

(ii) the farm operated on the Property owned by the defendant generated income from the sale of cattle and hay which varied significantly based on prevailing prices and the defendant's decision whether to sell cattle or hay at particular times and in particular years;

(iii) Mrs Pettett estimated in February 2010 that the farm income could be anything between $50,000 to $100,000 per year;

(iv) the defendant anticipated a substantial profit from the Project, estimated initially as $289,000; and

(v) the income figure of $250,000 on the two Loan Repayment Ability Declarations dated 16 February and 9 March 2010 was consistent with the estimate of $289,000 provided in the loan application dated 25 January 2010; and

(j) says further that conditional approval had been given, two interviews had been conducted, and the loan and mortgage documents had been sent for signature before the Loan Repayment Ability Declarations were provided.

25. The plaintiff denies paragraph 20(b) of the Counterclaim because the plaintiff did not and ought not to have known of the matters alleged, and because the plaintiff does not believe that Mrs Pettett was dependent upon James Loel, "vulnerable" or "at risk" as alleged, or without the skills alleged.

26. The plaintiff denies paragraph 20(c) of the Counterclaim because the plaintiff's policy was not as alleged.

27. In relation to paragraph 20(d) of the Counterclaim, the plaintiff:

(a) denies sub-paragraph (i) thereof because:

(i) the plaintiff properly considered the defendant's capacity to service and repay the loan; and

(ii) the matters particularised in paragraph 20(d)(i) of the Counterclaim do not support the inference that the plaintiff had not given proper consideration to the defendant's capacity to service the loan;

(b) says further that Mr Ray Stack and Mr Paul Stack had concluded from their consideration of the Loan Application, and from the additional information provided as pleaded in paragraphs 16, 17, 19 and 20(c) above that:

(i) the Project involved a simple and small scale development and was within the capacity of the defendant to carry out;

(ii) Mrs Pettett had a good grasp of the Project and had the ability to bring it to fruition;

(iii) the estimated profits of the Project, namely around $250,000 (net of six months retained interest), were such that the loan could have been repaid without resort to security even if the development blocks were sold for less than the prices anticipated;

(iv) the realistic worst case scenario was

1. the sale of the Richards Street Property as it was for $650,000 (according to the valuation obtained by the plaintiff dated 8 February 2010), leaving a sum owing equal to the difference between $650,000 and the funds drawn under the loan (including interest and costs) less the unused retained development funds of $150,000, or

2. if the loan had already been used to fund some or all of the development works for the site prior to sale, the sale of the Richards Street Property for $650,000 plus the realisable value of improvements made, leaving a sum owing equal to the difference between that sale price and the funds drawn under the loan to pay for the site and development works (and interest and costs), and

in either case the sum left owing being about $200,000, if the Richards Street Property was re-sold in 6 months as the plaintiff was informed would occur;

(v) the time-frame during which Mrs Pettett believed that the Project could be completed, namely six months, was plausible, and supported the pre-payment of six months interest (as occurred);

(vi) in the event that the Project took longer than six months, the defendant owned hay and cattle which could be used to meet the defendant's interest obligations until the development lots were sold;

(vii) the residence situated on the Richards Street Property also had the capacity to generate rental income until the lot on which it was situated was sold; and

(viii) in the event that the Project took longer than twelve months (being the term of the loan), the plaintiff had the right to extend the date for repayment by a further twelve months;

(c) denies sub-paragraph (ii) thereof because the plaintiff did not hold no real concern as to whether the defendant could service the loan.

28. In relation to paragraph 21(a) of the Counterclaim, the plaintiff:

(a) admits that it did not request proof or evidence from the defendant of its income for the previous three financial years including income tax returns, income tax assessment notices, business activity statements or financial statements prepared by the defendant's accountants;

(b) admits that it did not request details or evidence of property developments previously undertaken by the defendant or Mrs Pettett, or whether such previous developments had been profitable;

(c) denies that a prudent lender interested to ensure repayment of its loan without resort to its security was required to undertake the investigations referred to in the particulars to paragraph 21(a) of the Counterclaim because:

(i) the plaintiff is a prudent lender and did not consider it necessary to undertake those investigations for the defendant's loan application dated 25 January 2010 (pleaded at paragraphs 9 and 10 of the Counterclaim and paragraph 11 hereof); and

(ii) the plaintiff's lending policy as set out in paragraph 2 hereof was a prudent policy and the loan satisfied the plaintiff's lending policy; and

(d) insofar as alleged, denies that it did not investigate the true capacity of the defendant to service the loan sought by the application, because it did investigate that matter.

29. In relation to paragraph 21(b) of the Counterclaim, the plaintiff:

(a) denies sub-paragraph (i) because:

(i) the loan was for a term of 12 months, and six months interest had been pre-paid; and

(ii) the plaintiff having carried out reasonable investigations (as pleaded in paragraphs 28 hereof) believed the matters pleaded in paragraphs 27(b)(iii) to (viii) hereof, and that accordingly the defendant was well able to service the loan for $1,000,000.00;

(b) says further to sub-paragraph (i) that the defendant in fact paid interest on the loan until around May 2012;

(c) denies sub-paragraph (ii) because:

(i) after having carried out reasonable inquiries (as pleaded in paragraphs 11, 16, 17, 19, 20(c) and 27(b) hereof), the plaintiff believed that the defendant had the necessary expertise to undertake the Project, which was a simple and small scale development;

(ii) the plaintiff does not admit the allegation in particular (a) (vis that neither the defendant nor Mrs Pettett had previously undertaken any property developments or had been involved in or had any experience in property developments);

(iii) it does not follow from particular (a) that the defendant did not have the necessary expertise to undertake the Project as alleged because (as the plaintiff had been informed and concluded in carrying out its inquiries to assess the loan application, as pleaded in paragraphs 11, 16, 17, 19, 20(c) and 27(b) hereof):

1. the Project involved a simple and small scale development involving the sub-division of five lots only;

2. development approval had already been obtained;

3. detailed costings of the works required had already been obtained;

4. it was expected the development would be completed within six months; and

5. there was said to be strong demand for the development blocks; and

(iv) the plaintiff denies the allegation in particular (b) (vis that undertaking property developments was inconsistent with the farming business being undertaken on the Property) was or is true;

(d) denies sub-paragraph (iii) because the plaintiff did not know at the time and would not in any event have established from the investigations pleaded in paragraph 21(a) of the Counterclaim that Mr Loel acted for both the defendant and Mr John Anderson in respect of the Project, or any of the other matters pleaded in the particulars to sub-paragraph (iii);

(e) says further to sub-paragraph (iii) that the Counterclaim pleads no facts establishing that Mr Loel acted for both the defendant and Mr John Anderson (alleged to be the other party to the Project), or that the defendant was not assisted by independent and disinterested legal advice in relation to the Project, or in relation to the loan from the plaintiff;

(f) denies sub-paragraph (iv) thereof because:

(i) the matters alleged in paragraph 21(b)(i) and (iii) of the Counterclaim do not tend to suggest that the defendant was at real risk of not obtaining the profit forecast, as alleged;

(ii) the defendant was advised independently of the vendor of the Richards Street Property;

(iii) paragraph 21(b)(ii) of the Counterclaim (alleging that the plaintiff should have concluded that the defendant lacked the expertise to carry out the Project) is untrue, and even if it was true, that fact would not suggest that the defendant was at real risk of not obtaining the profit forecast in the loan application, as alleged; and

(iv) even if the defendant was at real risk of not achieving the profit forecast (as alleged), the defendant was not therefore unlikely to meet its obligations under the loan, or the loan and mortgage (as alleged) and would in fact have been capable of repaying the loan even if the profit forecast was not achieved, for the reasons pleaded in paragraphs 27(b)(iii) and (iv) hereof; and

(g) says further to sub-paragraph (iv) that the Counterclaim pleads no facts establishing that the defendant was in fact at real risk of not obtaining the profit forecast in the loan application dated 25 January 2010, or establishing that the plaintiff should have known that it was at such a risk.

30. The plaintiff denies paragraph 21(c) of the Counterclaim because:

(a) paragraph 21(b) of the Counterclaim is untrue;

(b) even if the defendant was at real risk of not obtaining the profit forecast (as alleged), it would not for that reason have been unable to repay the loan, for the reason pleaded in paragraph 27(b)(iii) and (iv) hereof; and

(c) even if the defendant was at real risk of not obtaining the profit forecast, and therefore unlikely to meet its obligations under the loan and mortgage (as alleged), a prudent lender, interested to ensure repayment rather than merely

resting on the protection afforded by the security, would not therefore have refused the loan and the mortgage, but would instead have reflected its assessment of the risk of default in the terms on which credit was offered.